

DOCUMENT RESUME

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RELEASED

[Review of INS's Contract with J. A. Reyes Associates, Inc., for a Residential Study of Illegal Aliens]. GGD-78-61; B-125051. April 17, 1978. 15 pp. + 2 enclosures (9 pp.).

Report to Rep. Joshua Eilberg, Chairman, House Committee on the Judiciary: Immigration, Citizenship and International Law Subcommittee; by Elmer B. Staats, Comptroller General.

Issue Area: Income Security Programs (1300).

Contact: General Government Div.

Budget Function: Law Enforcement and Justice: Federal Law Enforcement and Prosecution (751).

Organization Concerned: Department of Justice; Immigration and Naturalization Service.

Congressional Relevance: House Committee on the Judiciary: Immigration, Citizenship and International Law Subcommittee. Rep. Joshua Eilberg.

An Immigration and Naturalization Service (INS) contract with J. A. Reyes Associates, Inc., for a residential survey of illegal aliens was reviewed. The Reyes contract initially amounted to \$751,000, and it was later modified to include about \$80,000 for research on the impact of illegal aliens on social service programs. Reyes Associates' price proposal was neither the highest nor the lowest of the seven firms responding to the solicitation. The contracting officer awarded the contract to Reyes Associates without making a detailed preaward, line-item cost analysis of Reyes' estimated costs. Extensive mathematical errors were later found in Reyes' cost estimates, but the contracting officer could find no documentation showing that these discrepancies had been detected and resolved before or after awarding the contract. A number of causes for the extensive delays involved in the contract were noted, but delays may have been inherent in the brief timeframe set forth in the contract. Additional costs have been incurred by revisions to the contract and by work done outside the scope of the contract. To date, Reyes' has been paid about \$59,000 for work it claims was outside the contract's scope; INS is contesting about \$14,000 of those costs. In view of the contract's complexity, large dollar amount, and problems encountered, an interim audit of the contractor's costs is desirable. (RRS)



RELEASED 5/17/78

B-125051

April 17, 1978

The Honorable Joshua Eilberg
Chairman, Subcommittee on Immigration,
Citizenship, and International Law
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

In response to your March 20, 1978, request, we reviewed an Immigration and Naturalization Service (INS) contract with J. A. Reyes Associates, Inc., for a residential survey of illegal aliens. As you desired, this report presents the history and present status of the INS-Reyes contract. It also presents the facts concerning difficulties that INS has experienced in scope, cost, and delay in implementation of the contract.

You also asked us to review the planned transfer of the processing facility for INS' Alien Documentation, Identification, and Telecommunication system from Washington, D.C., to Dallas, Texas. We are continuing our work on that review, and we will provide our report when it is completed.

The residential survey is technical and complex. Its various phases are highly interrelated, so much so that INS officials told us that other agencies were reluctant to undertake this work. The volume of records and correspondence accumulated to date defies quick examination. Because of the limited time frame you desired, we were not able to examine all aspects of this contract in depth, nor did we conduct a financial audit (which we believe is needed). Therefore, our observations, discussed below, are largely based on discussions with contractor and agency personnel and on a limited analysis of records.

HISTORY AND BACKGROUND OF THE RESIDENTIAL SURVEY

In fiscal year 1976 the Congress appropriated \$1 million to INS for research on the problem of illegal aliens. The original design for the residential survey was proposed by David North of

Linton and Company in 1975 under contract to the Law Enforcement Assistance Administration, and further developed by members of the Domestic Council Committee with representatives of INS and the Bureau of the Census. In the spring of 1976, INS adopted the recommendation of the Domestic Council Committee on Illegal Aliens to conduct a household survey of the foreign-born population. Approximately \$800,000 was set aside for a residential survey to obtain information about the number and impact of illegal aliens in the United States. The basic purpose of the survey was to obtain (1) a reliable estimate of the illegal alien population in our most populated States and (2) other information with which to develop a profile of the illegal alien's impact on various aspects of American society. Objectives of the survey, in greater detail, are shown in enclosure I.

The remaining funds were used to finance other illegal alien studies and to contract for management and technical assistance to INS in conducting these studies and the residential survey.

The above-mentioned design was incorporated into a Request for Proposal (RFP). On September 17, 1976, following a competitive proposal process, J. A. Reyes Associates, Inc., of Washington, D.C., was awarded the contract to refine the methodology, design the questionnaire, and carry out the field work. The survey was to be completed in 12 months. The contract was a cost-plus-a-fixed-fee contract. Under this type of contract, the contractor receives a fixed fee in addition to reimbursement for allowable costs. The fixed fee is not adjusted later for variations in the actual costs of performing the work but may be adjusted for increases or decreases in the scope of the work. An estimate of the total cost of performing the work is established when the contract is awarded and is used as the initial contract ceiling. The contracting officer, however, can authorize the contractor to exceed this ceiling if additional funds are available.

The Reyes contract initially amounted to about \$751,000. Later, it was modified to include about \$80,000 from the Department of Health, Education, and Welfare (HEW) for research on the impact of illegal aliens on social service programs. This brought the estimated total cost of the contract to about \$831,000.

Local-resident interviewers, using questionnaires, were to gather desired information on illegal aliens by surveying a sample of households in the 12 most populous States. These States account for about 60 percent of the total U.S. population. INS officials said that to maximize the efficiency of the sampling procedure and

to increase the number of illegal aliens interviewed, a stratified random sample would be used. The sample was called stratified because some areas would be sampled more heavily than others. The areas receiving the higher proportion of the interviews would be those with relatively high concentrations of legal resident aliens. The rationale for sampling those areas more heavily than others was based upon the "clustering hypothesis"--the assumption that illegal aliens tend to reside in neighborhoods with high concentrations of legal aliens of similar ethnic origin.

The clustering hypothesis has not yet been proven. To allow testing of the sample allocation scheme, INS originally planned to have the contractor carry out the survey in two phases. Ten thousand interviews would be conducted during phase I (the test phase), and a remaining 90,000 during phase II (the main part of the survey).

The survey fell behind schedule soon after it began and has since been plagued by a continuing series of delays. In the fall of 1977, a pretest of approximately 700 interviews was conducted to evaluate the interviewer training procedures and the questionnaire. Both INS and the contractor considered the pretest successful. But it is now 7 months beyond the original contract date for completion of the survey, about \$575,000 has been spent, and no interviews (other than pretest) have been conducted. The survey schedule has been revised at least three times.

In February 1978, after the contractor announced it would not be able to complete the survey as originally planned with the approximately \$300,000 remaining at that time, the INS Commissioner directed that the survey be completed with the remaining funds but on a reduced scale. INS and the contractor are now working out the necessary survey revisions to accomplish this. The contract will be modified to formalize the revisions. The new target date for delivery of the final report to INS is October 9, 1978. This extends the contract period to 25 months.

HOW THE CONTRACT WAS AWARDED

On August 2, 1976, INS sent an RFP to 214 prospective offerors. The RFP had a closing date of September 1, 1976. This allowed firms 3 to 4 weeks to respond, assuming normal

mailing time. Among the seven firms submitting proposals, Reyes Associates' price proposal was neither the lowest nor the highest.

INS officials attributed the small number of proposals largely to the complexity of the survey, pointing out that many firms lacked the resources and expertise needed to take on a contract of such a magnitude. They acknowledged, however, that the short response time allowed in the RFP might have discouraged some firms from making offers. Two firms did, in fact, reply that they were declining to bid because of insufficient time to prepare adequate proposals. One of these was the Stanford Research Institute. We cannot speculate about how much wider a selection of offerors would have been available had the allowed response time been greater.

We examined INS records showing the procedure used to evaluate and rank each offeror's proposal. The total score awarded to Reyes Associates was considerably higher than those of the other six offerors.

One of the offerors protested the award to our Office under GAO's Bid Protest Procedures. On the basis of the issues raised and the written record presented by the parties, we concluded that the award was proper. Enclosed is a copy of our decision of May 5, 1977. (See enclosure II.)

The INS contracting officer, however, did not comply with the Federal Procurement Regulations (FPR) requirement that, as a preaward procedure, the contractor's past and present performance be evaluated in such areas as quality of product, meeting of delivery schedules, and timely compliance with contractual provisions. Although Reyes Associates had done work for INS under a previous contract and apparently had performed satisfactorily, it was a short-term, low-cost contract. Moreover, INS made no effort to obtain information about Reyes' performance under any of the other previous contracts it listed in its proposal.

The contracting officer awarded the contract to Reyes Associates without making a detailed preaward, "line-item" cost analysis of Reyes' estimated costs. The FPRs require making a cost analysis to include examining of the necessity for certain costs and the reasonableness of the amounts estimated. In examining the Reyes' cost estimates we found extensive mathematical errors. The net effect of these errors was the erroneous inflation of the contract ceiling by about \$49,000. Using the same

relationship of fixed fee to estimated costs that was contained in the contract, these errors could have had an inflationary impact on the fixed fee of as much as \$3,400.

The INS contracting officer could find no documentation showing that these discrepancies had been detected and resolved either before or after awarding the contract. During our review, he asked the contractor for a corrected cost estimate. The contractor's corrected estimate, dated April 5, 1978, also contained mathematical errors. Further, it contained revisions to the original proposed costs which were not supported by any evidence of negotiations between INS and the contractor. The result of the erroneous estimates is that 19 months after award of the contract, significant discrepancies in the contractor's initial cost proposal are still unresolved.

INS officials said that this and other problems with the award of the residential survey contract were caused by:

- Pressure to award the contract and obligate the funds before September 30, the end of the fiscal year. The contract was awarded on September 17, 1976, 3 days after the evaluation panel recommended Reyes Associates.
- Eagerness to get the survey started to (1) begin the collection of badly needed information about the illegal alien population and (2) establish INS credibility and experience in research.
- The INS contracting staff's inexperience and lack of training in handling cost-type contracts and contracts of this complexity. They said that previously they had administered primarily fixed-price, relatively simple contracts.

Despite their inexperience, contracting officials had not sought technical assistance from the INS legal office or the Department of Justice in processing the contract. They told us that, although legal assistance had not been available within INS at that time, it is now available.

WHY PERFORMANCE HAS BEEN DELAYED

Following are the nature and causes of some of the significant delays encountered in the survey:

1. A several month delay occurred while INS tried to recruit four other agencies to participate in the survey on a cost-sharing basis. Only HEW decided to participate. Pending agency decisions, however, certain critical work was postponed. In our opinion, if INS had more fully developed agency options before awarding the contract, it might have prevented some of the delay. INS officials told us they had done substantial work in developing these options for the RFP, but that other agencies were reluctant to commit themselves to the options before seeing the contractor's actual plan.
2. INS was uncertain about whether, under the Privacy Act, information in annual alien registration forms (INS Form I-53, Alien Address Report) could legally be used to identify the census tracts and blocks where legal aliens lived. According to an INS official, 3 to 4 weeks had passed before INS finally determined that no legal problems existed. He acknowledged that had the RFP been submitted to the legal officer for review before solicitation, such a review might have surfaced the legal issue early and resulted in a more timely resolution. An INS official stated that no legal opinion was sought because illegal aliens were not believed to come under the authority of this act.
3. Another contractor made a late delivery of a coded computer tape containing data from approximately 500,000 Alien Address Reports. These data from Alien Address Reports filled out annually by registered aliens, were necessary for site selection and sample allocation procedures in the survey. An INS official said the small contractor was over its head on this job and made delivery several weeks late. In retrospect, he said, INS should have terminated this contract as soon as slippage began. The contracting officer, however, did not agree that termination would have been a solution to the problem.
4. INS requested numerous changes in the survey design and questionnaire. These changes were accompanied by prolonged discussions, reviews, and deliberations. INS officials attributed much of this delay to a change in INS administration, which brought new thinking and viewpoints to the approach to the survey.

Although the project officer believed efforts to refine the survey resulted in improvements, they may have delayed the survey by as much as 2 months. INS officials felt that these changes represented an integral part of the development of the project. They stated that the survey was a pioneer effort and that no one could have known what was needed initially.

5. The management and technical assistance contractor may have failed to provide adequate management and technical assistance. In the opinion of Reyes Associates, the lack of adequate management and technical assistance cost them additional work and time. INS officials, however, said they considered the technical assistance contractor's work generally satisfactory. They added that the Reyes-technical assistance contractor working relationship apparently left something to be desired.
6. The RFP was inadequate. INS project office staff acknowledged that much of INS' hesitation and uncertainty about the survey design and questionnaire was caused by a failure to develop data requirements before the RFP was issued. According to the project officer, the RFP "was not adequately thought out. We didn't really know what we wanted." In later elaborating, he said that a more desirable approach would have been to develop the survey methodology with the assistance of a contractor before developing the RFP.
7. Purported lack of internal support for the survey. Project officials said they received less than full and enthusiastic support for the survey from other elements within INS. Although it is not possible to quantify the impact of this lack of support on the progress of the survey, the officials felt that the impact had been adverse.

Finally, delays may have been inherent in the brief time frame set forth in the contract. The project officer said the Domestic Council Committee on Illegal Aliens suggested 12 months and that INS had no reason to believe the survey could not be done in this period. The contractor also stated that he believed initially that 12 months would be adequate. In our view, the

possibility exists that, because of inexperience in studies of this nature, size, and complexity, INS may have been overoptimistic. A Bureau of the Census demographic expert, knowledgeable about the survey, shares this view. She said that 12 months was an optimistic time frame, considering the need for a long lead time, various constraints, and the uncertain status of the options of other agencies. She said that she would have chosen an 18-month contract and that she had informally expressed to INS project personnel her doubts about the 1 year time frame.

None of the INS personnel interviewed questioned the contractor's technical professionalism or the quality of its work. No one charged the contractor with causing any of the major delays in the survey. In fact, the project officer stated in an internal memorandum dated September 23, 1977:

"* * * the performance period for the contract must be extended * * *. This is due to no fault of JAR [J. A. Reyes Associates] and is a result of delays encountered by I&NS in the development of data and necessary clearances for the survey. This delay has been an undue hardship on the Reyes Company and will ultimately mean that JAR will have inadequate funds to complete their analysis and final report."

The project officer stated, however, that the contractor caused some minor delays which, individually, meant only a few days but collectively represented a significant delay.

The contractor said he believed that the underlying causes of delays were INS' inexperience in major research; the learning time required by the INS project staff because of the survey's technical aspects; and a lack of a sense of urgency on the part of the project staff as evidenced by frequent reevaluations of and changes in the plan.

WHY THE MONEY IS RUNNING OUT

Funds allocated for the survey are diminishing. Additional costs already incurred were caused by revisions to the plan and by work done outside the scope of the contract. "Standby costs" may have resulted in further additional costs. Moreover, initial funding may not have been adequate.

INS required revisions

Although within the scope of the contract, the revisions (as discussed on pp. 6 and 7) were costly, not only in time but in money, particularly in money spent for direct labor. As discussed earlier, fuller developing of the RFP before calling in a contractor might have avoided the need for some of these revisions.

A cost-type contract, in which time is money, dictates a need to keep changes and refinements to a minimum. Project office officials said they understand this now but that not until November 1977 (about 14 months after the contract was awarded) did they learn they had a cost-type contract and understand what a cost-type contract was. Until that time, they had assumed the contractor was committed to complete the job within the originally estimated cost of the contract. (This is the essential characteristic of a firm fixed-price contract.)

Contracting officials pointed out that although the project staff had a copy of the RFP, which stated that the contract would be cost-type, the project staff had not asked for an explanation of the contract. Contracting officials, therefore, assumed that the contract was understood. They acknowledged, however, that, as the staff responsible for contract administration, they should have insured the project staff's understanding of the contract.

INS has paid the contractor for work outside the scope of the contract

The FPRs state generally that changes to the scope of work must be approved by the contracting officer in a written modification. Further, the INS-Reyes contract stipulated that "no payment for extras shall be made unless such extras and the price therefore have been authorized in writing by the contracting officer." The contracting officer stated that for several months without his knowledge, the project officer gave the contractor oral or tacit approval for work considered by the contractor to be outside the scope of the contract. The project officer, however, disputed this, asserting that he had approved no alleged out-of-scope work without the contracting officer's prior knowledge. The contractor's statements of costs accompanying its monthly invoices did not separately identify out-of-scope costs. To date, the contractor has been paid about \$59,000 for work which it claims was outside the

scope of the contract. INS is now contesting about \$14,000 of those costs, and the matter is still unresolved.

All INS persons concerned candidly attributed the problem of payments for out-of-scope work to the lack of a clearly definitive contract. Because of the haste to obligate the funds before the end of the fiscal year (and, according to the contracting officer, inexperience in handling cost-type contracts), numerous ambiguities, omissions, and contradictions between the RFP and the contractor's proposal were left unresolved. Instead of preparing a formal contract resolving these matters, the contracting office placed a signed Standard Form 33 (Solicitation, Offer, and Award) on top of the RFP and contractor's proposal, and this package became the contract. According to the contracting officer, this informal type of contract has caused heartaches ever since.

The project officer requested or at least permitted the contractor to do work which he assumed was within the scope of the contract but which the contractor considered outside the scope and for which it later claimed payment. The project officer asserted that it had been the practice of the contractor to do work requested but to wait until after the work was done to announce that it considered the work to be outside the scope. Contractor officials told us they did not think this had been the case. We found evidence, however, that in at least some instances the contractor had not mentioned until after doing the work that it interpreted the work to be outside the scope of the contract. Had the contract been more specific, much of the problem could have been avoided.

Examples of issues which became troublesome with regard to contract scope are (1) frequency of meetings and briefings to be attended by the contractor, (2) additional work on the questionnaire format, (3) the contractor's role in recruiting other agencies to participate in the survey, (4) a contractor briefing for an Hispanic organization concerned about the survey, and (5) nature and extent of the management and technical assistance contractor's role.

The contracting officer said that at one time INS considered rewriting the contract to correct its deficiencies, but that the press of other work prevented it.

To resolve the problem of clarifying the contract once it had been signed, INS could have issued a letter contract. A letter contract enables the agency to "buy time" to have the

contract terms defined within a specified period after the funds are obligated and the work begun. The contracting officer said that, in retrospect, the letter contract would have been the best technique for preventing contract deficiencies. He said he did not consider using it at the time, however, because (1) his contracting workload had greatly increased and he foresaw no time or staff capability to later definitize a contract and (2) based on his contractual experience, he lacked confidence in the willingness of personnel involved in this or any other project to provide the time and documentation necessary to definitize a contract later.

INS may have paid the contractor
for "standby costs"

Under the FPRs' criteria for reasonableness of costs, if a contractor hires a staff for a certain project, the contractor can claim payment for this staff even if the project for which they were hired is delayed or inactive due to Government causes and if there are no other projects for which the staff time may be used. INS contracting officials did not think the contractor had billed INS for many standby days and said that if it had, the days had not been identified in the monthly invoices. Reyes Associates officials were vague, saying that "there may be a little standby cost but not much."

A common thread we found throughout our review was the need for the contracting and project staffs to work together more closely in the administration of the contract. Greater personal communication between the two offices might have resulted in:

- The project staff being better informed about the implications of a cost-type contract.
- A joint effort to definitize the terms of the contract.
- A joint effort to establish performance and dollar milestones as a tool for correlating dollars spent with tasks completed. Such a correlation might have alerted INS about the extent of the money problem earlier and allowed management to take timelier remedial action.
- A more timely decision by the Commissioner regarding the course of action to take in completing the survey. As early as September 1977, it was known that, under

the existing survey design and rate of spending, funds would not be adequate to complete the survey. Not until February 1978, however, did the project officer and contracting officer meet with the Commissioner to discuss alternative courses of action. Although we can't be sure, it seems logical to believe that earlier reaction might have produced a less austere plan for completing the survey than the plan now being developed. As previously stated, INS officials attributed much of the delay in bringing this matter to the attention of the Commissioner to a change in the administration.

In addition to the above, the project, as originally conceived by INS, may not have been funded adequately. INS records show that, on the basis of criteria developed in other surveys, Bureau of Census experts had expressed some doubt that \$800,000 was adequate. The contractor, however, told us it believed that without the delays that developed, the funding would have been adequate.

HOW THE SURVEY PLAN
HAS BEEN REVISED

Contractor officials estimated, without calculating details, that they would need an additional \$500,000 to \$750,000 to complete the survey with 100,000 interviews, as originally planned. To complete the survey with existing funds, INS has revised its plan, which will reduce the survey scope. INS, contractor, and Bureau of the Census officials, however, do not fully agree on the effects that reducing the survey will have on the results.

Following are essential features of the revised plan for completing the survey:

- 10,300 interviews (instead of 100,000) will be conducted in 12 States.
- The questionnaire will be reduced in length.
- The survey will be conducted in a single phase instead of two. This will not allow for testing the validity of the clustering hypothesis.

Although we were not asked to review the survey methodology in depth or determine its validity, we questioned contractor officials about the impact of the reduction of scope on the survey

results. They were concerned about not being able to verify the clustering hypothesis. They said that, although some experts believe that the hypothesis is valid and have advised them not to be concerned, those who do not give credence to the clustering hypothesis will not trust the survey results.

The contractor and INS agree that the revised survey will still produce meaningful data on the number and characteristics of illegal aliens for each of the 12 States and total estimates for the 12 States. However, reducing the scope of the survey will sacrifice the reliability of data on a national level as well as on a local level, except for New York City and Los Angeles. The survey will still obtain characteristics information (such as education, employment, and length of stay) but with a lower level of reliability than would have been possible with 100,000 interviews. Instead of producing national estimates of the number of illegal aliens by type, the survey will now produce only national minimum numbers. Contractor officials said they had discussed the revised survey with academicians, however, and were confident that their data would withstand the scrutiny of the academic world.

Curiously, Bureau of the Census demographic experts held a different view than did INS and the contractor regarding certain expected results. They believed that 10,000 interviews were adequate for obtaining a national estimate of the number of illegal aliens, but that 100,000 would be required to provide an adequate sample for State and local estimates. One expert commented, however, that the expected results would be "a good start for research" on illegal aliens for use by other agencies. INS believes its decision to continue the survey under a reduced scope has the obvious advantages that

"despite some loss of precision, Congress and the I&NS would get the required information, the cost of developing the survey to this point would not be lost, and the survey could be completed within its budget."

WHY THE CONTRACT NEEDS A FISCAL AUDIT

The FPRs provide that an audit of cost-type contracts may be made before final payment is made. In view of this contract's complexity, large dollar amount, and problems encountered, we believe an interim audit of the contractor's costs is desirable.

While we doubt that discovery and correction of the discrepancies in the contractor's cost estimates (discussed on pp. 4 and 5) before awarding the contract would have affected the award, we consider the episode an indication of the need for a financial audit of the contract.

Another indication are the errors in the contractor's cost estimates for completion of the survey during the period March to October 1978. After we pointed out the errors to the contracting officer, he asked the contractor for corrected estimates. The corrected estimates were incomplete, only partially corrected, and contained new errors.

An additional reason for an audit of the contract is that, in discussing Defense Contract Audit Agency (DCAA) audits of Government contracts performed by Reyes Associates, a DCAA auditor told us that DCAA was having substantial problems verifying both direct and indirect costs charged to the contracts because of inadequacies in the Reyes Associates accounting system.

The audit of the contract should include (1) an examination of the contractor's accounting procedures, (2) verification of incurred costs charged to INS, and (3) accuracy and reasonableness of all transactions related to the contract.

During our review, officials in the project office recommended to the Commissioner that a fiscal audit be conducted. At the completion of the review, the Deputy Commissioner concurred in this recommendation, and the contracting officer said that an audit would be made.

The contracting officer said he had not considered having the contract audited earlier because he had been close enough to the survey and its delay problems on a day-to-day basis to have no reason to suspect anything was wrong.

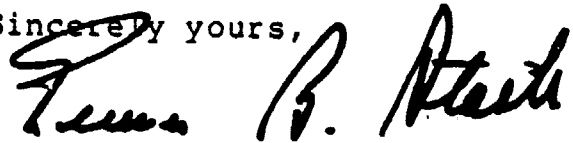
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In order to meet the reporting deadline, we did not obtain formal, written agency or contractor comments. However, we discussed the results of our review with INS officials and considered their comments in preparing this report. We believe it appropriate to mention that, during our review, officials and other personnel of INS were cooperative, candid, and straightforward.

B-125051

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to interested parties and make copies available to others on request.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas B. Stach". The signature is written in a cursive style with a large initial "T" and "S".

Comptroller General
of the United States

Enclosures

OBJECTIVES OF RESIDENTIAL SURVEY

1. Estimate the number of illegal aliens by type (entrant without inspection, visa abuser, malafide applicant, etc.) in the selected areas within the 12 most populous States: California, New York, Pennsylvania, Texas, Illinois, Ohio, Michigan, New Jersey, Florida, Massachusetts, Indiana, and North Carolina.
2. Collect and analyze characteristics information on illegal aliens such as: age, sex, nationality, marital status, mode of entry, education, length of stay, source of livelihood.
3. Determine extent of participation of illegal aliens in social service programs and labor market.
4. Stimulate interest in further illegal alien research in specific areas from results of this effort.

DECISION

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

FILE: B-187756

DATE: May 5, 1977

MATTER OF: Development Associates, Inc.

DIGEST:

1. Protest concerning defects in successful proposal is untimely filed since received more than 10 working days after protester received debriefing on proposal. Other bases of protest are timely filed.
2. Notwithstanding position that enforcement of standards of conduct is responsibility of each agency, GAO has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement.
3. Although it would have been appropriate for proposal evaluator to have disqualified himself completely from proposal evaluation upon notice that proposal had been received from former employer who had previously fired employee, fact remains that evaluator insists he did not discuss former employer's submitted proposal until fellow evaluators completed evaluation. Since protester has not submitted probative evidence contesting evaluator's statements and because relative standing of offerors is unchanged by excluding questioned evaluator's scores, new evaluation panel need not be convoked to rescore proposals to remedy irregularity.
4. Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals.
5. Since successful offeror's superior-rated proposal was properly considered for initial proposal award in that tests for award were met, it was proper for procuring agency not to have discussed with protester deficiencies noted in protester's proposal--indeed if discussions had been entered into initial award would not have been authorized.

B-187756

Development Associates, Inc. (DA), questions the award of a contract to J. A. Reyes Associates, Inc., under request for proposals (RFP) No. CO-48-76, issued by the Immigration and Naturalization Service, Department of Justice. The RFP described a requirement for a "residential survey to estimate the illegal alien population in the twelve most populous states and to obtain and analyze characteristics and impact data."

DA's protest which was filed with the General Accounting Office on November 3, 1976, or nearly 7 weeks after the date (September 17, 1976) on which the award was made is based primarily upon the contention that the "evaluation procedures on this procurement were conducted in a vague, misleading, and biased manner." Specifically, DA contends that: (1) a former DA employee (who is alleged to be biased against DA because the company fired the employee) evaluated DA's proposal to DA's disadvantage; (2) the discharged employee failed to disclose the "potential conflict with DA" until the contract award panel met on September 13, 1976--shortly before the protested contract was awarded; (3) "Parts of the methodology of the winning proposal are contradictory and in one instance in violation of the Office of Management and Budget regulations" (--this ground of protest raises 18 criticisms of the Reyes' proposal); and (4) the "reasons why the panel found the DA proposal to be unacceptable are vague, unfounded, untrue, and were not checked out by the panel with [DA]."

The Department asserts that DA's criticisms of Reyes' proposal are untimely filed under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. § 20 (1977)) which provides that protests concerning non-solicitation improprieties are to be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. The Department points out that on October 12, 1976, DA was permitted to read Reyes' proposal and that DA "could easily have extracted" any material needed to submit an informed protest concerning Reyes' proposal.

DA asserts that it was not in a position to submit an informed protest about the lack of merit of Reyes' proposal until November 1, 1976, at the earliest, when the Department provided DA with a copy of the Reyes' proposal, and copies of various documents evidencing the rationale which prompted the rejection of DA's proposal.

B-187756

The Department has informed us that it afforded DA's representative an unlimited time on October 12, 1976, to study the Reyes' proposal and that it would have allowed the representatives to make copies of pages of the proposal on that day had the representatives so requested. Additionally, the Department says that it gave DA a copy of a chart showing the relative scores of all offerors under each of the evaluation criteria. These acts constituted, in the Department's view, an adequate "debriefing" of the merits of Reyes' proposal. Consequently, the Department insists that DA was in a position to submit an informed protest about any alleged lack of merit in the successful proposal as of October 12.

A protester may reasonably withhold filing a protest concerning the lack of merit in a successful proposal until it is given sufficient information as to why the proposal was considered to be superior-- provided the request for the information was made within a reasonable time from the date of award. Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312.

There is no question that DA requested (on September 27, 1976) a "debriefing" of the Reyes' award within a reasonable time from the date of the award (September 17). It is our view, however, that the Department gave sufficient information at the debriefing (held on October 12, 1976) as to why Reyes' proposal was considered to be superior. DA was furnished a detailed chart showing Reyes' scores under all the evaluation criteria. For example, the chart showed that Reyes' proposal received a score nearly 30 percent higher than DA in technical approach. Having this scoring difference in mind, DA should have realized that significant defects were not considered to be present in Reyes' technical proposal (the source of the bulk of the criticisms subsequently advanced by DA) as compared with DA's technical proposal. Consequently, upon being allowed an extended period of time to study the Reyes' proposal, DA should have also realized that it was being given an opportunity to note defects in Reyes' technical proposal (and in all other areas of the proposal). DA must, therefore, be held to have had notice of any basis of protest concerning defects in Reyes' proposal as of October 12, 1976. Since DA's protest concerning defects in Reyes' proposal was not received until November 3, 1976--or more than 10 working days after the October 12 debriefing--this ground of protest is untimely filed under section 20.2(b) of our Bid Protest Procedures and will not be considered.

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Reyes also asserts that all other bases of DA's protest are untimely filed and should not be considered. Specifically, Reyes says that on September 14, 1976, the Department sent "DA a memorandum advising, in substance, that DA's proposal had been determined to be outside of the competitive range and that the contract would not be awarded to DA." Because of the transmission of this memorandum, Reyes argues that DA had knowledge of all bases of protest concerning the award in mid-September.

The Department has informed us that it has no record of any memorandum sent to DA. Instead, the Department maintains that the September 20 letter to DA was the first communication informing DA that it had not received the award.

In any event, Reyes mistakenly assumes that the mere communication of notice of award automatically serves to convey all possible bases of protest against an award. This is not so. So long as an offeror requests a debriefing of the rationale supporting an award within a reasonable time from the date of hearing of the award, the offeror is not foreclosed from filing a timely protest under our Bid Protest Procedures. See Lambda Corporation, supra. (Of course, if the offeror learns of the proposed rejection of its proposal prior to award and obtains the agency's rationale for rejecting the proposal before award, the offeror will be held to have had knowledge of the bases of protest against the rejection from the date it learned of the agency's rationale. Singer Company, 56 Comp. Gen. _____, B-186547, December 14, 1976, 76-2 CPD 481.)

There is no question that DA requested a timely debriefing of the Reyes award. And it is clear that DA was not furnished information giving rise to grounds of protests Nos. 1, 2 and 4 until November 1, 1976--the date on which it obtained several procurement documents from the Department specifically relating to these grounds of protest. Consequently, we find these other bases of protest to have been timely filed.

Responding to the first ground of DA's protest, the Department explains that the allegedly biased evaluator, a current employee of the Department of Health, Education, and Welfare (HEW) "on loan" to the Service for the procurement, was given copies of all the technical proposals in question on September 2, 1976. From that date until the evaluation panel convened on September 13, 1976, the evaluator reportedly read all but DA's proposal. On September 13, the evaluator informed the other panel members of his "former, albeit brief, association with DA, and disqualified himself from the initial evaluation of [the company's] proposal on the basis of a possible conflict in interest." The Department says that this disqualification lasted until the other evaluators had completed their evaluations and collectively

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found the DA proposal to be unacceptable. After this finding was made, the evaluator made an evaluation of the proposal to insure that "all proposals were evaluated by the complete panel." The Department further notes that the questioned evaluator "did not assign the greatest or least amount of points." Finally, the Department is of the view that, although the failure of the evaluator to disqualify himself was improper, his actions were "honorable."

The evaluator, who admits he had previously been fired by DA, insists that his dismissal was "predicated strictly on specific professional differences." Further, he states that, although he "elected not to review the DA submission and refused to participate in the review and discussions of the DA proposal," he decided not to disqualify himself from involvement in the panel since he felt this would be an "abdication of [his] responsibilities as a Federal official."

There is no statutory or regulatory authority for our Office to issue formal opinions on conflict of interest questions concerning officers and employees of other agencies. The basic provisions setting forth standards of conduct for Government employees are found in Executive Order No. 11,222, 3 C.F.R. § 156 (1974), 18 U.S.C. § 201 (Supp. IV 1974). Each agency head is required by section 702 of Executive Order No. 11,222 to issue implementing regulations concerning the activities of the agency. Ultimately, each agency head must take responsibility for executing the standards of conduct program.

Notwithstanding our position that the enforcement of standards of conduct is the responsibility of each agency head, we have, on occasion, offered views about considerations bearing on alleged violations of standards of conduct as they relate to propriety of particular procurement. See, for example, Alkco, Inc., B-184518, September 14, 1976, 76-2 CPD 239. In the cited case we announced our reservations about the practice of permitting a proposal evaluator who believed there was a conflict of interest with regard to one offeror to participate in the deliberations and to rate other proposals since the evaluator could potentially influence the selection by indirect action. Here, however, the evaluator in question insists that he did not rate any of the submitted proposals until after the other two evaluators completed ranking all proposals.

Since the questioned evaluator is an employee of HEW the standards of conduct issued by that agency are for review. HEW's

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standards of conduct are found at part 73 of Title 45, C.F.R. (1976). Nothing in these regulations expressly bears on the situation involved here other than a general exhortation found at section 73.735-305 of the part which provides:

"An employee shall avoid any action, whether or not specifically prohibited by this part, which might result in, or create the appearance of:

* * * * *

"Losing complete independence or impartiality * * *."

It would have been appropriate under the quoted regulation for the employee to have disqualified himself from the evaluation panel immediately upon learning of DA's participation in the procurement. Notwithstanding this observation, the fact remains that the evaluator insists that he did not even discuss the DA proposal with the other evaluators, let alone formally evaluate the proposal or any other of the proposals, until a final judgment had been made to find the DA proposal unacceptable. DA has not furnished any specific probative evidence which contradicts these recitals. Consequently, and since the relative ranking of offerors, when the ratings of the questioned evaluator are excluded, is not changed, we do not agree with DA's assertion that a new panel must be convened to reevaluate proposals and test the soundness of the original ranking of proposals merely because of the presence of this evaluator on the evaluation panel.

The other timely ground of protest relates to the reasons why the Department's evaluators found DA's proposal to be "unacceptable" and to the Department's failure to discuss the unacceptable rating with the company prior to award.

The specific reasons why the evaluators found DA's proposal "unacceptable" were.

- (1) Reservations about inducements to be offered illegal aliens to participate in the survey;
- (2) Specific analytic techniques not detailed;
- (3) Questionable corporate capability;
- (4) Questionable availability of key personnel; and
- (5) Proposed level of effort questionable.

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As to point (1), DA insists that this was a tentative suggestion only and that it could have been remedied, together with all other criticisms, had discussions been entered into.

DA further insists that the criticism concerning analytic techniques is not supported by a consultant's analysis of submitted proposals.

The consultant's analysis, supplied under a separate contract for the benefit of the Government evaluators, was not considered to be binding on the evaluators. That analysis--which described DA's proposal as having given "good thought to analysis" questions--also noted (in agreement with the final departmental evaluation) that DA had not called out specific analytic techniques and noted that DA's "whole analysis will be [emphasis supplied] well thought out and sound." Since the consultant found lack of detail concerning DA's proposed analytic techniques, the consultant's opinion that DA had the capability of preparing a well-thought-out proposal does not necessarily contradict the evaluators' criticisms and rating of DA's proposal in this area.

The main point of DA's protest concerning the rating of its proposal involves the Department's refusal to conduct discussions with DA--so as to permit modifications to its proposal in the areas relating to the criticisms. This refusal was made in view of the Department's decision to award a contract under initial proposal contracting authority. "Initial proposal award" authority is described in Federal Procurement Regulation (FPR) § 1-3.805-1 (a)(5) (1964 ed. amend. 153), which provides:

"After receipt of initial proposals, * * * discussions shall be [held] * * * except [in] * * *:

* * * * *

"(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition * * * that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price: Provided, That the request for proposal contains a notice * * * that award may be made without discussion * * *. In any case where there is uncertainty as to the pricing or technical aspects of any proposals the contracting officer shall not make award without further * * * discussion prior to award."

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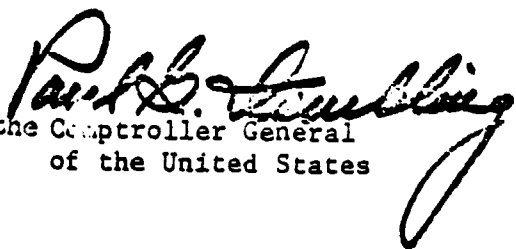
"Adequate competition," sufficient to support the award of a negotiated contract without discussions, exists when several offerors submit independent cost and technical proposals, as was the case here, and the offeror with the most favorable initial proposal, price and other factors considered, is selected for award at a "fair and reasonable" price. See Shappell Government Housing, Inc. and Goldrich and Kest, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161, and cases cited in text.

Determining that a "fair and reasonable" price would result from an "initial proposal" award requires an independent cost projection of the proposed cost. See Shappell, supra. Here, the record contains a detailed cost estimate showing seven items of proposed direct labor, seven items of other direct costs, and a fixed fee estimate totaling \$757,500--or \$6,000 more than the award cost of the challenged contract. Consequently, we conclude that the Reyes award was made at a "fair and reasonable" price.

Finally, the record does not show that there was any "uncertainty as to the pricing or technical aspects of any proposals" which would have otherwise prevented the initial proposal award. Thus, the tests for an "initial proposal" award were met.

Since Reyes' superior-rated proposal was properly considered for an initial proposal award, it was proper for the Service not to have discussed the deficiencies in question with D.A. Indeed, had it entered into discussions with D.A. there would have been no authority for an initial proposal award and the Service would have been required to enter into discussions with all other competitive offerors.

Protest denied.


For the Comptroller General
of the United States