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

FILE: B-218622.2; B-218622.3 **DATE:** September 25, 1985

MATTER OF: Agency for International Development, Developing Countries Information Research Services--Reconsideration

DIGEST:

1. GAO affirms prior decision's conclusions that offerors' direct and indirect costs should be effectively evaluated in determining the contracting agency's best advantage in contract awards and that agency should consider use of hypothetical work model as a basis for soliciting future competition.

2. Prior decision questioning authority of Agency for International Development (AID) to conduct its own minority set-aside is modified since it appears Congress has given AID authority to conduct such a program.

3. Knowledge of cost evaluation approach used on earlier procurement would not have benefited offeror under protested procurement because agency used varying cost evaluation approaches in these procurements and later procurement was otherwise deficient, and agency's failure to provide this information does not automatically entitle offeror to award under current procurement.

The Agency for International Development (AID) and Developing Countries Information Research Services (DCIRS) have requested reconsideration of our decision in Aurora Associates, Inc., B-215565, Apr. 26, 1985, 85-1 C.P.D. ¶ 470. Our decision concluded that AID did not use a reasonable evaluation approach in evaluating cost proposals for 13 indefinite quantity contracts for technical services in the design and evaluation of agricultural projects in developing countries. Specifically, we concluded that AID's cost evaluation approach was faulty because: (1) AID did not obtain (or evaluate) Aurora's direct costs but rather assumed that Aurora's (and all other offerors') direct costs would be the same; and (2) AID did not evaluate all of Aurora's indirect costs (numerically represented by three varying "cost multipliers") in some reasonable way but, instead, evaluated only one multiplier--Aurora's highest cost multiplier--on a "worst-case" assumption.

As to four of the thirteen contracts which were reserved for minority firms, we also questioned the statutory authority under which AID, in effect, conducted its own minority business set-aside.

AID'S RECONSIDERATION REQUEST

With regard to our first conclusion about the unreasonableness of AID's cost evaluation approach, AID essentially repeats the arguments it made in its initial report on the protest. AID again says it cannot evaluate Aurora's (or any other offeror's) proposed direct costs because the work associated with those costs cannot be predicted until AID field offices are actually in a position to issue work orders under the contract. AID further argues that it has no way of determining in advance of the issuance of a work order whether "firm X has access to a less-expensive labor pool than firm Y." As stated by AID:

> "If a guarni-speaking watershed management specialist with 15 years experience commands a given salary from one firm, we have no way of predicting, in advance, that he would take less than that figure from any other proposing firm. AID considers direct costs when specific assignments arise, but at the stage of the contract process the GAO has seen, AID is really only looking at the indirect costs it will pay to the various contractors to field and support these technicians. Direct costs are considered when indirect work orders are written."

AID also rejects the idea that it develop a hypothetical performance plan as a basis for soliciting competition, as, we pointed out, was done in another case. Although AID acknowledges it could also construct a hypothetical work model for competitive purposes, it argues that the model used for cost comparison will bear no relationship to the services actually utilized thereby artificially benefiting some firms at the expense of others. AID also argues that this method could also limit competition because firms were not required to bid on all skills to be responsive to the original RFP, but that the hypothetical would have to include all one hundred and fifty subsectors to be fair to all possible firms--thereby raising the possibility that some firms might elect not to propose under the model RFP.

As to our second conclusion, AID argues that it cannot reasonably evaluate Aurora's indirect costs other than on a worst-case basis given that Aurora was not legally bound to

any specific labor skill mixture in its proposal. AID also insists that our decision wrongfully mandated use of a "weighted cost factor reflecting the 'average' indirect rates" proposed by an offeror.

A request for reconsideration must specify any errors made in our decision. AID points out that we erred in stating that only Aurora had proposed varying cost multipliers. On the contrary, AID now states, five companies in addition to Aurora bid varying cost multipliers and all of these other proposals were evaluated on the same "worst case" approach. This factual error, however, does not alter our conclusions that AID improperly failed to obtain and evaluate offerors' direct costs and that AID failed to evaluate all of the offerors' indirect costs in some reasonable way instead of using a worst-case approach.

Specifically, AID has not rebutted our finding that, in the absence of some appropriate evaluation of direct costs, the principle requiring cost to be given appropriate consideration before contract awards are made (see, e.g, RCA Service Company, B-208871, Aug. 22, 1983, 83-2 C.P.D. ¶ 221) would be violated. Further, while AID has speculated that some direct costs--for example, the salaries of "quarni-speaking, watershed management specialists"--would allegedly be the same for all offerors, it has not rebutted our conclusion that the evaluation of only indirect costs was faulty because an offeror with relatively high direct costs but a lower indirect cost rate may be more costly ultimately than a competitor with low direct costs and a higher indirect cost rate. AID also misunderstands our decision regarding use of a "weighted cost factor." The decision does not mandate the strict use of the "weighted cost factor" described by AID but rather permits use of some reasonable method designed to give approximate weight to the costs of workers who are likely to be employed by an offeror.

Finally, with respect to a hypothetical work model, since AID acknowledges that it can construct such a model--thereby permitting evaluation of offerors' direct costs--we consider it appropriate for AID to use this approach for future procurements, notwithstanding AID's argument, which we consider to be speculative, that competition may be limited, since in our view the overall cost benefit to the government from evaluating offerors' direct costs outweighs the speculative restriction on competition described by AID.

Finally, AID takes issue with the statement in our decision concerning AID's minority set-aside approach. AID points out that in the Further Continuing Appropriations for Fiscal Year 1984, Pub. L. No. 98-151, 97 Stat. 964 (1983), under which the subject procurement was funded, AID is directed to make available not less than 10 percent of the appropriation in question for activities of "economically and socially disadvantaged enterprises" and other minority-controlled organizations. AID points out that this direction is also found with respect to Fiscal Year 1985 in a Continuing Resolution enacted October 12, 1984, Pub. L. No. 98-473, 98 Stat 1837.

Both statutory directions reflect, in AID's view, AID's initial authority for the agency's minority set-aside program which dates back to 1977. As stated by AID:

> "On August 3, 1977, Public Law 95-88, 91 Stat. 533, 22 U.S.C. Section 2151 was enacted. Section 133 of that statute provided, in pertinent part:
>
> > 'PLAN FOR INCREASED MINORITY BUSINESS PARTICIPATION IN FOREIGN ASSISTANCE ACTIVITIES
> >
> > 'SEC. 133. (a) THE [A.I.D.] Administrator . . . shall prepare a detailed plan for the establishment of a section on minority business within such agency.
> >
> > '(b) Such plans shall include, but shall not be limited to -
> >
> > * * * * *
> >
> > '(2) a listing of the specific responsibilities that will be assigned to the section on minority business to enable it to increase, in a rational and effective manner, participation of minority business enterprises in activities funded by such agency;
> >
> > '(3) a design for a time-phase system for bringing about expanded minority business enterprise participation, including specific recommendations for percentage allocations of contracts by such agency to minority business enterprises;
> >
> > * * * * *

> '(6) a detailed set of objective criteria upon which determinations will be made as to the qualifications of minority business enterprise to receive contracts funded by such agency.'

> "In furtherance of this provision on June 1, 1978, the A.I.D. Administrator approved the creation of a minority set-aside program as part of A.I.D.'s congressionally-mandated plan to insure increased minority participation in the Agency's contracting. The action memorandum . . . was written and approved by Agency personnel familiar with the enactment of the above statutory language, and was characterized as furthering the intent of Congress.

> "No party has questioned the propriety of this program in the eight years since the enactment of Section 133 or the Agency's implementation thereof.

> "Congressional awareness and approval of our minority set-aside program has been evidenced repeatedly since then."

AID then cites the above congressional directions in the appropriations laws as well as references in unpublished House Committee on Appropriations reports accompanying the unenacted Fiscal Years' 1984 and 1985 foreign assistance appropriations bills.

Given that Congress has specifically directed that the appropriations in question are to be made available for activities of minority enterprises, given AID's above comments, and given the basic principle of granting considerable deference to the agency's interpretation of statutes which the agency is charged with administering (e.g., Udall v. Tallman, 380 U.S. 1 (1965)), we will not now conclude that AID is without authority to conduct its own minority set-aside program in order to ensure that "not less than 10 percent" of the specified AID funds be made available for activities--including contracts--of minority business enterprises. Without the set-aside approach, AID would not be assured of meeting the congressionally-mandated percentage for spending on minority activities. Our prior decision is so modified.

52324

DCIRS' RECONSIDERATION REQUEST

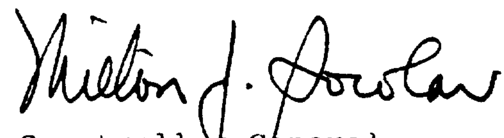
DCIRS identifies its interest as being part of the joint venture (Aurora Associates, Inc., and DCIRS) which originally submitted the initial protest to our Office.

DCIRS argues that our decision was incorrect because we recommended recompetition of the remaining contract requirements rather than an outright award to Aurora/DCIRS. DCIRS argues that it should have been entitled to an outright award under the subject RFP because AID allegedly failed to provide DCIRS with a debriefing in October 1983 under an earlier, similar RFP. Had AID provided this earlier debriefing, DCIRS argues, the company would have been in a "position to overcome the lack of information which resulted in our second experience with AID, the RFP SOD-PDC-024, the procurement in question right now in front of GAO."

The information which DCIRS sought (and which AID finally provided to DCIRS in July 1985) related to how AID evaluated cost multipliers under the earlier procurement. Unlike RFP-024, however, AID informed DCIRS that it "employed an average of the multipliers proposed by each firm" on the earlier procurement.

Since AID used a "worst-case", rather than an averaging, approach in evaluating cost multipliers under the protested procurement and the RFP was deficient for failing to provide for the evaluation of direct costs, DCIRS would not have been aided under the protested procurement by knowledge of AID's contrasting cost evaluation approach which was used under the earlier procurement.

Consequently, we affirm our prior decision--except for the modification, noted above--and we affirm our prior recommendation that the requirement for the option years be recompeted. DCIRS' related claim for proposal preparation costs is also denied.



Acting Comptroller General
of the United States