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**DECISION**



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

*9475*

*[Protest of Contract Award]*

FILE: B-192756

DATE: March 14, 1979

MATTER OF: Washington School of Psychiatry/The  
Metropolitan Educational Council for  
Staff Development

**DIGEST:**

1. Discussions in negotiated procurement must be meaningful, and Government must therefore inform offerors of excesses or deficiencies in their proposals. HEW advice to offeror to reduce proposed costs in certain areas and to delete some items therefore was not improper. Also, such advice did not constitute prohibited "auction," since that term as it applies to negotiated procurements connotes direct price bidding between two competing offerors, not negotiation of price between Government and offeror provided offeror's standing with respect to competitors is not divulged.
2. During negotiations, HEW advised offeror of proposal deficiency, but in best and final offer deficiency was not resolved to HEW's satisfaction. Although HEW was not obligated to reopen negotiations to further discuss deficiency, once negotiations were reopened for another reason HEW should have raised matter again.
3. Protest that HEW disclosure to offerors of Government budget limit estimates was improper, filed more than 10 working days after such disclosure, is untimely under section 20.2(b)(2) of GAO's Bid Protest Procedures and will not be considered on merits.
4. Protester complains that another offeror learned of substantial addition to Government requirements before protester did, and was therefore able to include change in best and final offer. However, protester was not prejudiced thereby, since agency properly

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reopened negotiations to advise protester of change and afford protester opportunity to submit second best and final offer.

5. Protester contends that HEW improperly failed to confirm in writing numerous "changes" to RFP. HEW concedes that one change should have been subject of written amendment to RFP, but argues that other matters merely involved breakdown of cost proposal into specific categories. Notwithstanding characterization of such matters, protest is denied, since protester was in fact orally advised of each matter to same extent as only other acceptable offeror, and protester responded to each in timely fashion.
6. Protester argues that "auction" was conducted through reopening of negotiations and submission of new best and final offers. Protest is denied, since substantial addition to Government requirements subsequent to receipt of first best and final offers necessitated reopening negotiations, and it was not improper to discuss other proposal deficiencies.
7. Protest that HEW improperly awarded contracts prior to GAO resolution of protest against awards need not be considered, since awards have been determined proper. Further, even if protest on this issue were sustained, legality of awards would not be affected.
8. Where contracting agency essentially conducted procurement properly, and even where such conduct was questionable it had no effect on outcome of competition, there is no basis to disturb contract award at request of unsuccessful offeror.

#### FACTS

Request for proposals (RFP) No. 78-42 was issued on April 27, 1978, by the Office of

Education of the Department of Health, Education, and Welfare (HEW) to establish under a cost-type contract 12 regional networks to provide logistical and administrative support for Teacher Corps projects in each region. An offeror was to submit a proposal involving only the work in its geographic region. Initial proposals were due on June 21, by which date proposals for the Mid-Atlantic Network were received from the Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development (Metro); Temple University (Temple); and George Washington University. The proposal submitted by George Washington University was judged technically unacceptable. Negotiations with the other two offerors were begun on July 13.

HEW memoranda of July 13 telephone negotiations show that Metro was asked questions regarding certain cost and technical aspects of its proposal, including Metro's capacity to arrange required meetings outside of the District of Columbia (D.C.) metropolitan area. Temple, whose technical proposal was determined not to require any clarification, was told that its cost proposal was "way over the amount that is currently available for this award," and was advised of three areas in which its overall budget could be reduced. Both firms were told that revised proposals would be due on July 19.

According to HEW memoranda, on July 17 the contracting officer informed Metro and Temple by telephone of "four items that must be included in" their revised cost proposals. Temple was advised that the deadline for receipt of its revised proposal was extended to July 24.

Immediately after its July 17 telephone conversation with HEW, Metro sent a telegram to the contracting officer stating that in accordance with that conversation it was revising its budget to take into account matters discussed on July 13 and 17. Metro listed what it understood from

those discussions were the areas to be addressed, and requested confirmation that the list was accurate. Upon receipt of the telegram, the contracting officer telephoned Metro to state that his workload precluded providing the written confirmation requested; that he considered the oral discussions to have been sufficient; and that revised proposals were due on July 24.

We note at this point that certain areas of the July 17 discussion and changes necessary as reflected in the HEW memorandum do not coincide with those listed in Metro's telegram, particularly regarding the existence and duration of several regional and national conferences.

HEW memoranda indicate that on July 20, the contracting officer informed Metro and Temple that certain budget items that the HEW program office thought were essential as "monetary limits" somehow had been disclosed to offerors in other regions, and proceeded to reveal this information to Metro and Temple. The offerors were advised that the limits did not set prices that must be met for further proposal consideration, but were only suggested amounts.

Best and final offers were submitted by July 24. Temple's proposed cost was \$257,819, and Metro's was \$199,188.

In a memorandum dated July 27 to the HEW Chief, Immediate Office of the Commissioner (IOC), the HEW Program Specialist stated as follows:

"The Temple proposal is selected for funding, even though the budget is more than the one from \* \* \* [Metro]. The Temple cost proposal gives very detailed estimates of cost and is explicit. It includes additional

costs for travel from Puerto Rico and the Virgin Islands. This choice is also in keeping with the fact that the Temple proposal had the highest technical score. If necessary the Temple budget could be decreased; the person listed as documentor must be negotiated.

"Two requests were discussed in the final offer from Metro. The response concerning the Dean's Consultant was satisfactory. The response to ability to arrange travel in other cities did not show that ability. Rather, it was a rationale as to how plans would be developed for holding meetings. The budget would have to be substantially increased. The request by Metro to add a clause if funded is confusing."

On July 31, the contracting officer and the Program Specialist telephoned Metro to advise that negotiations were being reopened to give Metro an opportunity to submit a revised proposal, due by August 3, to include consideration of Teacher Corps projects in Puerto Rico and the Virgin Islands, a substantial addition to the Government's requirements. As indicated above in the July 27 memorandum to the Chief, IOC, Temple had previously been informed of the increased requirements and had included in its first revised proposal travel costs for those projects. Metro was also asked how two reductions in its revised proposal--\$39,000 concerning consultants, and \$32,000 concerning travel--would affect its original plans, and was told of a change in the number of regional meetings to be held.

Temple was also telephoned on July 31 concerning reopening negotiations and the change in the number of meetings. An HEW memorandum shows that 11 areas of Temple's cost proposal were discussed in that telephone call. Temple was advised

to reduce its cost in a number of those areas, to increase its cost in others, and to delete two items from its proposal entirely.

The HEW Selection Panel evaluated the second best and final offers on August 3. A memorandum of that date to the Chief, IOC, from the Program Specialist shows that Temple's offer was judged acceptable, with an average rating of 90.2 points, but that Metro's offer, which had received an average of 80.8 points, was unacceptable. The memorandum states:

"\* \* \* [Metro] does not technically meet the RFP requirements. Panel members felt the proposal did not fully address the issue of capacity to arrange meetings outside the geographical area. The addendum submitted [Metro's July 24 best and final offer] provides a rationale as to how plans would be developed for holding meetings. The comments of readers reflect the non-response on this item. The Metro Council has coordinated activities among member institutions in the Washington, D.C. Metropolitan area. Meetings outside the District [of Columbia] were referred to once - on page 5. The experience which the proposal states as being related to RFP networking ability is inadequate. The description on page 93 of a Six-State Technical Assistance Network ...VI D.1.(c) does not show ability and capacity to arrange and conduct meetings in other states."

On August 4, the contracting officer advised the successful offerors in the 12 regions that their proposals had been accepted, and authorized them to incur start-up costs, which would be "recognized" as of August 1. On August 9 Metro orally protested to HEW against the award of any of the 12 contracts,

based on what Metro considered were improper procedures used by HEW regarding the Mid-Atlantic Network procurement. Metro filed the same protest in our Office on August 25. HEW then determined that the contracting officer's August 4 advice to the 12 offerors effectively committed the Government to formal contracts with them, and written contracts were issued. Temple's written contract was issued on September 29.

#### PROTEST AND DISCUSSION

Metro argues that "HEW violated Government regulations in at least six important respects in administering this procurement," as follows:

- "1. HEW's price assistance and directions to Temple;
- "2. HEW's failure to inform Metro of perceived technical deficiencies;
- "3. HEW's disclosure of government cost estimates;
- "4. HEW's transmission of information only to Temple;
- "5. HEW's refusal to confirm in writing changes in government requirements; and
- "6. HEW's abuse of the 'Best and Final Bid' procedure."

In addition, Metro argues that the alleged violations of procurement regulations by HEW show a pattern of action consistently favorable to Temple and prejudicial to Metro.

Issue 1. "HEW's price assistance and directions to Temple."

Metro cites in this connection Federal Procurement Regulations (FPR) § 1-3.805-1(b) (1964 ed. amend. 153), and HEW Procurement Regulations (HEWPR) § 3-3.5108(a). The former provides in part:

"Whenever negotiations are conducted with more than one offeror, no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided. Likewise, no offeror shall be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors. \* \* \* Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations \* \* \* shall be offered an equitable opportunity to submit such price, technical or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date. \* \* \*"

HEWPR § 3-3.5108(a) provides that the contracting officer in conducting negotiations shall not transmit information "which could give one offeror a competitive advantage over another."

Metro argues that the contracting agency's July 13 and 31 discussions with Temple as reflected in HEW memoranda show that HEW "did far more than simply 'point out' to Temple that its price was deficient." Metro contends that HEW's repeated requests to Temple for a lower offered price constituted an "auction technique" in violation of FPR § 1-3.805-1(b).

#### Discussion

As stated in our discussion of the facts, on July 13 HEW advised Temple that its proposed cost was "way over" HEW's budget limits. The HEW memorandum of the July 31 negotiations with Temple states in pertinent part:

"We [the contracting officer and the Program Specialist] went over the following items with Dr. Ryder [Temple's representative]:

- "1) Student worker - add to adm[inistrative] costs
- "2) Regional meetings - there will now be 2 meetings for 2 people
- "3) Board of Directors' meetings - reduce
- "4) Nat[ional] Conference - reduce
- "5) Evaluation Workshop - reduce participants 1/2
- "6) Management Review Comm[ittee] - delete
- "7) Board initiated training activities - reduce 1 day of meals

- "8) Dean's initiated training activities  
- reduce by at least \$2,000
- "9) Reduce substantially:  
Nat. Network Meetings  
Outreach/ Comm  
Exec. Sec. Site Visits  
Management & Gov. Workshop  
Board initiated activities
- "10) Newsletter - delete
- "11) Materials & Supplies - reduce"

Written or oral discussions in a negotiated procurement must be meaningful, and to that end the Government must usually furnish information to offerors as to the areas in which their proposals are deficient. See Piaseck Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10, at p. 16. The requirement for meaningful discussions applies to proposal excesses as well as deficiencies. 50 Comp. Gen. 117, 123 (1970). The content and extent of discussions needed to satisfy the requirement is a matter primarily for determination by the contracting agency, whose judgment will not be disturbed unless clearly without a reasonable basis. Austin Electronics, 54 Comp. Gen. 60 (1974), 74-2 CPD 61. We have stated in this connection, however, that it would be unfair for an agency to help one offeror through successive rounds of discussions to bring its proposal up to the level of other adequate proposals where that offeror has been given the opportunity to correct a large number of deficiencies but has not adequately done so. 51 Comp. Gen. 621 (1972). Further, the requirement for meaningful discussions is limited by the need to preclude the "technical transfusion" of one offeror's innovative, ingenious technical approach to another offeror. See Sperry Rand Corporation, 56 Comp. Gen. 312 (1977), 77-1 CPD 77.

In view of those principles, we cannot agree that HEW's discussions with Temple exceeded the

parameters of allowable discussions. Ten of the 11 items (item 2 represented a change in requirements) were clearly "excesses" or "deficiencies" in Temple's proposal. We do not see how discussions with Temple could have been "meaningful" without pointing them out, and doing so necessarily involved suggesting additions, deletions, and reductions. Compare 47 Comp. Gen. 336, 342 (1967).

In addition, the term "auction" as it applies in negotiations connotes direct price bidding between two competing offers, not the negotiation of a price between the offeror and the Government provided an offeror's standing with respect to competitors is not divulged. 52 Comp. Gen. 425, 429 (1973). We see no "auction" technique in HEW's negotiations with Temple. Rather, we consider that the HEW negotiators were, on July 17 and 31, in effect, recommending to Temple (which by July 24 had already submitted the highest rated technical proposal) that its proposed cost was "too high" in certain areas, a technique sanctioned by Defense Acquisition Regulation § 3-805.1(b) (1976 ed.), and which we have stated in another decision involving HEW does not violate FPR § 1-3.805-1(b). See Education Turnkey Systems, Inc., 57 Comp. Gen. 8 (1977), 77-2 CPD 267. In fact, the Program Specialist's July 27 memo to the Chief, IOC, indicates that Temple's proposal would have been "selected for funding" even without further discussion or cost reduction. See also our discussion of Issue 6, infra.

Issue 2. "HEW's failure to inform Metro of perceived technical deficiencies."

We have already stated the requirement for meaningful discussions. Metro also points out that HEWPR § 3-3.5108 requires the contracting officer to identify deficiencies to an offeror and provide a reasonable opportunity for correction. Therefore, Metro contends that when negotiations were reopened on July 31 the HEW negotiators'

failure to advise Metro of any problem with Metro's response to their July 13 questions concerning the arrangement of meetings outside the D.C. metropolitan area was improper. Metro points out that the Program Specialist employed precisely that deficiency "in changing her rating of the Metro proposal from acceptable to unacceptable." In this connection, Metro also questions why the Program Specialist lowered her rating of Metro's proposal when its evaluated technical score in fact increased. Metro states:

"Such misconduct not only deprives the bidder of fair and equitable consideration of its offer but also deprives the government of the opportunity to obtain the best technical score. \* \* \*"

#### Discussion

Metro was certainly afforded an opportunity to revise its initial proposal to respond to HEW's criticism of Metro's capacity to arrange certain meetings. Had negotiations not been reopened after the receipt of best and final offers on July 24, HEW would have had no further obligation to discuss that matter with Metro. Century Brass Products, Inc., B-190313, April 17, 1978, 78-1 CPD 291. However, since negotiations were reopened, and in view of the fairly extensive July 31 discussions with Temple, we agree with Metro that it would have been equitable for HEW to raise the matter with Metro again.

Nevertheless, we do not see how Metro was prejudiced by HEW's failure to do so. The RFP assigned 25 out of 100 possible technical points to "Present capacity to facilitate Network activities reflected by ability to provide technical assistance and capacity to arrange and conduct meetings and workshops within the geographic region served by Network." The HEW

evaluators' worksheets show that of those 25 points, 12 were assigned to "Capacity to arrange for meetings/workshops in other states within the network \* \* \*." Metro received a total of 44 of the 60 points maximum (12 points x 5 evaluators) under the criterion (Temple received 52). Adding the 16 remaining (60-44) points to Metro's technical score of 404 results in a total score of 420, and an average score of 84. Temple scored 451 total points, with a 90.2 average. Thus, even assuming that Metro had been afforded a second opportunity to respond to the matter and had done so to the complete satisfaction of the HEW evaluators, Temple's proposal would still have been judged technically superior. Since proposed costs were essentially equal (\$193,701 for Metro; \$195,967 for Temple), we cannot say that HEW's failure in this regard resulted in an improper award. See National Puerto Rican Forum, Inc., B-189338, November 23, 1977, 77-2 CPD 400. See also 52 Comp. Gen. 358 (1972).

In addition, the Program Specialist did not lower her rating of Metro's proposal, or change it from "acceptable to unacceptable." The evaluation record shows that her initial rating of the proposal was "acceptable with negotiation," and her July 27 and August 3 memoranda to the Chief, IOC, indicate that such negotiation did not resolve that part of Metro's proposal that she found unacceptable. In addition, we note that two other evaluators also gave Metro's proposal a poor rating in the subject area.

Issue 3. "HEW's disclosure of government cost estimates."

Metro points out that on July 13 Temple was advised that its cost proposal was "way over" the Government's budget limits, and that on July 20 the HEW program office's budget limit estimates were disclosed to both offerors. Metro argues that such actions violated HEWPR §§ 3-3.5103(d) and 3-3.5108(a), which prohibit the disclosure to offerors of Government cost estimates, and

HEWPR § 3-3.5106, which concerns the disclosure of information generally by personnel participating in proposal evaluations. Metro also contends:

"\* \* \* by instructing the bidders that the price limits were considered 'essential as far as monetary limits were concerned,' \* \* \* [the contracting officer] effectively set a price which offerors knew they must meet for further consideration \* \* \*. This effectively eliminated significant price competition from the procurement and constituted an 'auction technique' in violation of \* \* \* FPR § 1-3.805-1(b)."

#### Discussion

We have already discussed our views regarding both HEW's July 13 advice to Temple, and the allegation that an "auction" was conducted. The protest against the July 20 disclosure of the Government's budgetary limits is untimely under section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 20 (1978) (Procedures), since it was filed more than 10 working days after the basis for protest was known, and will not, therefore, be considered on the merits as an independent basis for protest.

#### Issue 4. "HEW's transmission of information only to Temple."

This allegedly improper transmission involved (a) informing Temple that its budget proposal was "way over" the Government's budget limits; (b) informing only Temple on July 17 that the date for receipt of best and final offers was extended to July 24; and (c) advising Temple to provide in its proposal for projects in Puerto Rico and the Virgin Islands before similarly advising

Metro on July 31. Metro argues that "such selective disclosure of information" violated FPR § 1-3.805-1(b) and HEWPR § 3-3.5108(a).

#### Discussion

Regarding (a): See our above discussion on Issue 1.

Regarding (b): The record shows that Metro was in fact advised on July 17 that the date for receipt of best and final offers was extended to July 24, although we note that this advice was not given to Metro during the July 17 negotiations, but when the contracting officer telephoned Metro in response to Metro's telegram of that date.

Regarding (c): Clearly, Temple knew of the addition of the Puerto Rico and Virgin Islands projects before Metro did. However, it is not clear from the record how Temple got that information, although it appears that it was from a source not directly involved in the Mid-Atlantic Network procurement. In any case, Metro was not prejudiced thereby, since HEW afforded Metro the opportunity to include those projects in its proposal through the July 31 reopening of negotiations.

#### Issue 5. "HEW's refusal to confirm in writing changes in Government requirements."

Metro cites FPR § 1-3.805-1(d), which provides:

"When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the

request for proposals, and a copy shall be furnished to each prospective contractor. Oral advice of change or modification may be given if (1) the changes involved are not complex in nature, (2) all prospective contractors are notified simultaneously (preferably by a meeting with the contracting officer), and (3) a record is made of the oral advice given. In such instances, however, the oral advice should be promptly followed by a written amendment verifying such oral advice previously given. The dissemination of oral advice of changes or modifications separately to each prospective contractor during individual negotiation sessions should be avoided unless preceded, accompanied, or immediately followed by a written amendment to the request for proposals embodying such changes or modifications."

Metro contends that during the course of negotiations HEW made at least four "oral modifications" in the contract requirements without written confirmation. These included the addition of off-continent Teacher Corps projects in Puerto Rico and the Virgin Islands; directors' sharing and validation meetings; dean's sharing and institutionalization conferences; and evaluation facilitation meetings. Metro argues that FPR § 1-3.805-1(d) clearly requires at the least written verification of those matters. Metro alleges that the cost of the items was approximately \$76,000, almost 40 percent of the contract price.

In addition, Metro contends that even though such "modifications" were in fact transmitted to

both offerors, there was substantial prejudice to Metro, as illustrated by the fact that Metro's understanding of the matters discussed with HEW on July 17 differed from that of the contracting officer. Metro states that the detriment of such a misunderstanding is especially significant because it related to changes in conference and meeting requirements, and Metro's proposal was faulted by HEW in that area. Metro further argues that in any event HEW's failure to confirm in writing the "oral modifications" constituted a "flagrant violation of mandatory procurement regulations" to justify setting aside the contract award regardless of prejudice.

#### Discussion

HEW concedes that the inclusion of the Puerto Rico and Virgin Island projects constituted a "substantial change" in the Government's requirements and should have been the subject of a written amendment. However, HEW argues that since both offerors were notified of the change and given the opportunity to revise their proposals accordingly, HEW's failure in this regard was not "fatal."

HEW argues that the other matters, however, concerned the protester's "business proposal," and required no modification to the RFP. HEW states:

"\* \* \* These discussions requested clarification of the cost proposal by means of cost breakdown into specific categories of cost. Additionally, the protestant was afforded an opportunity to revise its cost proposal, not directed to do so. The substance of these discussions would, of course, have no material effect on the stated provisions of the RFP."

Notwithstanding the characterization of the subject discussions, the offeror was in fact orally advised of, and responded to, every change

in requirements (and proposal receipt dates), and/or "cost breakdown categories" to the same extent as was Temple. In this connection, we do not consider it relevant that Temple learned of the two off-continent projects before Metro did, since Temple's source was evidently not involved in this procurement, and since Metro never indicated that it needed additional time to adequately deal with that additional requirement in its proposal. The only area in which it appears that Metro deviated from any oral HEW advice as recorded in HEW memoranda involves attendance at a national conference--Metro provided for a 5-day national conference, whereas the HEW July 17 memorandum states that a 6-day conference requirement was communicated to Metro. However, consistent with Metro's method for computing costs, provision for one additional day would have increased its cost proposal by \$1,300 to \$195,001, just \$966 less than Temple's. Moreover, contrary to Metro's assertion, the HEW evaluation does not show that this matter had any adverse impact on Metro's score, since it was in the area of capacity to arrange meetings that Metro was judged deficient.

Under these circumstances, and without concluding whether all the matters raised by Metro should have been confirmed in writing by HEW, we cannot say that Metro was prejudiced in the preparation of its proposal in this regard, and interference with the award on this basis therefore would not be proper. Education Turnkey Systems, Inc., supra.

Issue 6. "HEW's abuse of the 'Best and Final Bid' procedure."

Metro argues that FPR §§ 1-1.011-2(10) (1964 ed. amend. 141), 1-1.301-1 (1964 ed. amend. 83), 1-3.101(d) (1964 ed. amend. 153), and § 1-3.805(b) were violated by HEW. FPR § 1-1.011-2(10) states the Government's policy to promote fair and equitable

relationships with contractors; FPR § 1-1.301-1 requires the maximum practicable competition in Federal procurements; and FPR § 1-3.101 restates the requirement for competition in the context of negotiated procurements. FPR § 1-3.805-1(b) is quoted above.

Metro argues:

"\* \* \* By July 27, Ms. Gerald [the Program Specialist] had already decided to make the award to Temple. Such an award, however, posed a problem. Despite the agency's illegal assistance to Temple and its revelation of its own budget estimates, Temple's bid of \$257,819 exceeded the Metro bid by almost \$60,000 and was at least \$40,000 higher than the government's budget limits.

"HEW's solution to its problem was to request 'second best and final' bids, allegedly because of additional off-continent projects. Mr. Blum [the contracting officer] and Ms. Gerald carefully restricted their discussions with Metro to this matter and several other minor items, failing to mention the deficiencies which they saw in the Metro proposal. Although Temple had already known of the off-continent project and had included costs for these items in its bid, Blum and Gerald nevertheless contacted Temple and proceeded to provide specific, careful instructions concerning price reduction.

"Only after these directions did Temple lower its bid within government limits. When the Temple bid nevertheless exceeded the Metro

bid by more than \$2200, Gerald simply changed her rating of the Metro proposal to nonacceptable, despite the overall increase in evaluation score which it had received, thereby ensuring that Temple would receive the award. \* \* \* Although the award was not made until late September, start-up costs were authorized for Temple as of August 1, several days before the technical evaluation panel meeting which HEW claims formed the basis for the award."

#### Discussion

We do not agree that the reopening of negotiations on July 31 reflects the existence of any improper motive on HEW's part to assist Temple at Metro's expense. In this connection, the question of whether an "auction" has been conducted through the reopening of negotiations and submission of new best and final offers must be determined in the light of the particular circumstances of each case. See Rockwell International Corporation, B-188542, August 16, 1977, 77-2 CPD 119; Bell Aerospace Company, 55 Comp. Gen. 244, 247 (1975), 75-2 CPD 168, and cases cited therein. The parties agree that the addition of projects in Puerto Rico and the Virgin Islands was a substantial change in the Government's requirements. Since Temple, which had already learned of the change, had included it in its first best and final offer, it was incumbent upon HEW to afford Metro a similar opportunity to respond to the change and compete on an equal basis. Ocean Technology, Inc., B-183749, October 29, 1975, 75-2 CPD 262.

Further, since the reopening of negotiations had to include both Metro and Temple, 50 Comp. Gen. 202 (1970), it was not improper for HEW to

take that opportunity to discuss Temple's price. See Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348, at p. 10. See also our treatment of Issue 1, in which we conclude that the extent of those discussions was not improper.

Specifically regarding the Program Specialist's July 27 memorandum to the Chief, IOC, HEW states:

"\* \* \* It is true that on the basis of the information up until July 27, 1978, Temple would have been funded, and the project officer was prepared and did make that recommendation. But, to be absolutely fair that a proper selection was being made, and given the facts of the additional amendment, etc., HEW wanted to be absolutely sure that a proper selection was being made, and that it was getting the best buy. Therefore, it asked for another round of offers. The fact that the results of the second go round were the same did not prejudice Metro, but rather gave Metro an additional chance to improve its standing--a second bite of the apple, so to speak. It also enabled the Government to get a more favorable cost proposal. All this took place through negotiations with both offerors. Once negotiations were reopened with one offeror, they had to be held with both offerors. (FPR section 1-3.805.1)"

We see no impropriety in that explanation. As indicated above, we agree with HEW that a reopening of negotiations with both offerors was necessary. As we also indicated in our discussion of Issue 1, this memo in fact is evidence that Metro was not prejudiced thereby, since

Temple's proposal was acceptable with respect to cost even without further negotiation. We have also pointed out that the Program Specialist did not "simply" change her rating of Metro's proposal upon final evaluation. Accordingly, we reject Metro's position as to the significance of the memorandum.

#### ADDITIONAL ISSUES

Metro also raises a number of other matters for our consideration. Metro argues that HEW failed to administer the bid protest process fairly and equitably. Section 20.4 of our Bid Protest Procedures, 4 C.F.R. part 20 (1978) (Procedures), states that when a protest has been filed before award, the award will be withheld pending disposition of the protest except as provided in applicable procurement regulations. See FPR § 1-2.407-8(b) (1964 ed. amend. 139). Metro argues that HEW's August 3 oral advice to the 12 successful offerors did not constitute contract awards for purposes of our Procedures or the regulations. On that basis, Metro contends that the filing of its protest on August 9, which concerned all 12 awards, was a filing before those awards, and that HEW should have in good faith withheld formal issuance of the contracts until Metro's protest was resolved. In this connection, HEW never considered Metro an "interested party" under section 20.1(c) of our Procedures with respect to the regions in which Metro did not submit an offer.

Metro argues that HEW's failure to withhold the awards (Metro cites a number of reasons why it is in fact an "interested party" regarding all 12 regions), and HEW's failure to notify Metro of its intention to proceed with them, "precluded Metro from seeking preaward injunctive relief against the making of the award and from securing a GAO determination prior to the award."

We do not find it necessary to consider the propriety of HEW's actions with respect to the timing of the contract awards in view of our conclusions herein sustaining the award to Temple. Starline, Incorporated, 55 Comp. Gen. 1160, 1172 (1976), 76-1 CPD 365. In fact, even if the award actions violated the pertinent regulations as argued, the legality of the awards would not be affected. B-178303, June 26, 1973.

Finally, as indicated at the outset, it is Metro's position that even if we find that HEW's allegedly improper actions did not prejudice Metro in the competition with Temple (or, presumably, were not protested by Metro in a timely manner), the seriousness and significance of those actions dictate that the award to Temple be set aside.

Even in cases where we have found clearly improper contract awards, in determining whether it was in the best interest of the Government to recommend termination we have taken into consideration factors such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, and the good faith of the parties. See Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348. Here, after reviewing all of Metro's allegations, we have concluded that HEW essentially conducted the subject procurement in accordance with the applicable regulations, and even where HEW's actions were questionable they had no real effect on the outcome of the competition between Metro and Temple. On that basis, it would not be appropriate to disturb any of the contract awards as argued.

The protest is denied.



Deputy Comptroller General  
of the United States