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

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B-178345

November 19, 1973

Fried, Frank, Harris, Shriver & Kampelman
Suite 1000, The Watergate 600
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Attention: Joel R. Feldman, Esq.

Gentlemen:

By letter dated August 9, 1973, and prior correspondence, you protested as counsel to Horner Information Services, Inc. (Horner), the award of contract No. 68-01-0730 to The Franklin Institute (Franklin) by the Environmental Protection Agency (EPA), under request for proposals (RFP) RD-73-M256.

As our following discussion of the issues will indicate, we are denying your protest that the award to Franklin was illegal. Consequently, we cannot recommend that the option provision of the contract not be exercised.

The RFP, issued on September 15, 1972, anticipated awarding a cost-plus-fixed-fee (CPFF) contract for screening and abstracting services of published literature and scientific work for use in publishing monthly issues of the Health Aspects of Pesticides Abstract Bulletin (HAPAB). The term of the contract was for a 12-month period from the effective date of award plus two 12-month option periods. The evaluation criteria contained in the RFP were (1) understanding of the project; (2) facilities; (3) personnel; and (4) experience. Each contained various subcriteria. The order of importance was stated in the RFP. The first criterion was the most important. In addition, offerors were cautioned that the technical proposal was the most important factor.

Prior to submission of its proposal, Horner received permission from EPA to submit its proposal on a firm fixed-price basis without prejudice. The four proposals received by the closing date of October 16, 1972, were forwarded to the project officer for technical evaluation. As a result

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of the technical evaluation based on a possible score of 100 points, two proposals were determined to be within the competitive range: Franklin, rated at 94; Herner, rated at 80. Thereafter, written and oral discussions were conducted with both offerors on November 16, 1972, pointing out deficiencies and requiring revised technical and/or cost proposals by November 27, 1972.

Both offerors submitted revised technical and cost proposals by the required date. The revised proposals were again sent to the project officer for evaluation. The record indicates that revised proposals were not numerically rescored. Rather, the project officer reviewed the revisions and recorded her opinion and recommendation in a narrative form in a memorandum to the contracting officer. The recommendation stated that as a result of the review only Franklin could be considered "acceptable."

The Herner proposal was downgraded due to proposed utilization of what was considered to be too many full and part-time personnel in the screening process. Herner was also downgraded for its lack of experience in publishing a periodical with inherent deadlines. The stated basis for this conclusion was an investigation of the Herner contracts. Concerning this the contracts investigated, personnel problems were encountered. It was stated that one contract for abstracting articles for the Cancer Chemotherapy Bulletin, National Cancer Institute, was 2 months late for publication due to inadequately qualified personnel. Discussion with the project officer for Herner's contract for abstracting services for the Smoking and Health Bulletin, Public Health Service, revealed that changes in personnel working on the project had hindered performance. On the matter of proposed personnel, while noting the qualifications appeared excellent, Herner was penalized for what was considered salary levels not commensurate with qualifications.

A comparative cost analysis of Herner and Franklin's proposals was made. The analysis concluded that Herner's lower price was attributable to lower personnel services costs. This was considered a weak area in Herner's proposal. Herner's proposal to utilize a large number of full and part-time personnel in the screening process was considered a hindrance to the development of expertise. Since the screening process was considered a critical area, the foregoing was cited as justification to accept Franklin's higher cost proposal.

Based upon the technical evaluation, the contracting officer determined that the technical superiority of the Franklin proposal justified the higher cost of the Franklin proposal. Thereafter, a final clean-up negotiation session was conducted with Franklin on January 10, 1973. By letter dated January 12, 1973, the Director, Contracts Management Division, informed

Franklin that any resulting contract would contain a date of incurrence of cost article. This article entitled the contractor to incur costs on or after January 15, 1973, up to $20,000. Reimbursement would be determined in accordance with the final contract terms. Franklin was cautioned that incurrence of costs prior to any contract date was deemed a voluntary action on its part and it assumed the risk that it might not receive an award. The contract with Franklin was finally executed on March 22, 1973, at a total estimated cost of $124,835, including a fixed fee of $7,034.

Herner's protest raises five basic issues: (1) the use of a CPFF contract was inappropriate; (2) the fixed fee exceeded Environmental Protection Procurement Regulations (EPPR) guidelines; (3) part of the award was on a cost-plus-percentage-of-cost basis and therefore illegal; (4) the evaluation criteria did not give sufficient weight to price and did not clearly indicate the cost-technical relationship; (5) the evaluation was not conducted impartially. We shall discuss the issues in the order listed.

Herner notes that FPR 1-3.405-1(b) provides that a "* * * cost-reimbursement type contract is suitable for use only when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of any type of fixed-price contract." Since the prior NIKE contract was fixed-price and Herner submitted a fixed-price proposal, Herner contends that the cost of performance could have been estimated with sufficient reasonableness so as to permit the use of a fixed-price contract.

41 U.S.C. 254(b) provides that a cost or CPFF contract may be used when the agency head determines that such method of contracting is likely to be less costly than other methods or it is impractical to secure property or services of the kind or quality required without the use of a cost or CPFF contract. The applicable determination and findings (D&F) was executed on September 14, 1972. Since 41 U.S.C. 257(a) affords finality to the D&F, we perceive no legal basis upon which our Office can object to the choice of contract type. See 50 Comp. Gen. 565, 578 (1971). However, it does appear that under the EPPR guidelines, this type of contract could have been negotiated on a firm fixed-price basis. Therefore, the question whether the decision to employ a CPFF contract was sound from a procurement policy standpoint is being referred to our Procurement and System Acquisition Division for further consideration.

Herner next contends that the fee awarded Franklin exceeded the regulatory guidelines contained in EPPR 15-3.808-50 to the effect that generally a CPFF contract would not justify a fee in excess of 7 percent.

The $7,054 fixed fee represents approximately 6 percent of the estimated cost of $117,741 for the initial period, which fee remains constant for both successive 12-month option periods. EPA's position on this matter was contained in the contracting officer's report that the "* * * negotiation complied with the requirements of the EPPR in establishment of a prenegotiation position with respect to fixed fee. The protestor's allegation is based upon a misinterpretation of the provisions of the EPPR."

EPPR 15-3.808-50(a) provides that the stated guidelines are for use in establishing prenegotiation profit/fee objectives for negotiated contracts. The policy covering the profit/fee negotiation objective is intended to consider all relevant factors to give the contractor a profit objective commensurate with the nature of the work done, the contractor's input to total performance and the risk assumed by the contractor. EPPR 15-3.808-50(b)(1) lists factors and weighted ranges to be considered in the profit negotiation. Included in the list of profit factors is a weighted percentage of 0 to 6 for contractor assumption of cost risk. The EPPR policy for the weighted factor applicable to CPFF contracts for assumption of cost risk is 0 to 1 percent. Since assumption of risk is only one of several factors to be considered, the 1-percent limitation is inapplicable to the total profit/fee that may be negotiated. In any event, the fee in this case falls within the limitation of 10 percent of the estimated contract cost, exclusive of fee, contained in 41 U.S.C. 254(b). Consequently, our Office cannot legally object.

Horner also contends that Article VIII of the contract, which entitled Franklin to be reimbursed up to $20,000 for costs incurred from January 15, 1973, to contract date, constituted a cost-plus-percentage-of-cost contract prohibited by 41 U.S.C. 254(b). This contention is without merit. Horner bases this allegation on the erroneous assumption that the precontract costs already incurred at the time of award would be in addition to the total estimated amount stated in Franklin's proposal. However, the total estimated cost of $124,805 stated in the contract is the same amount contained in Franklin's revised proposal dated November 22, 1972. The purpose of such a procedure is to obtain uninterrupted service. We contented in B-177822, July 16, 1973, that the same procedure employed by EPA does not afford a basis for disturbing a contract. See also 50 Comp. Gen. 565, 575 (1971).

Horner next argues that the RFP was defective because the evaluation criteria did not give sufficient weight to cost and did not clearly indicate the relative importance of cost to technical considerations. Horner argues that these contentions are timely because it could not have known that

almost no weight was accorded cost before notification that the award was on a CPFF basis. While EPA agreed, at Herner's request, to consider a fixed-price proposal, Herner was aware that a CPFF contract was envisioned by EPA. Under section 20.2 of our Interim Bid Protest Procedures and Standards, the time to question the relative importance of the evaluation factors was before submission of a proposal. Consequently, these contentions are untimely.

Finally, Herner contends that the evaluation was not conducted in an impartial manner and did not result in an award most advantageous to the Government. In this regard, Herner raises the following objections: (1) the failure to numerically score the revised proposals resulted in an evaluation of revised proposals which departed from the criteria stated in the RFP; (2) Herner was prejudiced by the submission of a fixed-price proposal; (3) EPA's information about Herner's past performance and financial resources was inaccurate; and (4) the award was not in the best interests of the Government because Franklin's status as a nonprofit organization affords it a competitive advantage and the Federal Government derives no tax revenues from it.

First, neither our Office nor FPR requires that a proposal be evaluated on the basis of numerical scores computed through a mathematical formula. Even though such a method may be employed to rate the initial technical proposals, we are not aware of any requirement that revised proposals be scored numerically. The matter of technical evaluation is primarily within the discretion of the procuring activity. Our Office will accept that determination unless the judgment exercised represents an abuse of administrative discretion. As long as the technical evaluation of revised proposals comports with the criteria stated in the RFP, there is no legal basis for our Office to object to the evaluation procedure. From the record it appears that, while presented in narrative form, the factors considered upon reevaluation were confined to those stated in the RFP: personnel, past performance, understanding problems, and knowledge of the work flow associated with the effort. In view of the wide disparity between Herner and Franklin from a technical standpoint, we do not perceive any prejudice flowing to Herner from the method of evaluation employed.

Herner's allegation that the technical evaluators were prejudiced against it is based upon inferences. In its July 6, 1973, letter to our Office, commenting on the contracting officer's report, Herner contends that it was prejudiced by the submission of a fixed-price proposal. There is no support in the record for this contention. Herner's proposal was rejected for technical reasons and not because it offered a fixed-price

proposal. Horner notes that EPA's assessment of its financial capabilities was erroneous since it did not consider that Horner is a wholly owned subsidiary of Horner and Company with annual receipts well in excess of those stated by EPA. In this regard, FAR 1-3.101(b)(4) provides that prior to entering a negotiated contract the prospective contractor must be determined responsible in accordance with FAR 1-1.12. FAR 1-1.1204-2 provides that affiliated concerns generally shall be considered as separate entities in determining whether the concern which is to perform the contract is responsible. Even assuming your contention to be correct, since award was primarily predicated on technical ability, we do not believe this was a significant factor which prejudiced Horner.

Horner questions the reference in the evaluation memorandum to two previous contracts which EPA stated indicated poor past performance. The contracting officer states that he and the technical evaluator contacted the project officer for each contract and received the evaluation stated in the report. Horner, on the other hand, states that it received laudatory comments for its work on the contract for abstract of publications concerning cancer chemotherapy and was awarded another contract by the National Clearinghouse for Smoking and Health for the Smoking and Health Bulletin. Horner also referred to B-178033, September 5, 1973, a case where Franklin protested award of a contract to Horner for abstract services for the Smoking and Health Bulletin. The protest was subsequently withdrawn. In that case, HEW found the Horner proposal technically superior and the Franklin proposal unacceptable. From this, Horner concludes that EPA's present evaluation was biased and deficient because of alleged misstatements and variance from other agencies' assessments.

Each procurement must be considered on its own considering the Government's requirements and the merits of the proposals submitted in response thereto. While the services called for in the referenced procurements are similar (abstracting), the requirements varied. Moreover, since the technical determinations and evaluations are matters discretionary with the procurement activity, no weight can be given to the fact that the same firm may receive an award from one agency and not from another.

Further, our Office contacted both project officers mentioned in the evaluation report. On the Smoking and Health Bulletin, the project officer indicated that at the time of the inquiry, Horner was having problems retaining personnel, but this was subsequently corrected to his satisfaction. Concerning the Cancer Chemotherapy Abstracts, the project officer stated that at the time of the inquiry, Horner was 2 months late in providing the necessary abstracts. This problem also was corrected

later by hiring a new editor and work has proceeded satisfactorily since then. While it may be that the timing of the inquiries worked to Horner's disadvantage, we can find no evidence of record of prejudice to Horner.

Finally, Franklin's status as a nonprofit organization has no bearing upon whether the contract was most advantageous to the Government. B-179033, March 28, 1972.

In view of the foregoing, your protest is denied.

Sincerely yours,

Paul G. Dembling
For the Comptroller General
of the United States