DECISION

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

FILE: B-216643 **DATE:** May 24, 1985

MATTER OF: Arthur Young & Company

DIGEST:

1. Where agency, concerned that competitors for a cost reimbursement negotiated contract were "buying in," amended solicitation to specify "170,000 professional hours required," then whether proposed use of bookkeepers satisfied the requirement was not merely a matter of contract administration which could be ignored in evaluating offers, since offerors must be treated equally and provided with a common basis for the preparation of proposals.

2. Protest of award of a cost reimbursement contract is sustained. The protester's interpretation of RFP as prohibiting use of bookkeepers to fulfill solicitation requirement for "170,000 professional hours" was at least as reasonable as agency view that solicitation would be interpreted as not prohibiting the use of bookkeepers as professionals. Therefore, the solicitation requirement was at best ambiguous, resulting in competition on an unequal basis.

3. GAO sustains protest but will not recommend termination of improperly awarded contract for a management study where the contracting agency reports that almost half of the contract amount has been expended and that any new firm awarded a contract to complete the study will necessarily have to duplicate much of the work already done, and our Office cannot conclude with any certainty that if the solicitation had not been ambiguous award would have gone to another offeror.

Arthur Young & Company (AYC) protests the award of a contract to Coopers & Lybrand (CL) under request for proposals No. NOO600-84-R-4259, issued by the Department of

the Navy for the undertaking of a management analysis of the Naval Industrial Fund program and activities. AYC questions the evaluation of CL's proposal, alleging that the Navy failed to take into account CL's extensive reliance on the use of temporary personnel, that the Navy failed to conduct a meaningful cost realism analysis of CL's proposal, and that the evaluation panel which considered CL's best and final proposal was improperly constituted. We sustain the protest.

The Naval Industrial Fund program encompasses a number of commercial or industrial types of activities, including those concerned with shipyards, air rework facilities, military sealift, research laboratories, and printing. The contractor selected to undertake the study was expected to draw upon the procedures used in the private sector to make specific recommendations for enhancing the operations of the individual activities and of the program in general.

The Navy stated in the solicitation that it contemplated awarding a cost-plus-fixed-fee level of effort contract to the offeror whose proposal offered the greatest value to the government from the technical and price standpoints. The solicitation provided that technical proposals were to be evaluated in regards to the offeror's technical understanding and approach, its relevant past experience, and the extent of expertise, education and experience of its proposed personnel. Although the solicitation indicated that these technical considerations were to be significantly more important than cost and that price was not expected to be a controlling factor, nevertheless, offerors were warned that price was an important factor, the importance of which would increase with the degree of equality of the proposals with regard to other factors.

During the course of negotiations, contracting officials became concerned that several firms were "buying in" by proposing unrealistic expense rates and numbers of hours of work. In response to this concern, the Navy amended the solicitation to specify "170,000 professional hours required," to cap the indirect expense rates for the prime contractor at 2 percent above those proposed in its best and final offer, and to make the prime contractor responsible for capping the rates of its subcontractors at 2 percent above the proposed rates.

Best and final offers submitted by CL and AYC received the highest greatest value scores after adjustment for the realism of the proposed costs. Although AYC's technical proposal was rated higher than CL's technical proposal, receiving a technical score of 96.83 in contrast to CL's technical score of 93.40, AYC proposed a cost of $8,102,895 while CL proposed a cost of only $7,032,932. For purposes of evaluation, it would appear that the Navy adjusted the wage rates proposed by offerors, resulting in an increase in the cost for CL's proposed to $7,045,812. Contracting officials determined that AYC's 3.43 point technical advantage over CL was not worth the $1,057,083 additional evaluated cost of AYC's proposal. Accordingly, award was made to CL as offering the greatest value to the government. AYC thereupon filed this protest with our Office.

AYC questions the Navy's evaluation of CL's proposal, especially as it relates to CL's proposed extensive reliance on the use of a subcontractor to provide CL with temporary employees for this contract work.

In its technical proposal, CL stated that it intended to use "financial research staff" provided by a subcontractor--Robert Half Associates (RHA)--to perform "basic data retrieval." In its cost proposal, CL indicated that of the required 170,000 professional hours, it proposed that 39,433 hours would be performed by employees of a temporary agency. In its proposal CL described these employees as "less experienced researchers who will focus primarily on the collection of raw data and entry into our computer system," or bookkeepers.

AYC argues that the Navy failed to consider CL's extensive reliance on the use of temporary personnel. It questions the qualifications of RHA and its personnel, including whether RHA's bookkeepers qualify as professionals such that their work can be counted towards meeting the mandatory solicitation requirement of "170,000 professional hours." AYC notes that the Department of Labor (DOL) in its regulations implementing the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 (1982), defines employees employed in a bona fide professional capacity as those:

> "(a) Whose primary duty consists of the performance of:
>
> (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
> (2) Work that is original and creative in character in a recognized field of artistic endeavor . . . or
> (3) Teaching . . .; and
> (b) Whose work requires the consistent exercise of discretion and judgment in its performance; and
> (c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. . . ."

29 C.F.R. § 541.3 (1984). The solicitation incorporated the DOL definition for purposes of defining professionals under the Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351-358 (1982), and of defining professionals for whom a compensation plan must be submitted.

In response to AYC's claim that temporary bookkeepers are not professionals, the Navy responds that whether bookkeepers can be used to satisfy the requirement for 170,000 professional hours involves findings of fact as to individual circumstances, i.e., whether a bookkeeper is actually working as a professional, and thus requires determinations to be made during the administration of a contract rather than before the award of the contract. In any case, the Navy maintains that its contracting officials acted reasonably because what constitutes a professional for this contract's purposes does not necessarily constitute a professional for purposes of the Service Contract Act.

It is a fundamental principle of federal procurement that offerors must be treated equally and provided with a common basis for the preparation of their proposals. In negotiated procurements such as this, any proposal which ultimately fails to conform with the material terms of the solicitation should be considered unacceptable and should not form the basis of award. If an agency wishes to accept such a proposal, it must place the other offerors on notice of the specific changes and provide an equal opportunity for all offerors to compete for the requirement. See McCotter Motors, Inc., B-214081.2, Nov. 19, 1984, 84-2 C.P.D. ¶ 539; see also CDI Corp., B-209723, May 10, 1983, 83-1 C.P.D. ¶ 496.

Since proposals were to be evaluated for purposes of award in part based upon the proposed costs, which in turn depended upon the number of hours of work and the rate of pay and benefits proposed for each category of employee, we do not believe that whether proposals complied with a requirement for 170,000 professional hours is only a matter of contract administration which can be ignored in evaluating proposals. See CDI Corp., B-209723, supra, 83-1 C.P.D. ¶ 496 at 4-5 (contracting agency improperly accepted an offer of a different category of labor than that specified in the solicitation without amending the solicitation to give other offerors an opportunity to offer based upon the relaxed requirement).

We need not, however, decide between AYC's view that the DOL definition of "professional" defines the employees required in order to perform "professional hours" and the Navy's contrary interpretation.

If the DOL definition of "professional" is relevant to the issue of "professional hours" rather than merely to the Service Contract Act and to the requirement for submission of a professional compensation plan, then we believe that CL clearly failed to offer all of the professional hours required. As indicated above, DOL defines a professional as an employee whose primary duty consists of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, rather than training in the performance of routine mental processes, and requiring the consistent exercise of discretion and judgment. DOL regulations further indicate that, "accounting clerks, junior accountants, and other accountants [besides certified public accountants] . . . normally

perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt," i.e., are not professionals. 29 C.F.R. § 541.302(f).

Here, CL itself describes the work to be performed by the bookkeepers as involving only "basic data retrieval," focusing "primarily on the collection of raw data and entry into our computer system." We are aware of nothing to indicate that the bookkeepers were to be employed in work requiring the consistent exercise of discretion and judgment rather than merely routine mental processes. See Otis v. Mattila, 281 Minn. 187, 160 N.W. 2d 691, 698 (1968) (bookkeeper is not a professional as defined by DOL since work does not require the consistent exercise of discretion and judgment and is not predominantly intellectual and varied in character).

Even if we accept the Navy's interpretation that bookkeepers could perform professional hours, we believe that it was at least as reasonable for AYC to interpret the solicitation as requiring offerors to propose that all of the 170,000 professional hours be performed by employees who were professionals rather than mere bookkeepers. It is a basic principle of federal procurement law that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. Since the solicitation requirement here is at best ambiguous and has resulted in offerors responding to the Navy's requirement for professional hours based on different, yet reasonable interpretations as to what the requirement was, the competition was conducted on an unequal basis. See McCotter Motors, Inc, B-214081.2, supra, 84-2 C.P.D. ¶ 539 at 3; Delta Data Systems Corp., B-213396, Apr. 17, 1984, 84-1 C.P.D. ¶ 430.

We note that CL indicated in its cost proposal that the use of research assistants obtained from within CL would cost substantially more per hour for labor and overhead than would the use of research assistants obtained from RHA, i.e., the bookkeepers. Had CL been forced to rely on its own research assistants for the 39,433 hours of work proposed to be performed by RHA's bookkeepers, CL's proposed cost plus fee would have increased substantially, thereby reducing CL's greatest value score substantially. On the other hand, had the Navy told AYC and other offerors

during discussions or by issuance of an amendment that bookkeepers would be acceptable as professionals, AYC and other offerors might have been able to restructure the labor force offered to effect significant reductions in their proposed costs with resulting increases in their greatest value scores. We cannot calculate what effect this would have had on the competition, but it is apparent that AYC might have been unfairly displaced as a result of this solicitation defect, and, therefore, the award to CL was improper. See McCotter Motors, Inc., B-214081.2, supra, 84-2 C.P.D. ¶ 539 at 4. Accordingly, we sustain the protest on this point.

Given our conclusion in this regard, we need not consider AYC's other allegations, which, for the most part, concern alleged evaluation deficiencies in connection with CL's use of RHA temporary personnel.

We are unwilling to recommend termination of the contract with CL for the convenience of the government. The decision whether to recommend termination of an improperly awarded contract involves consideration of the cost of termination, the extent of performance, the degree of prejudice to other offerors or to the competitive procurement system, and the impact of termination on the procuring agency's mission. Any one of these factors may be controlling with respect to whether corrective action is appropriate. See Memorex Corp., B-213430.2, Oct. 23, 1984, 84-2 C.P.D. ¶ 446.

The Navy has advised us that, as of April 4, in excess of $3.1 million, or over 44 percent of the contract amount, had already been expended. Further, the Navy maintains that any other firm awarded a contract to complete the study would need to duplicate a substantial portion of the work already done by CL, resulting in an additional direct cost in excess of $2 million. The Navy also suggests that the likely 1 year delay in completion of the study arising from award to a different contractor might result in additional indirect costs because the delay of the management study would allow existing inefficiencies in Naval Industrial Fund activities to continue.

Finally, we are unable to conclude with any certainty that award would necessarily have gone to an offeror other than CL if the solicitation had not been defective, because offers were not made on the same basis and since point

scores in a negotiated procurement are not necessarily controlling as to award. See Prison Health Services, Inc., B-215613.2, Dec. 10, 1984, 84-2 C.P.D. ¶ 643; cf. Technical Services Corp., B-214634, Feb. 7, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ 152. Accordingly, we believe that the high cost to the government appears to be out of proportion to any benefits received from termination. See McCotter Motors, Inc., B-214081.2, supra, 84-2 C.P.D. ¶ 539 at 4 (although we sustained the protest where the solicitation defect caused offerors to compete on an unequal basis and the record suggested that an unsuccessful offeror might have been unfairly displaced, we refused to recommend termination, since the cost of termination would have been substantial).

Protest sustained.

Harry R. Van Cleve
General Counsel