



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Appalachian Council, Inc.

**File:** B-256179

**Date:** May 20, 1994

James S. Hostetler, Esq., Robert S. Ryland, Esq., and Susan K. Fitch, Esq., Kirkland & Ellis, for the protester. Thomas P. Barletta, Esq., and Jerald S. Howe, Jr., Esq., Steptoe & Johnson, for Dynamic Educational Systems, Inc., an interested party. Vaughn E. Hill, Esq., Charles D. Raymond, Esq., and Annaliese Impink, Esq., Department of Labor, for the agency. Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of agency evaluation of technical proposals is denied where protester has not demonstrated that evaluation was unreasonable or inconsistent with the evaluation factors set forth in the solicitation.
2. Protest that agency improperly failed to conduct discussions with protester concerning its past performance is denied where, as part of the technical evaluation, offerors were required to furnish references concerning past performance information and should have been aware that these references might be contacted; information received from such sources is historical in nature and protester does not deny the validity of such information.
3. Protest that agency failed to conduct meaningful discussions with protester concerning three weaknesses in its proposal is denied where agency imparted sufficient information to afford offeror the opportunity to identify and correct two weaknesses, and where agency was not required to discuss the third weakness, a minor one in the protester's technically acceptable proposal.
4. Protest that statutory preference is limited to nonprofit agencies or state-affiliated organizations is denied where statutory language does not expressly restrict application of the preference to such groups and does not prohibit application of the preference to for-profit organizations, and where agency interpretation, consistent

with the statutory language, that the preference is available to any organization with experience with youth is reasonable.

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### DECISION

Appalachian Council, Inc. protests the award of a contract to Dynamic Educational Systems, Inc. (DESI) under request for proposals (RFP) No. 3-JR-418-51, issued by the Office of Job Corps, Department of Labor (DOL), for outreach and screening services in support of Job Corps program activities in Virginia and West Virginia. Appalachian primarily argues that the agency conducted a "seriously flawed" technical evaluation, and failed to conduct meaningful discussions with the firm. The protester also contends that the agency improperly failed to apply a statutorily authorized preference to its proposal.

We deny the protest.

### BACKGROUND

Job Corps, authorized by the Job Training Partnership Act of 1982 (JTPA), 29 U.S.C. §§ 1501 et seq. (1988 and Supp. IV 1992), is a national training and employment program to address the barriers to employment faced by disadvantaged youth. The Job Corps provides various services to these youth in Job Corps centers, and also contracts out for the outreach and screening of eligible youth. Outreach and screening services entail identifying and physically locating potential enrollees, verifying that eligibility requirements are met, completing forms, and ensuring that accepted youth depart for the designated Job Corps centers.

This solicitation was issued on September 24, 1993, and contemplated award of an indefinite quantity contract with a 1-year base period and two 1-year options. The RFP included annual outreach and screening goals of 2,900 youth (2,440 arrivals in Virginia and 460 arrivals in West Virginia) for the base period. The solicitation stated that, based on the number of arrivals required, a minimum of 2.5 screeners would be assigned to the West Virginia area, and 11 would be assigned to the Virginia area. Payment was to be made on a fixed-unit price basis for each arrival at a Job Corps center.

Offerors were to submit both a technical and a price proposal. The technical proposal would be scored on a 100-point scale, with the evaluation factors and maximum points allotted to those factors as follows: Design of Program (30 points); Counseling and Student Support (20 points); Administration (15 points); Knowledge and Utilization of Community Resources (15 points); and

Capability and Past Effectiveness (20 points). A procurement review panel would review the proposals for acceptability with an emphasis on these evaluation factors, scoring them as described above, and average the scores to select an offeror.

Section M of the RFP stated that, to the extent practicable, preferential consideration for award would be given to organizations meeting the criteria and intent of section 424(a) of the JTPA. As discussed in further detail below, that section of the JTPA includes a statement as to the type of agencies, organizations, and individuals entitled to the preference. The solicitation further stated that the contracting officer's determination of whether a proposal submitted by such a group was "practicable" with regard to selection for award depended upon whether the technical proposal was acceptable and not substantially more costly than other proposals received.

On November 5, five proposals were submitted in response to the solicitation. After initial evaluations were conducted, a competitive range determination eliminated three of the offerors, leaving only the protester and DESI. On December 6, the agency provided both offerors with a written list of concerns with their respective proposals and advised the firms that these concerns would be the subject of oral discussions on December 9. Both offerors prepared written responses to the discussion items and submitted these to the agency, along with their best and final offers (BAFO), on December 16. The procurement review panel evaluated BAFOs the next day, with the following results:

	<u>DESI</u>	<u>Appalachian</u>
Technical Proposal:	76.7	73.0 <sup>1</sup>
Price Proposal:	\$2,517,073	\$2,600,922

The contracting officer reviewed the results of the final evaluation and determined that DESI was the technically superior offeror, citing various strengths and advantages presented by DESI's proposal, and that the firm proposed a price that was fair and reasonable for both the base and

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<sup>1</sup>The agency concedes that the BAFO summary rating sheet contains a mathematical error, and that the protester's final technical score should be 73 instead of the 72 reflected in that sheet and in the source selection memoranda.

option year periods.<sup>2</sup> DESI was awarded the contract on December 29. The protester received a debriefing on January 6, 1994, and filed this protest the next day. Performance of the contract has been suspended pending resolution of the protest.

#### TECHNICAL EVALUATION

Appalachian argues that the agency's evaluation of technical proposals was "seriously flawed." The protester alleges that the agency confused the staffing plans of the two offerors and miscalculated Appalachian's staffing plan in various ways, that the agency evaluated the area of free advertising under the wrong evaluation factor, and that two individual evaluator rating sheets contain ambiguities that cast doubt on the accuracy of Appalachian's technical proposal score.

The evaluation of proposals is within the discretion of the procuring agency, since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. RAI, Inc.; The Endmark Corp., B-250663 et al., Feb. 16, 1993, 93-1 CPD ¶ 140. In cases challenging an agency's technical evaluation, our Office will not independently weigh the merits of offers; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Id. As discussed below, we have examined the agency's evaluation of technical proposals and conclude that it was both reasonable and consistent with the stated evaluation factors.

#### Staffing Plan

Appalachian argues that the agency improperly relied on portions of its proposed staffing plan in arriving at the conclusion that DESI's staffing plan was superior.

The December 22, 1993, source selection memoranda<sup>3</sup> state that one reason for selecting DESI's proposal was the agency's conclusion that it included an "innovative staffing

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<sup>2</sup>The RFP stated that while the option year price would be considered in the evaluation, more value would be placed on the proposed price for the base year. DESI's price for the base period was \$833,153, and Appalachian's was \$810,937.

<sup>3</sup>There are two source selection memoranda: one from the procurement review panel chairperson to the Job Corps's Regional Director, and a second from the Regional Director to the Director. The contents of these memoranda are virtually identical.

plan which utilizes 17 full-time staff supplemented by the work of six sub-contracted staff who will be paid per arrival." However, as the protester correctly points out, DESI did not propose to supplement its full-time staff with six subcontracted staff. While DESI proposed to use subcontractor services to supplement its recruitment goals over and above the contract requirements, identifying various sites for the performance of those services, the firm did not propose a specific number of subcontractors, and did not provide for subcontracted staff in its cost proposal. On the other hand, Appalachian did specifically propose six subcontracted screening staff to work on a part-time basis to assist in meeting the requirements for recruitment of females.

The contract specialist attests that when she edited the Regional Director's source selection memorandum,<sup>4</sup> she added this reference to six subcontractors based on a mistaken interpretation of the listing of satellite offices in DESI's initial proposal, and was not referring to the number of subcontractors proposed by Appalachian. She states that the original intent of this comment was to "highlight the innovative nature of the DESI staffing plan which supplies four<sup>5</sup> additional, full-time paid staff beyond the requirements of the RFP, supplemented by subcontractors whose efforts result in 'student arrivals over and above the goal of this contract.'"

Appalachian argues that the record is "clear" that the innovative subcontract plan falsely attributed to DESI had the same terms as the proposal submitted by Appalachian. However, the source selection memoranda do not state that DESI had an innovative "subcontracting" plan, but an innovative "staffing" plan. Further, notwithstanding this error, other passages of the source selection memoranda support the agency's position that it believed DESI's staffing plan to be superior to that offered by Appalachian. The memoranda state:

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'The contract specialist, the Deputy Regional Director, states that her duties were to review the cost proposals and to edit the panel chairperson's technical evaluation reports and source selection memorandum. While the protester questions the propriety of her editing duties, we have no basis to conclude that the assignment of these duties was improper.

'We note that DESI's staffing plan provides for 4 additional, full-time paid staff beyond the RFP's requirements if the 2 half-time clerks are counted as 1 full-time staff member, for a total of 17 full-time paid staff.

"While [Appalachian's] proposal provides for the minimum number of screeners (11 for Virginia and 2 for West Virginia), there is no clerical support, nor is there an on site administrator for the project. [Appalachian] proposes to utilize the current 'Project Director,' who is responsible for the administration of all four [Appalachian] contracts currently operating in [the Region]. . . .

"The proposal submitted by [DESI] offers the required minimum number of screeners, plus one Project Director who will give full attention to the Virginia, West Virginia operation, and one administrative assistant and two half time clerical staff to attend to the myriad clerical functions associated with this type of contract. By freeing the screeners from clerical responsibilities, this staffing pattern allows them much more time in the field to actually recruit and screen youth."

These remarks indicate that the agency believed that DESI offered the innovative staffing plan, not Appalachian, and are notably devoid of any reference to the subcontracting plans of either offeror. Given that this error appears to be an isolated mistake that is inconsistent with the remaining passages of the source selection memoranda, we do not think that it reflects a true failure of the agency to accurately assess the differences between the two proposals. See Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176. However, we now turn to Appalachian's objections to three statements made by the agency in these passages from the source selection memoranda.

Appalachian first argues that the agency mistakenly concluded that DESI offered a larger screening and recruiting staff than did Appalachian, contending that the agency incorrectly found that it "only" offered the minimum number of screeners.

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"This sentence contradicts the protester's contention that the agency's statement, made in its supplemental report, that Appalachian's staffing plan "dilutes the effectiveness of screeners by assigning [to them] clerical and administrative duties," is not supported by the source selection memoranda. While this precise language does not appear in the memoranda, the language clearly reflects the agency's view expressed in those documents.

The protester has misread the source selection memoranda. They do not state that Appalachian "only" offered the minimum number of screeners, but that it offered the minimum number of screeners; in other words, it met the solicitation's requirements to offer at least 13 screeners. The evaluation documents do not reveal any agency statement that DESI offered a "larger" screening and recruiting staff than did Appalachian. The issue here, as reflected in the source selection memoranda, was not which offeror proposed the largest staff, but how that staff was utilized. It is evident that the agency believed DESI's staffing pattern, whatever its staffing size, allowed it to be more effective in its screening and recruiting functions by allowing its screeners "more time in the field to actually recruit and screen youth" than did Appalachian's.

Appalachian next argues that the agency ignored its proposal to provide for on-site supervisory staff, contending that the source selection memoranda's statement that Appalachian did not provide an on-site administrator reflects a concern with supervision. As the agency does not dispute the protester's interpretation of this weakness, we will consider it to be accurate.

The statement in the source selection memoranda concerning Appalachian's failure to provide an on-site administrator is immediately followed by the sentence, "[Appalachian] proposes to utilize the current 'Project Director,' who is responsible for the administration of all four AFL contracts currently operating in [the Region]." The record shows that Appalachian's screening teams would be supervised by a project manager who had dedicated only .45 person-years to the project, and who would also serve as the project manager for the protester's Job Corps recruitment efforts in Maryland, Pennsylvania, and Indiana. In contrast, DESI offered "one Project Director who will give full attention to the Virginia, West Virginia operation." Under the circumstances, we have no basis to conclude that the agency's determination in this regard was unreasonable.

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<sup>7</sup>This interpretation arises from two statements in the agency report. The agency stated that its concern with Appalachian's lack of an on-site administrator related to the Administration evaluation factor's instruction that offerors "indicate how performance will be monitored and how staff will be held accountable for their performance." The agency went on to state that one of DESI's strengths was its on-site supervisory staff, related to this same instruction, and that "[t]he Region felt that an on-site administrator could do this very effectively."

Appalachian finally argues that the agency ignored its proposal to provide for on-site clerical support. The protester argues that under its "team concept," screeners perform clerical duties, with less experienced screeners spending more of their time proportionately performing those duties than more experienced team members.

We think the source selection memoranda's emphasis on "freeing the screeners from clerical responsibilities," and having clerical staff to "attend to the myriad clerical functions," supports the agency's argument that dedicated clerical support was preferable to having screeners perform clerical functions. While Appalachian argues that it offered at least as much clerical support as DESI, the record shows that DESI offered one full-time administrative assistant in its central office, which supports three screeners, and one half-time clerk in each of the other two offices supporting three screeners. In contrast, Appalachian offered one full-time clerk and 1/3 of another in its central office, which supports one screener, and one volunteer who could perform clerical duties in another office supporting one screener. Since DESI's proposal offered dedicated clerical support staff for more of its screeners proportionately than did Appalachian, we do not think the agency unreasonably concluded that DESI offered a superior proposal in this regard.

#### Free Advertising

In its comments on the agency report, Appalachian argued that the agency had no basis to conclude that DESI's proposal was significantly better than its proposal in the area of soliciting free advertising in agency publications.<sup>8</sup> In its supplemental report, the agency explained that while DESI's proposal offered an extensive plan for marketing and publicity, including five pages on free advertising, Appalachian's publicity section contained a generic description of its marketing approach, with only a few statements on free advertising. In its supplemental comments, the protester does not dispute the validity of the agency's position, but seems to contend that the agency

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<sup>8</sup>In those same comments, Appalachian also argued that the agency had no basis to conclude that DESI's proposal was superior to Appalachian's with regard to retrieval of student tickets. In its supplemental report, the agency responded to this allegation, and Appalachian in its supplemental comments did not rebut this response. As a result, we consider the issue to be abandoned. See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338.



improperly gave DESI a strength in this area under the wrong evaluation factor.

In the RFP's discussion of the evaluation factors, offerors were asked to include a description of their techniques for obtaining the free use of agency newsletters in the sections of their proposals dedicated to the Knowledge of Community Resources evaluation factor. The agency reports that, while DESI inappropriately placed its advertising plans in the portion of its proposal dedicated to the Design of Program evaluation factor, the agency evaluated those plans under the Knowledge of Community Resources evaluation factor.

Appalachian argues, and we concur, that the record contradicts the agency's position. The only individual rating sheet that refers to DESI's plan for free advertising, noting it as a strength, clearly evaluates this area under the Design of Program evaluation factor. However, Appalachian has not articulated how it was prejudiced by this apparent error, and there is no evidence that it alone resulted in DESI's higher technical score. Further, Appalachian does not challenge the substance of the agency's evaluation. Under the circumstances, we do not think that the agency's apparent error was prejudicial to Appalachian. Prejudice is an essential element of every viable protest. See Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

#### Rating Sheets

Appalachian argues that "blatant" alterations of one individual evaluator's final rating sheets for its proposal indicate that its final score should be 76.3, or, at a minimum, that the rating sheets render the scores ambiguous, and that they should not have been recorded without attending documentation.

The final rating sheets of one evaluator for the sections of Appalachian's proposal concerning the Design of Program and Counseling and Student Support evaluation factors originally had the word "excellent" written in the space for the adjectival rating, and the word "excellent" was circled in the array of possible choices presented. However, on both sheets, the circled "excellent" has been marked out, the initials of the evaluator have been added, and the words "very good" have been circled in the array of possible choices presented. On the rating sheet for Design of Program, a line has been drawn through the written-in "excellent," and the words "very good" have been written in instead. On the rating sheet for Counseling and Student Support, the written-in "excellent" has not been crossed out.

The evaluator attests that he changed these rating sheets based on discussions with the other panel members during their meetings to finalize the status of their concerns. As for the rating sheet for Design of Program, he states that other members of the panel pointed out that since he had no concerns with the initial proposal and rated it "very good," when he reviewed the BAFO he had no basis on which to change the rating to "excellent"; further, while two of the other panel members had raised concerns with the initial proposal, Appalachian's BAFO responses did not cause them to change their ratings from "good" and "very good," respectively. As for the rating sheet for Counseling and Student Support, the evaluator initially rated Appalachian's proposal "very good," with two concerns, and his final rating was "excellent," with no concerns. However, as a result of the panel discussions on the BAFO, he became aware that one of Appalachian's responses did not strengthen the original submission and merely reiterated the requirement. As a result, he decided to retain the original rating of "very good."

There is nothing inherently objectionable in an agency's decision to develop a consensus rating. The fact that the evaluators individually rated Appalachian's proposal more favorably does not by itself warrant questioning the final evaluation results. See Syscon Servs., Inc., 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258; Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151; General Research Corp., B-253866.2, Dec. 17, 1993, 93-2 CPD ¶ 325. It is proper for technical evaluators to discuss the relative strengths and weaknesses of proposals in order to reach a consensus rating, which often differs from the ratings given by individual evaluators. Schweizer Aircraft Corp., B-248640.2; B-248640.3, Sept. 14, 1992, 92-2 CPD ¶ 200. The overriding concern in the evaluation process is that the final score assigned accurately reflect the actual merits of the proposals, not that it be mechanically traceable back to the scores initially given by the individual evaluators. The Cadmus Group, Inc., B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271.

Here, the record provides no basis to question whether the final evaluation results properly reflected the attributes of Appalachian's proposal. While Appalachian contends that the evaluator's handwritten comments on the final rating sheets indicate that he nevertheless considered its BAFO and responses to be "excellent" with respect to both of these criteria, there is no evidence that these comments warranted assessing Appalachian a rating of "excellent," as opposed to a rating of "very good." The substance of the comments in the final rating sheet for Design of Program is the same as that in the initial rating sheet, where Appalachian was rated "very good." As for the rating sheet for Counseling

and Student Support, the evaluator states that he did not realize until the panel conferred that one of his initial concerns was not adequately addressed by Appalachian; it is that response that he called "excellent" in his final rating sheet. Under the circumstances, we have no basis to conclude that the discrepancies in these two rating sheets cast doubt on the accuracy of Appalachian's technical proposal score. See Dragon Servs., Inc., supra.

## DISCUSSIONS

Appalachian argues that the agency improperly failed to conduct discussions with the organization about its concerns with Appalachian's past performance, as well as about various aspects of its staffing plan.

### Past Performance

Appalachian's contention regarding the agency's concern with its past performance arises from a statement made in the source selection memoranda:

"With regard to the number of screeners proposed, we are skeptical of [Appalachian's] intent to actually provide these staff. On the current Virginia contract, [Appalachian] also proposed 11 screeners, but we know that there are only 8 staff actually working in Virginia. The minimum screener requirement was added to all of the Region III contracts several years ago to insure 100 [percent] accomplishment of female arrival goals. In the state of Virginia, [Appalachian's] performance against goal for female arrivals is 70 [percent] on the current contract."

The Regional Director states that on October 1, 1993, during the bidders' conference for this solicitation, one of Appalachian's representatives asked the contract specialist why and how the requirement of a minimum number of screeners was developed for the RFP. He was advised that the current contract, held by Appalachian, had a minimum requirement of 11 screeners. The Regional Director states that, on the basis of this inquiry, the agency surmised that Appalachian was not maintaining the minimum number of screeners as stipulated in that contract. The agency later examined documents showing that, at most, Appalachian had only eight names of screeners for Virginia.

Appalachian contends that the agency willfully denied it discussions with respect to its concerns with the protester's staffing levels in its current contract.<sup>3</sup>

In evaluating proposals, a contracting activity may consider evidence obtained from sources outside the proposal so long as the extrinsic evidence is consistent with established procurement practice. Western Medical Personnel, Inc., B-227991, Sept. 28, 1987, 87-2 CPD ¶ 310. Where, as part of the technical evaluation of offers, offerors have been required to furnish references concerning past performance information and are aware that these references may be contacted, the contracting agency may consider the replies of the references without being required to seek the offeror's comments concerning the information. We view this information as essentially historical in nature, and the protester is generally unlikely to be able to make a significant contribution to its interpretation. Dragon Servs., Inc., supra; see JCI Envtl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299; Bendix Field Eng'g Corp., B-241156, Jan. 16, 1991, 91-1 CPD ¶ 44; Saturn Constr. Co., Inc., B-236209, Nov. 16, 1989, 89-2 CPD ¶ 467.

Here, since the RFP required offerors to include a list of contacts and programs currently operated or operated in the recent past, we think the protester should have been aware that these sources might be contacted and that information supplied by them might be considered. Further, despite the opportunity to do so in its supplemental comments, the protester has not denied the validity of the assessment made by the agency. As a result, we have no basis to believe that Appalachian could have made any significant contribution to the agency's interpretation of the historical information regarding its past performance such that the agency was required to raise the issue with Appalachian. See JCI Envtl. Servs., supra; Bendix Field Eng'g Corp., supra.

#### Staffing

Appalachian argues that the agency improperly failed to discuss its concerns with the organization's staffing plan

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<sup>3</sup>The protester also argues that the agency "apparently converted for evaluation purposes Appalachian's proposal into an unacceptable proposal for providing only eight screeners in Virginia." There is no basis for this statement: the protester's proposal was found to be technically acceptable, and it was rated "very good" by each evaluator under both the Capability and Past Performance and the Administration evaluation factors, the two factors under which past performance might have been considered.

deficiencies regarding job qualifications, a staff training plan, and an on-site administrator.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. Federal Acquisition Regulation § 15.610. In evaluating whether there has been sufficient disclosure of deficiencies in the course of discussions, our focus is not on whether the agency described deficiencies in such detail that there could be no doubt as to their identification and nature, but on whether the agency imparted enough information to the offeror to afford it a fair and reasonable opportunity in the context of the procurement to identify and correct deficiencies in its proposal. Satellite Transmission Sys., Inc., 70 Comp. Gen. 624 (1991), 91-2 CPD ¶ 60.

Under the RFP, proposals were required to contain "[j]ob descriptions, including minimum qualifications, employment practices, and staff training plans. . . ." According to an individual evaluator's rating sheet, Appalachian's initial proposal was downgraded because its job descriptions were inadequate and its proposal did not include the minimum qualifications for those job descriptions; there is no mention of the protester's staff training plan in any of the rating sheets. During discussions, Appalachian was told that its "job descriptions [were] inadequate." The agency states that this discussion item imparted sufficient information to the protester to lead it to its deficiencies in the areas of job qualifications and the staff training plan, since the RFP's instruction indicated that job descriptions included both of these.

We think that Appalachian was sufficiently afforded a fair and reasonable opportunity to identify and correct its failure to include job qualifications. When the above RFP instruction is read as a whole, "job descriptions" is inclusive of "minimum qualifications"; the two are obviously related. However, while Appalachian's initial proposal included a page devoted to job descriptions, it did not include minimum qualifications for those jobs, even though it was specifically required to do so. Since the RFP's instruction plainly indicates that job descriptions include minimum qualifications, we think that when Appalachian examined its job descriptions in response to the discussion item, it should have been able to identify the omission of the minimum qualifications and, thus, could have corrected that omission.

We do not believe that the agency's reference to "job descriptions" was sufficient to notify the protester that its staff training plan was inadequate, as we do not discern an immediate relationship between the two when the above RFP

instruction is read as a whole. However, we see no prejudice from the agency's failure to discuss this issue with Appalachian, as there is no evidence in the record that the protester was downgraded as a result. Although the agency, in its debriefing, stated that Appalachian's proposal could have scored higher if there had been more detail or explanation of its staff training plan, there is no evidence that this had any bearing on Appalachian's evaluation for this factor, as it was not mentioned in any of the individual evaluator rating sheets which were the basis of the scoring, or in the source selection memoranda. Since there is no evidence to suggest that this area would have prevented the agency from making award to Appalachian, we do not believe that DOL was required to have discussed this matter with the firm. See Booz, Allen & Hamilton, Inc., B-249236.4; B-249236.5, Mar. 5, 1993, 93-1 CPD ¶ 209.

Finally, Appalachian complains that the agency did not discuss its failure to provide for an on-site administrator, which, as discussed above, pertains to supervision, particularly with regard to the monitoring of performance and accountability of staff. During discussions, Appalachian was asked to explain its methods for, among other things, "assuring accountability." In response, the protester referred the agency to the section in its proposal containing a discussion of its "team concept" for supervision, which includes a description of how its project director will monitor production and performance. Under the circumstances, we view Appalachian's response as evidence that the agency's discussion question was sufficient to inform the protester of this deficiency.<sup>10</sup>

#### STATUTORY PREFERENCE

Appalachian argues that the agency improperly awarded the contract to DESI, which the protester contends is not eligible for the JTPA preference, and failed to apply the preference to Appalachian's proposal.

As discussed above, section M of the RFP stated that the contracting officer would give preferential consideration to organizations meeting the criteria and intent of section 424(a) of the JTPA, which states:

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<sup>10</sup>Appalachian's argument that the agency should have notified it of its failure to provide certain cost forms in its BAFO is untimely raised. The protester was informed of this omission in its January 6 debriefing, but did not raise this issue until it filed its comments on the agency report on March 7, more than 10 working days later. See 4 C.F.R. § 21.2(a)(2) (1994).

"To the extent practicable, outreach and screening contracts shall be implemented through arrangements with agencies and organizations such as community action agencies, public employment offices, entities administering programs under Title II of the JTPA, professional groups, labor organizations, and agencies and individuals having contact with youth over substantial periods of time and able to offer reliable information as to their needs and problems." 29 U.S.C. § 1694.

The parties agree that Appalachian, established by and affiliated with a labor organization, is eligible for the JTPA preference. The parties disagree, however, on whether DESI is eligible for the preference. Appalachian argues that the preference is limited to "agencies" that are nonprofit or state-affiliated organizations, and that DESI, a for-profit commercial organization, is not eligible for the preference. Both the agency and DESI contend that the operative language of section 424(a) is that consideration be limited to organizations with extensive experience with youth and their needs and problems. The agency reports that, over the past 9 years, it has given the preference to any organization with a demonstrated record in recruiting disadvantaged youth, regardless of whether the organization is for-profit or nonprofit.

There is no language in section 424(a) or in any of the legislative history referring to this preference that specifically restricts the application of the preference to nonprofit or state-affiliated organizations, or that prohibits the application of the preference to for-profit organizations. The protester contends that, aside from the final clause in section 424(a),<sup>11</sup> every use of the term "agency" in the statute refers to a nonprofit or state-affiliated organization. However, as DOL notes, each of these other references is preceded by a modifier that clearly states what kind of agency is meant, such as "education agencies" or "community action agencies." Here, there is no such restrictive modifier. On the other hand, the legislative language concerning the preference clearly emphasizes an association with youth as a requirement.<sup>12</sup>

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<sup>11</sup>This language was added by the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, § 453(a), 92 Stat. 1909, 1993 (1978).

<sup>12</sup>The first appearance of this language provides that "[r]ules prescribed for screening and selection shall encourage recruitment through agencies having long term contact with youth . . . ." Economic Opportunity

(continued...)

An agency's interpretation of a statute that it is responsible for implementing is entitled to substantial deference. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). If the agency's interpretation is reasonable, it should be upheld. Id. Since the language in section 424(a) does not specifically restrict the application of the preference to nonprofit or state-affiliated organizations, and does not prohibit the application of the preference to for-profit organizations, and since the language and legislative history places an emphasis on experience with youth, we cannot conclude that the agency's interpretation of the section is unreasonable.

As DESI has been competing for and performing Job Corps contracts since 1985, and, thus, has demonstrated experience with youth, we see no reason why it could not have been eligible for the preference. With two offerors both eligible for the preference, the agency selected DESI's proposal because it was technically superior to that of Appalachian, and because the cost differentials were too insignificant to affect the award outcome.

#### PROTECTIVE ORDER VIOLATION

Appalachian's final contention is that DOL should terminate the award to DESI and either award the contract to it or resolicit for these services because the agency released Appalachian's initial protest document to DESI, rather than its counsel, after the issuance of a protective order in this protest. DOL explains that the release was due to a misunderstanding on the part of agency personnel regarding the significance of the protected status of the document.

Since Appalachian's initial protest--and hence, DOL's release of that document--was not generated until after Appalachian learned that DESI was awarded the contract, we fail to see how Appalachian was competitively harmed (in connection with its ability to win this contract). See NSI Technology Servs. Corp., B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344. Accordingly, we see no basis to recommend the relief

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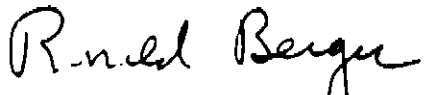
<sup>12</sup>(...continued)

Amendments of 1967, Pub. L. No. 90-222, § 101, 81 Stat. 672 (1967).



requested. However, by separate letter we are advising the Secretary of Labor of this matter so that he may consider taking appropriate steps to prevent a recurrence.

The protest is denied.

  
Robert P. Murphy  
Acting General Counsel