

J. Roberts
PLII

14282

DECISION



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

FILE: B-197178

DATE: July 16, 1980

MATTER OF: Kramer Associates, Inc.

DLG04930

DIGEST:

1. GAO will not consider protest allegation involving alleged violation of Office of Federal Procurement Policy letter directing use of Qualified Film Producers List when contracting for motion picture productions. Alleged violations of executive branch policy are not within GAO bid protest function.
2. Allegation that amount of contract award was excessively high when viewed against protester's cost proposal is without merit since protester's allegedly lower cost is irrelevant where protester's offer has been found technically unacceptable because offer is not in competitive range and agency determination of price reasonableness has not been overcome.
3. Protester has not sustained burden of proof where agency denies unsupported allegation that agency intentionally misled protester as to anticipated time frame for award.

Kramer Associates, Inc. (Kramer) protests the award of a contract to Public Media Center under request for proposals (RFP) No. L/A 79-54 issued by the Department of Labor (DOL). The RFP called for proposals for an informational media and educational campaign to inform the public about the health hazards of working in asbestos-related industries.

Against Contract Award
DLG04931
AGC 00009

~~011312~~

W2773

Kramer raises the following three allegations. First, Kramer alleges that Public Media Center is not qualified to receive award because it is not listed on the Qualified Film Producers List (QFPL). Second, Kramer asserts that the dollar amount of the contract award to Public Media Center is excessively high. Third, Kramer charges that DOL intentionally misled it by awarding the contract only five days after informing Kramer that no decision on award would be made for several months.

The QFPL, on which Kramer bases its first ground for protest, is maintained by the Department of Defense Directorate for Audiovisual Activities (Directorate). Office of Federal Procurement Policy (OFPP) Letter 78-5, in effect at the time of this procurement, established a requirement for all executive departments and agencies to use the QFPL system when contracting for motion picture productions.

DOL contends that the QFPL requirement is inapplicable to the instant procurement because the procurement does not deal mainly with film production. In this regard, DOL states that the asbestos information campaign requirement called for eight highly integrated and inter-related media tasks including the design of an overall media and education campaign, staging a national conference, conducting a media campaign, developing vocational/technical school modules, producing a training film, developing a curriculum and staging regional training conferences for worker representatives, and conducting a post-campaign analysis.

DOL asserts that the actual film production required could be as little as one-eighth of the entire work to be performed. DOL believes that under these circumstances, use of the QFPL system is not mandated by OFPP Policy Letter 78-5.

We have been informally advised by the Directorate that they regard DOL's position as correct. In any event,

we regard the requirements of OFPP Policy Letter 78-5 as an expression of executive branch policy, alleged violations of which are not within the bid protest decision function of this Office. Systems & Programming Resources Inc., B-192190, August 16, 1978, 78-2 CPD 124. Consequently, we will not consider this question.

Kramer's second basis for protest is that the dollar amount of the contract award to Public Media Center is excessively high in light of the work requirements of the RFP. In this regard, Kramer emphasizes that its own cost proposal is 78 percent lower than that of Public Media Center.

The record indicates that the technical evaluation panel found Kramer's proposal to be technically unacceptable. We have held that an offeror's low cost is irrelevant where the offer has been found technically unacceptable since that offer is no longer within the competitive range to be considered for award. Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218. A technically unacceptable proposal is of no value to the Government regardless of the lower price tag associated with it. Ronald Campbell Company, B-195919.3, March 18, 1980, 80-1 CPD 208.

In addition, our review of the record shows that DOL conducted a thorough cost analysis of all proposals within the competitive range. DOL concluded that the cost proposed by Public Media Center was realistic for the effort involved. The only evidence Kramer offers in support of its contention that Public Media Center's price was unreasonably high is its offer of a substantially lower price. We therefore find no basis to overcome the agency determination of price reasonableness. See Brodart, Inc., B-195208, March 5, 1980, 80-1 CPD 173.

Kramer's third allegation is that DOL intentionally misled Kramer that no decision on award would be made for several months. DOL denies that it in any way deliberately misled Kramer and there is no evidence to support the allegation of intentional misrepresentation.

B-197178

4

In this regard, we point out that a protester has the burden of affirmatively proving its case and Kramer's unsupported allegation does not meet this burden. The Nedlog Company, B-195963, January 10, 1980, 80-1 CPD 31. In any event, we fail to see how Kramer would have been legally prejudiced by such a misrepresentation even if it did occur, since it was not eligible for award. Vanguard Industrial Corporation, B-195700, January 3, 1980, 80-1 CPD 13.

The protest is denied in part and dismissed in part.

Milton J. Asolar

Acting Comptroller General
of the United States