



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Richard M. Milburn High School

File: B-249286

Date: October 30, 1992

Robert H. Crosby for the protester,
Cynthia M. Wilke, Esq., and Herbert F. Kelley, Jr., Esq.,
Department of the Army, for the agency,
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

In the absence of evidence that the agency unfairly created an advantage for educational institutions previously granted Article 71 status by the German Government, a status which allows the United States Armed Forces to provide logistic support to, and confers certain economic benefits on, American companies performing services in support of United States Armed Forces in Germany, the agency is not required to equalize competition for offerors who have not been granted such status.

DECISION

Richard M. Milburn High School protests the terms of request for proposals (RFP) No. DAJA37-92-R-0124, issued by the Contracting Center, U.S. Army Europe, for educational services. The protester contends that prior contractors, who have obtained Article 71 status allowing the agency to provide them with logistical support, have an unfair advantage compared to offerors, like Milburn, to whom such status has not been granted.

We deny the protest.

On June 2, 1992, the agency issued the solicitation for a firm, fixed-price requirements type contract to provide educational services throughout the U.S. Army in Europe for a 1-year base period, with four 1-year options. The solicitation provides for a cost/technical tradeoff, with price considerations secondary to technical merit and least important of three award criteria.

Amendment -0001 to the solicitation, dated June 23, states that the agency will supply individual and organizational logistical support, including base parking, discount gasoline, medical services, and access to Department of Defense schools, commissaries and exchanges, to eligible persons and institutions. The agency advised offerors that Article 71 of the supplementary agreement to the North Atlantic Treaty Organization status of forces agreement allows such support to assimilated institutions. The RFP committed the agency, in the event of award, to initiate processing of an application for assimilation of the awardee if the institution is not already assimilated by the grantor nation, in this case Germany.¹ The agency warned such institutions, in preparing their offers, to take into account potential lengthy processing time and the agency's inability to guarantee that the German Government would approve Article 71 status.

The protester contends that the granting of Article 71 status confers a competitive advantage on certain offerors, who can therefore offer significant benefits, and consequently, lower salaries to their employees. The protester contends that a contractor, without Article 71 status, will have to abide by German tax and labor laws to the point where it will have to hire German nationals at significantly higher prices, requiring such a contractor to increase prices to the point where their cost proposals cannot be competitive. The protester maintains that the agency is obligated to compensate for the advantage held by institutions previously granted Article 71 status, by allowing a longer phase-in period during which a new contractor can apply for Article 71 status or by applying an evaluation factor to offerors' prices to compensate for the advantage that previously assimilated institutions have.

The record shows that there are presently 22 educational institutions that enjoy Article 71 status approved after prior contract awards, and that new applications are processed through diplomatic channels. While processing time averages 3 months to 1 year, the political situation can delay the process indefinitely; specifically, the German Government has delayed the processing of requests in response to taxation of German military property at Dulles Airport by the Commonwealth of Virginia, where the protester is located.

¹Provisions of the article allow non-German, non-commercial organizations necessary to and operating under the direction of American forces in Germany to enjoy the benefits and exemptions accorded to those forces.

The fact that a firm or organization may enjoy a competitive advantage provides no basis for objection so long as that advantage is not the result of preferential or unfair action by the agency. The government has no duty to eliminate a competitive advantage unless the advantage results from preferential or unfair action by the government. Valentec Kisco, Inc., B-238359, May 11, 1990, 90-1 CPD ¶ 465. We think the competitive advantage resulting from Article 71 status is not the result of preferential or unfair action by the agency, which the agency is obligated to eliminate. The record shows that Article 71 status is not within the United States Government's control, but rather is a sovereign act of the German Government. Under the Article 71 process, only American companies awarded contracts and actually performing work in Germany can apply for and receive Article 71 status. Consistent with the Article 71 procedures, the United States Government agrees to initiate the application process after a firm is awarded a contract. Clearly, the advantage is not the result of preferential or unfair action by the agency and the protester does not argue otherwise.

In response to the protest, the agency has reviewed the protester's two recommendations concerning how to eliminate the advantage. First, the contracting officer reports that the agency cannot lengthen the phase-in period under the contract because lengthening the phase-in period would require extending the existing contract on a noncompetitive basis which the agency could not justify. The contracting officer also points out that the approval process can be delayed by the political situation and ultimately the application could be denied. Thus, the firm which won the contract based on an expectation of subsequent Article 71 approval might find its price for the work is too low to cover costs. Thus, the agency would be faced with performance difficulties and other contract administration problems. The contracting officer thus does not believe it is prudent or feasible to provide for a phase-in period adequate to insure processing of the application for Article 71 status. We agree.

Second, the protester's recommendation that the agency add an amount reflecting the monetary benefits of Article 71 status to assimilated offerors' proposals, to compensate for the advantage of these firms' Article 71 status, in essence suggests that the agency should be willing to award to a higher priced, nonassimilated offeror for services which it can obtain at a lower price from assimilated firms. We see no reason why the government has any duty to equalize competition in a manner that could result in the government paying more for services than is necessary. Further, the contracting officer declares that the agency is unable to calculate the value of individual and institutional logistic

support, for the purposes of developing such an evaluation factor, with any precision, since that value is unique for each institution. Each institution, for example, is subject to different tax liabilities, depending on its domestic location. Beyond speculation that the benefits of Article 71 status could amount to "as much as \$5.00 per hour," the protester offers no basis for estimating the value of such benefits.² Since such costs cannot be quantified with any certainty, we cannot find unreasonable the agency's decision not to consider them in its evaluation of proposals. See 52 Comp. Gen. 997 (1973).

The protest is denied.



m James F. Hinchman
General Counsel

²The protester concedes that certain benefits, such as mortuary services, are difficult to quantify, but suggests that the agency estimate the value of those that can be quantified. Since the solicitation contains an estimated quantity of 3,000 hours per year, and the protester concedes that the value does not exceed \$5.00 per hour, the effect may well be de minimis, where the record shows that the annual contract value in fiscal year 1991 was \$2,769,000.