

**DECISION**

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

FILE: B-193477

DATE: August 9, 1979

MATTER OF: Government Sales Consultants, Inc.

*[Protest of HEW Contract Award For Procurement Training Program]*  
DIGEST:

1. Where RFP requires that offerors propose schedule of courses with instructors specified to teach each course and that no changes of instructors can be made without agency approval, proposal that would permit offeror to revise course sessions did not deviate from RFP's requirement because it did not interfere with agency's right to approve substitution of instructors and courses.
2. Since successful offeror was contractually committed to provide listed key personnel, letters of commitment became excess; therefore, agency's failure to obtain such letters prior to award does not constitute basis to sustain protest.
3. GAO will not disturb agency's proposal evaluation unless it is shown to be arbitrary or in violation of procurement statute or regulation. After reviewing protester's examples, proposals, and evaluator's report, GAO has no basis to disturb evaluation.
4. Protester contends that technical evaluators did not properly consider merits of technical proposals because while evaluating technical proposals, evaluators were aware of proposed prices. Where agency denies that contention and record does not provide any support for protester's view, GAO has no basis to question agency's position without more than protester's unsupported statement.
5. Contention--that awardee was given unfair cost advantage because agency directed awardee to update course texts under another

contract--is without merit because updated course texts were to be furnished to selected contractor for use in instant procurement.

Government Sales Consultants, Inc. (GSCI), by letter filed on November 14, 1978, protests the award of a contract to Management Concepts, Inc. (MCI), under request for proposals (RFP) No. 144-78-HEW-0S issued by the Department of Health, Education, and Welfare (HEW) for a procurement training program. GSCI's protest is essentially based on these grounds:

(1) MCI was permitted to substitute instructors within the training program, thus materially deviating from the stated requirements of the RFP. Moreover, HEW failed to enforce the RFP's requirement for letters of commitment from MCI's proposed consultants;

(2) Evaluation of proposals was conducted on a different basis for the two offerors, unreasonably favored the incumbent contractor, and failed to judge the offerors' ability to perform successfully;

In addition, the technical evaluation was conducted in terms of the cost proposals, in effect converting the evaluation and award decision from one based on technical factors to one based on price. Also, in the price evaluation, HEW failed to consider the prompt-payment discount offered by GSCI; and

(3) HEW's separate noncompetitive award to MCI for text revisions was improper because much of the costs of MCI's course preparation under this RFP could be diverted to payments under the other contract.

GSCI requests that the contract award to MCI be terminated and that award be made to GSCI, or that the

requirement be resolicited and the costs of proposal preparation and prosecution of this protest be awarded to GSCI.

1. RELAXATION OF MATERIAL REQUIREMENT

The RFP required that:

"All proposals received in response to this [RFP] shall contain as a minimum the following information:

\* \* \* \* \*

"The offeror shall list the instructors by course, and include written commitments from the instructors as to their availability to teach the scheduled courses. The names of the instructors and the courses they will teach will be set forth in the 'Key Personnel' clause of any resultant contract."

The Key Personnel clause provided that:

"The personnel cited below are considered to be essential to the work being performed hereunder. Prior to diverting any listed individual to another program, the Contractor shall notify the Contracting Officer, reasonably in advance of such diversion, and shall submit justification (including the names and vital of proposed substitutions) in sufficient detail to permit evaluation of the impact of such substitutions on the program. No diversions shall be made by the Contractor without the written concurrence of the Contracting Officer."

GSCI states that, during negotiations, HEW insisted that a list of specific teaching assignments was required as a part of the offer in order to obtain further consideration. GSCI provided specific teaching assignments in its best and final offer and had signed commitments available prior to the date of award.

MCI's best and final offer stated that:

"As was pointed out during the discussion and agreed to by the HEW Project Officer, this planned schedule is not binding upon MCI and will be subject to revision throughout the the life of the contract."

GSCI believes that MCI's offer was a material departure from the RFP, in effect, permitting MCI infinite substitution. GSCI contends that, if MCI's offer was acceptable, then it constituted a change in HEW's requirements and Federal Procurement Regulations (FPR) § 1-3.805-1 (1964 ed. amend. 153) required that HEW inform GSCI of the changed requirement.

In response, HEW disagrees with GSCI's interpretation of MCI caveat. HEW believes that MCI is in compliance with the RFP instructor-listing requirement and HEW notes that the contract contains the Key Personnel clause which lists MCI's proposed list of instructors by course. Thus, HEW concludes that MCI is precluded from using any instructors to teach courses if they were not authorized by the contract; the same provisions would have been applicable to GSCI if GSCI was awarded the contract.

HEW reports that in its initial proposal neither GSCI nor MCI provided a list of instructors by course session. (We note, however, that both provided a list of instructors by course.) During discussions, HEW requested that each offeror provide a list of instructors by course session to determine if the offerors were maximizing the use of the same instructor for different sessions of a course (1) to emphasize consistency of instruction among different sessions of a course, and (2) to determine whether the offeror could adequately perform the administrative functions required for each course session.

HEW also reports that there was no material deviation from the terms of the RFP as the Key Personnel clause in the RFP is identical to that in the contract and nothing was required of GSCI that was not required of MCI. HEW explains that the names of the instructors and the courses they will teach were made a part of the

contract by incorporating MCI's technical proposal; accordingly, no instructor could be replaced without HEW's prior approval. HEW's project officer further explains that:

"It was not intended that either offeror commit itself to a list of instructors by course session; nor was either offeror requested to commit itself to the list they proposed; nor did either offeror commit itself to the list they proposed. \* \* \* Furthermore, this approach does not differ from our past practice, which is to list instructors in the Key Personnel clause, but not to require a commitment of instructors by course session. MCI will not be allowed to use any instructor not included in the Key Personnel clause. \* \* \*"

In reply, GSCI argues that by allowing MCI's caveat, HEW gave MCI valuable flexibility in both planning and performance denied to GSCI and compromised the evaluation since GSCI was constrained to listing only committed, not merely possible, personnel.

In our view, the RFP's requirement to list instructors and the courses they would teach and the RFP's Key Personnel clause reflected HEW's desire to control possible substitution of instructors from those listed and did not indicate any desire by HEW to require a commitment of instructors by course session. Here MCI's caveat merely confirmed HEW's intent; by MCI's reserving the right to change its proposed schedule it did not interfere with HEW's right to approve substitution of nonlisted instructors. We conclude that MCI's caveat did not constitute a deviation from a requirement of the RFP.

With regard to the letters of commitment, HEW reports that neither offeror included such commitments in its proposal and HEW assumed that each offeror had the required commitments in its files and would make them available at the time of award. (We note that HEW also questioned the timeliness of this particular allegation, but we believe that the matter should be

discussed along with the first issue above, which was timely raised. See Iroquis Research Institute, B-184318, February 23, 1976, 76-1 CPD 123.)

As to the merits, GSCI states that HEW reported that on October 9, 1978, the date of the debriefing, MCI had not provided the required written commitments.

We do not believe that an offeror must in every instance have contractual relationship with key employees, subcontractors, etc.; however, for them to be considered in the evaluation of the offeror's proposal absent such a contractual relationship, the agency must reasonably be assured that they are firmly committed to the offeror. See Management Services, Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD 74. In Kirschner Associates, Inc., B-187625, June 15, 1977, 77-1 CPD 426, we held that HEW's evaluation of an offeror's key personnel, even though some were changed after award, was not objectionable since the names were submitted in good faith by the offeror with the consent of the respective individuals.

Here, MCI was required to use only the instructors listed in the Key Personnel clause. Therefore, the required letters became excess protection for the Government's interests and HEW's waiving them does not constitute a basis for this Office to sustain GSCI's protest.

## 2. IMPROPER EVALUATION

GSCI contends that technical proposals were reviewed in terms of widely differing standards; the evaluators were figuratively provided two sets of glasses: dark lenses for the GSCI proposal and bright rose for MCI. GSCI lists examples that it believes are indicative of a larger pattern of individually insignificant errors in judgment or patently incorrect reading of proposals adding up to a seriously defective technical evaluation.

For example, GSCI states that:

### "a. Qualifications of Instructors

"The dark lens for GSCI: although the comment relates only to a backup

instructor, the evaluation report dated 9/13/78 states:

"'Mr. Miller's resume indicates a teaching background in ADP and not in the areas of the required courses.'

"The GSCI proposal (p. 35) clearly states that Mr. Miller teaches and consults in the field of procurement with a specialty -- but not an exclusive concern -- in high technology procurements in the computer field. This experience deals with all facts of the procurement process and is clearly 'in the areas of the required courses.' Substantial attention was paid to this point in negotiations to the extent that it appears this misconception may have been used to downgrade the GSCI proposal.

"The rose colored glasses for MCI: as quoted in point 1 above, the technical evaluators stated a real concern over the background and qualifications of two proposed MCI instructors. But by the time of award (without further explanation by MCI) this valid concern had been translated into the following invalid conclusion:

"'MCI is rated more highly due to the wider range of expertise of their instructors.'

"This point, to be valid, would have to be based on a correspondence between courses being taught and the exceptional expertise (i.e., the CPA) to be provided. There is no indication that the CPA would teach any course where accounting would be significant. Thus, though a CPA may be valuable, the benefit is wrongly applied for lack of assurance of application of those skills

and grossly overvalued since it would apply to only a very small portion of the courses even with a commitment."

In response, HEW states that two conclusions may be drawn from this portion of the protest: (1) GSCI disagrees with the findings of the evaluation panel and has, in effect, offered a substitute evaluation; and (2) GSCI is suggesting that GAO evaluate the proposals de novo.

Concerning the former, HEW notes that, citing Automatic Informational Retrieval Systems, Inc., B-188550, August 4, 1977, 77-2 CPD 80, and Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458, our Office has held that: determinations by procuring agencies regarding the technical merits of proposals will be questioned by this Office only upon a clear showing of unreasonableness, abuse of discretion, or a violation of the procurement statutes and regulations. HEW also notes that, citing Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87, and K-MCC, Inc. Consultants, B-190358, March 10, 1978, 78-1 CPD 194, the fact that a protester does not agree with the agency's evaluation does not render the evaluation arbitrary or illegal.

Concerning the latter, HEW refers to Tracor, Inc., 56 Comp. Gen. 62 (1976), 76-2 CPD 386; Pharos, Inc., B-188454, July 13, 1977, 77-2 CPD 19; First Harlem Management Corporation, B-188454, July 7, 1977, 77-2 CPD 12; Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206, as defining our Office's well-established position that it is not the function of this Office to evaluate proposals in order to determine which should have been selected for award; the determination of the relative merits of proposals is the responsibility of the contracting agency and must not be disturbed unless shown to be arbitrary or in violation of procurement statute or regulation.

We find no reason to question HEW's evaluation based on the examples cited by GSCI. Thus, in the quoted example, we see no inconsistency in the evaluators expressing concern with the range of



experience possessed by GSCI's backup instructor, and the conclusion that MCI's instructors have a wide range of experience. Although GSCI believes that the evaluators ignored the negative features of the MCI proposal and overlooked the positive features of GSCI's proposal, we are not able to reach this conclusion. Instead, we find that HEW gave MCI 92.0 points and GSCI 76.7 points in the technical evaluation. After thoroughly considering GSCI's examples, the proposals, and the evaluators' reports, we have no basis to disturb HEW's technical evaluation.

GSCI next contends that the technical evaluators did not properly consider the merits of the technical proposals because of cost concerns. GSCI believes that, while the technical evaluation was in process, the technical evaluators were aware of the prices proposed, thus violating HEW regulation 41 C.F.R. § 3-3.5103 (1978) which requires separate evaluation of business and technical proposals.

HEW reports that the evaluation was conducted in compliance with HEW regulation § 3-3.5103 and it is not the intent of this regulation to create an artificial atmosphere where technical effort exists independent of cost.

While it appears that the technical evaluation was conducted separately, the record does not reveal the point where price comparison and technical score were first related. Absent some indication in the record to support the protester's belief, we have no basis to question the agency's report. See The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, August 15, 1977, 77-2 CPD 116, affirmed, B-187639, November 23, 1977, 77-2 CPD 395.

GSCI also contends that the final award determination does not take note of the 8-percent, 20-day discount which GSCI offered; this, of course, tended to overstate the pricing difference between the proposals.

HEW reports that award was made to the low-priced, high technical offeror. In essence, HEW is arguing that GSCI's proposed discount, if considered, would not have affected GSCI's relative standing.

Here we need only conclude that GSCI was not prejudiced by HEW's failure to consider GSCI's proposed discount but we are required to observe that such proposed discounts in future procurements should not be overlooked.

### 3. TEXT REVISIONS

GSCI contends that prior to this competition HEW modified its existing contract with MCI to provide updated course texts, thus providing MCI a substantial cost advantage because much of the necessary preparation for courses could be charged to that contract. GSCI believes that this gave MCI an improper competitive advantage which HEW should have avoided.

In reply, HEW reports that this matter pertains to the Government's exercising its contractual rights under another contract and, therefore, is extrinsic to the matter at hand. Further, HEW reports that the updated materials were to be provided to the selected contractor for use in the training course. HEW concludes that the determination to have MCI update the materials under the existing contract was proper.

We cannot conclude that (1) MCI was given an unfair cost advantage because the updated texts were to be furnished to the selected contractor, or (2) HEW was attempting to interfere with or defeat the competitive procurement. Cf. E.R. Hitchcock & Assoc., B-182650, March 5, 1975, 75-1 CPD 133.

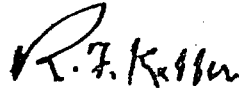
GSCI also contends that the determination of responsibility was lax in that the contracting officer did not check MCI's capacity beyond a review of the workload under one contract; thus, no one considered that MCI already had contemporaneous commitments to HEW alone for a number of training courses. However, this matter relates to HEW's affirmative determination of MCI's responsibility and, therefore, will not be reviewed by our Office. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

Finally, we note that GSCI initially claimed proposal preparation and protest prosecution costs, then after receiving and reviewing HEW's report, seemed to

have abandoned its claim. We also note that GSCI has provided no arguments in support of its claim.

Our review of GSCI's protest reveals no basis to conclude that HEW's conduct constituted arbitrary or capricious action toward GSCI. Further, protest prosecution costs are not recoverable (see Bokonon Systems, Inc.--Reconsideration, B-189064, August 8, 1978, 78-2 CPD 101).

GSCI's protest and claim are denied.



Acting Comptroller General  
of the United States