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DECISION



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

FILE: B-214564.2 **DATE:** January 3, 1985
MATTER OF: Department of Labor--Reconsideration

DIGEST:

1. Prior decision sustaining protest is affirmed on reconsideration where agency requesting reconsideration has failed to show either errors of fact or of law in prior decision.
2. Recommendation that agency take corrective action of reopening negotiations on contract is modified, since less than 3 months' performance remains on the contract and contracting agency has decided not to exercise contract option and to issue a new solicitation instead.

The Department of Labor (Labor) requests reconsideration of our decision in Joint Action In Community Service, Inc. (JACS), B-214564, Aug. 27, 1984, 84-2 C.P.D. ¶ 228, which sustained JACS's protest against Labor's award of a cost-reimbursement contract to Women in Community Service, Inc. (WICS), for the provision of social services to young men and women of the Jobs Corps.

We sustained the protest because of: (1) improper negotiation of a substantial change in contract requirements (substitution of government-furnished property (GFP) and the reallocation of the "savings" resulting therefrom) with only one of two offerors within the competitive range following best and final offers (BAFO); and (2) possible prejudice to the protester. We recommended a reopening of negotiations with a clear statement of Labor's requirements and termination of WICS's award should JACS's proposal prove the better. We note that the "savings" referred to above grew out of the fact that, although during the improper negotiation Labor relieved WICS from the responsibility for providing \$40,500 worth of property by substituting GFP, WICS only lowered its price approximately \$1,200. The "savings" are the approximately \$39,300 which are still available to WICS as compensation for work under the contract even though the work it was originally allocated to

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(the provision of property) is no longer required. Labor reports that the "savings" are to be reallocated. Exactly what is meant by this, in terms of the nature and quantity of services to be provided, is unclear.

Labor requests reconsideration on the grounds that: (1) the protester was not prejudiced by the post-BAFO negotiations with the awardee; and (2) the recommended corrective action is inappropriate.

We affirm our prior decision; however, we are acceding to Labor's request that our recommendation for reopening of negotiations be modified.

STANDARD FOR RECONSIDERATION

In order to prevail in a request for reconsideration, the requester must convincingly show either errors of fact or of law in our earlier decision. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 975 (1976), 76-1 C.P.D. ¶ 240 at 5.

PREJUDICE

Labor cites our decision in D&P Transportation Company, Inc. (D&P), B-190735, July 14, 1978, 78-2 C.P.D. ¶ 37, as authority for its contention that JACS was not prejudiced. D&P held that, even if it were assumed that an agency erred in providing an awardee with GFP, we would deny the protest if the improper action did not prejudice the protester. There the protester claimed that it would have submitted a lower price if it had known of the availability of GFP. We found no prejudice and denied the protest because the protester's price remained substantially higher than the awardee's price after the protester's cost was adjusted to reflect the impact of GFP.

In the instant case, the proposed prices were based on each offeror's cost of providing through volunteers the required level of social services. Both JACS and WICS had to locate and recruit volunteers capable of working with both young men and young women. Each organization had in the past worked primarily with one group, JACS with young men and WICS with young women. It is clear that each organization had office facilities, office equipment and a volunteer recruiting capability prior to this procurement. Both JACS and WICS, under previous government contracts, had

provided Labor with their respective volunteer lists. Labor considered the lists government property. Since JACS previous experience had been primarily with young men, JACS believed at the time that it submitted its initial proposal that it would need an additional professional staff member, over and above its normal recruiting staff, to recruit and train volunteers interested in the provision of support services oriented toward young women (pre and postnatal child care, family planning, etc.). JACS's cost for this position was \$44,900. JACS contends that access to the WICS volunteer list represented an alternate solution to JACS's recruiting problem. The record shows that Labor was aware of the increase in JACS's staff and that Labor asked JACS for a justification. JACS's BAFO contained the above explanation.

Although JACS's BAFO price was higher than WICS's BAFO price, both prices were in excess of available funding. Labor's purpose in entering post-BAFO negotiations with WICS was to further reduce the WICS offer to the level of available funding. The record shows that as a result of the post-BAFO negotiations, WICS lowered its price approximately \$1,200 (an amount sufficient to come within available funding) and Labor in exchange gave WICS the JACS volunteer list (list GFP) and the use of government office space, facilities and equipment (office GFP).

Labor admits that it was improper to conduct negotiations with only one of two offerors in the competitive range; however, it contends that, in light of our holding in D&P, this technical error is an insufficient basis for sustaining JACS's protest because JACS was not prejudiced thereby. Labor contends that the factual basis of our decision is incorrect. In so contending, Labor's arguments center upon our interpretation of the role played by the list GFP in the post-BAFO negotiations. Labor does not challenge our valuation of the office GFP and never explains whether the reallocation of the "savings" itself involved substantial quantitative or qualitative changes in the statement of work.

Our finding that it was not clear that the changes effected by the Labor/WICS post-BAFO negotiations were not prejudicial to JACS was premised on the following calculation:

	<u>WICS</u>	<u>JACS</u>
Offer	\$281,197	\$337,033
Office GFP	(40,500)	(43,100)
List GF	-0-	(44,900)
	<u>\$240,697</u>	<u>\$249,033</u>

Difference: \$8,336

At the time of the protest, Labor had contended that both WICS and JACS had proposed an extra position for the development of volunteers and that, since WICS, using the JACS volunteer list, had been unable to reduce its staff, there was no reason to believe that provision of list GFP to JACS would result in a reduction of JACS staff. We considered this argument, but found it lacking because, although both JACS and WICS had proposed adding a position to their professional staffs, the staff positions were added for different reasons. The record shows that JACS's justification for the position was primarily JACS's concern about its ability to recruit and train volunteers to work with young women. The record further shows that WICS did not have similar concerns for when Labor questioned WICS about organizational adjustments that would be necessitated by its being required to field volunteers capable of working with young men, WICS BAFO response was, in part:

". . . we really do not know how to answer this question since we do not see a separation of services to corps members by sex as being relevant nor appropriate to this work statement."

However, when Labor asked:

"Of concern is that there will be no paid staff outside of Washington, D.C., and the San Francisco Project Office. Can the performance be adequate and consistent entirely with non-paid volunteers in the field?"

WICS, in part, replied:

"The concern of WICS in rethinking the project, was not about the performance of the volunteers, but rather that we had planned too little support for their activities. As a result, it has been decided to add another professional employee in Los Angeles."

Because of this, we concluded that WICS's additional staff position was not added in order to meet a perceived need to recruit volunteers capable of working with young men, but rather to meet Labor's concern that WICS's professional staff was over centralized. It followed that Labor's provision of list GFP had no value to WICS since in WICS's view its current volunteers were more than adequate to cope with either young men or young women. On the other hand, JACS believed it necessary to obtain a type of volunteer different from its current volunteer and lacking list GFP (giving access to a pool of volunteers having the required experience) JACS added a staff position to recruit and train such "different" volunteers.

Labor now contends that JACS did not need additional volunteers. Labor bases this contention on: (1) the fact that 53 percent of the population receiving support is male and JACS had sufficient volunteers to meet this demand; and (2) that JACS held a contract to provide AWOL counseling services to the total population (both male and female) and again had sufficient volunteers to meet this demand. We see no merit in this argument since it is clear that JACS believed that it required a "different" kind of volunteer to meet the requirement and it is also clear, notwithstanding WICS's position to the contrary, that Labor's evaluators believed that different kinds of volunteers were required to meet the different kinds of support required by young men and young women. For example, one evaluator noted:

"The concern is that WICS sees no need for any new emphasis or training for volunteers who originally signed on to serve females only and who have never officially worked with corpsmen;"

and another evaluator pointed out:

"The Bidder demonstrated no knowledge of specific acting out male behavior that the WICS ladies must be prepared to handle."

Labor believes we erred in stating that "WICS volunteers were trained, experienced and in place" because, in Labor's words, "[a]t the time of award WICS had no additional staff who were 'trained, experienced, and in place' as GAO contends to perform JACS's former duties." The challenged statement referred to WICS ability, as the organization that had traditionally assisted young women, to provide the volunteers which JACS lacked. The question we

were addressing was not WICS ability to meet its contractual obligations to both men and women, but whether provision of the WICS volunteer list to JACS would have lowered JACS anticipated cost of performance by providing JACS with a resource, a supply of volunteers skilled at assisting young women, which JACS otherwise lacked. After all, as Labor points out, JACS already had volunteers for the work with young men.

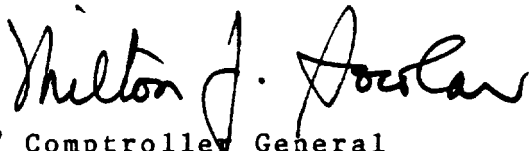
Labor also contends that, with or without the list GFP, JACS would have needed the additional professional staff position for recruiting and training volunteers because "[v]olunteer organizations have a high turnover." Labor argues that JACS is only prejudiced if its access to the list GFP would result in 100 percent of WICS's volunteers joining JACS. In Labor's view, this would not happen. We have asked JACS for its comments in this regard. JACS claims that it has a superior record in recruiting and retaining volunteers. Moreover, JACS claims that:

"Even with only 30 percent of WICS volunteers JACS would have been able to maintain the 15-1 staff-volunteer/enrollee ratio required by the contract given its roster of dedicated volunteers in the Region."

While Labor now asserts that it would not have accepted JACS's offer without the additional staff position because it believed such a person was necessary, this assertion does not square with the fact that Labor initially asked JACS to justify the need for the position and one evaluator commented after BAFO that the justification for the extra position may still be weak. In light of the foregoing, we cannot conclude that Labor has convincingly shown that we erred in concluding that there was reason to believe that JACS might have reduced its staff had it received list GFP. We note that Labor has also argued that JACS's list should not have been deemed to have any value to JACS since the government has already paid for it under a previous contract. We agree. Nevertheless, it is not its own list that JACS seeks as list GFP, but rather WICS's list which JACS argues has the value of a staff position which would otherwise be required for JACS to recreate the contents of the list. We therefore remain of the opinion that Labor's post-BAFO negotiations with WICS resulted in a substantial change in contract requirements and that it is not clear that JACS was not prejudiced thereby.

CORRECTIVE ACTION

In our earlier decision, we recommended that Labor reopen negotiations on the contract with both WICS and JACS with a clear statement of its minimum requirements. Labor poses some problems in reopening negotiations. However, we will not consider those problems, since less than 3 months' performance remains on the contract and we have learned that Labor has decided not to exercise the option on the contract, but to instead issue a solicitation for the period commencing March 1, 1985. In the circumstances, we will interpose no objection to not reopening negotiations on the original contract.

for 
Comptroller General
of the United States