

DECISION

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

FILE: B-186489, B-186492

DATE: September 27, 1976

MATTER OF: Kirschner Research Institute,
Humanics Associates, and Onyx61500
97963**DIGEST:**

Agency "Handbook" requirement that at least 25 percent of the members of proposal evaluation panels be from outside the sponsoring program activity, intended as internal guidance and not as creating or defining substantive rights of offerors, is not binding upon the agency.

Kirschner Research Institute (KRI) and Humanics Associates (Humanics) have each, through mutual counsel, protested the Department of Health, Education and Welfare (HEW) making any award to anyone other than themselves under certain solicitations issued by HEW. KRI is protesting solicitations HEW-0009-76 and HEW-0014-76, while Humanics is protesting solicitations HEW-0013-76 and HEW-0012-76. The protests of KRI and Humanics are grounded upon the premise that HEW, in its evaluation of the proposals received in response to the solicitations, failed to abide by requirements which are binding upon it in the execution of its duty to fairly evaluate the offers submitted.

The Onyx Corporation (Onyx) having itself submitted proposals in response to the same HEW solicitations which Humanics is protesting, protests the award of those solicitations to anyone other than Onyx. Onyx takes the position that HEW has complied with all applicable evaluation procedures.

KRI and Humanics contend not that the evaluations were in derogation of the criteria set forth in the solicitations, but rather that the evaluations of the subject solicitations were not conducted in accordance with a document entitled "OHD Contract Procedures Handbook" (Handbook) which was published by the Office of Human Development (OHD) within HEW. KRI and Humanics cite in particular what they believe to be the failure on the part of HEW to meet a requirement, set forth in the Handbook, that no less than 25 percent of the membership of an evaluation panel shall be

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of individuals who are not assigned to the sponsoring program activity. Both Onyx and HEW counter the KRI/Humanics assertion on the dual grounds that, first, the Handbook is not applicable to the protested solicitations, because the Handbook is a Washington Office document which is inapposite to the procurement activities of the regional offices, and, second, that even if the Handbook were relevant it constitutes nothing more than internal guidance for the benefit of government personnel that is of itself not binding upon the agency.

This Office has been furnished with a copy of the Handbook. Our review of the Handbook has convinced us that HEW's characterization of the Handbook, as internal guidance for the benefit of government personnel, is reasonable. We do not believe that it is necessary for us to decide whether the intended application of the document was limited to the Washington Office of the agency. The introductory portion of the Handbook indicates that:

"This document is essentially a working manual. It is intended that at any point during the procurement cycle a Project Officer, an Evaluation Panel member, or a reviewing official can refer to the appropriate section and thereby gain enough information by which to perform his assigned responsibility." (Emphasis added.)

We find it significant that the contracting officer is not one of the Handbook's intended beneficiaries. Federal Procurement Regulations § 1-3.801-2 (1964 ed.) provides in pertinent part:

"(a) Contracting officers, acting within the scope of their appointments (and in some cases acting through their authorized representatives) are the exclusive agents of their respective agencies to enter into and administer contracts on behalf of the Government in accordance with agency procedures. Each contracting officer is responsible for performing or having performed all administrative actions necessary for effective contracting. * * *

"(b) To the extent services of specialists are utilized in the negotiation of contracts, the contracting officer must coordinate a team of

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experts, requesting advice from them, evaluating their counsel, and availing himself of their skills as much as possible. The contracting officer shall obtain simultaneous coordination of the specialist's efforts to the greatest practical extent. He shall not, however, transfer his own responsibilities to them."

The Handbook, in this context, advises its non-contracting officer readership that:

"It is important to note that the selection of firms to be within the competitive range is the last step in the evaluation process. While ultimate responsibility rests with the contracting officer, program personnel should be intimately involved in this process." Section III, E.

We believe that the Handbook is guidance aimed at the technical personnel who must necessarily aid the contracting officer in the task of source selection. We have noted in the past that "[s]ource selection is the responsibility of the contracting agency since it must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis." B-178220, December 10, 1973. In this situation it appears that HEW, in an attempt to assist the contracting officer in his source selection responsibilities, has followed the common federal practice of preparing written guidance for technical personnel. We cannot find that the exercise of administrative judgment in thus guiding technical personnel in their relationship with the contracting officer is in any way unreasonable.

The technical personnel assist the contracting officer in, first, setting the agency's minimum needs, as found in the solicitation and, second, in assessing whether proposals received in response to the solicitation meet those needs. This Office has recognized that both of these functions are primarily the responsibility of the purchasing activity. B-173264, December 22, 1971.

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are not bound by the regulation if the court finds that its requirements have been waived by the Government. * * *

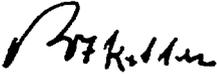
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"* * * If a regulation on its face attempts to create or define substantive non-governmental rights, it is presumptively for the benefit of contractors and binds both parties. On the other hand, if a regulation has no significant effect on private rights and obligations, but is merely an internal guideline promulgated solely for the benefit of the Government, the contractor cannot complain that the regulation was not complied with and neither party is bound by it."

Braude and Lane, Modern Insights on Validity and Force and Effect of Procurement Regulations--A New Slant on Standing and the Christian Doctrine, 31 Fed. B. J. 99, 111, 113 (1972).

As we have indicated above, we regard the Handbook provision as internal guidance and not as creating or defining substantive rights of offerors. Consistent with the above analysis, we must therefore conclude that the Handbook provision is not binding upon HEW in its evaluations of the proposals received in response to the protested solicitations.

The protests accordingly are denied.


Deputy Comptroller General
of the United States