

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

KOBA ASSOCIATES, INC.)	
)	CAB No. P-350
Under RFP No. JA/92046)	

For the Protestor: Keith R. Malley, Esquire. For the Government: Nancy K. Hapeman and Edward J. Rich, Assistants Corporation Counsel.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judge Zoe Bush concurring.^{1/}

OPINION AND ORDER

Introduction

On November 6, 1992, Koba Associates, Inc. (hereinafter "protestor" or "Koba") filed a protest with the Board against RFP No. JA/92046, issued by the Child and Family Services Division (CFSD), Family and Child Services Administration, Commission on Social Services, Department of Human Services (DHS). In its protest, Koba made five claims. The first was that DHS substantially changed the RFP requirements from three family preservation units to one such unit without proper notice to all offerors, in violation of D.C. Code §§ 1-1183.3(c) and 1-1183.4(b), as well as 27 DCMR §§ 1602.2, 1602.7 and 1300. The second claim flowed from the first claim: that because there was a substantial change in requirements, the contracting officer should either have issued an amendment to or cancelled the solicitation pursuant to 27 DCMR § 1615.3.

In its third claim, Koba alleged that the contracting officer issued a call for best and final offers (BAFO's) prior to conducting any discussions, in violation of 27 DCMR §§ 1621.2 and 1621.3. In addition, protestor claimed that DHS engaged in technical leveling and violated the cost principles (and generally accepted accounting principles) set forth in 27 DCMR §§ 3300.2, 3305.2, 3306.1, 3313.2 and 1215, by attempting to reduce arbitrarily protestor's indirect cost rate during contract negotiations.

Protestor's fourth contention was that by changing the scope of work and the basis for award (by virtue of a September 10, 1992, letter from the contracting officer), DHS

^{1/}At the time this matter came before the Board, three judges were assigned to the panel. This decision is rendered by a majority vote of the three judges assigned. Rule 101.5, 36 DCR 2686 (April 21, 1989). See *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179 (1967).

violated D.C. Code § 1-1183.4(c) and 27 DCMR §§ 1618.1 and 1617.2. Finally, Koba alleged that the government violated 27 DCMR § 1621.5 because all offerors were told that they must meet a price not to exceed \$1 million.

Protestor demanded the following: (1) that award be made to it based upon its July 8, 1992, BAFO; (2) that DHS terminate any award made under the RFP; (3) that DHS cancel the RFP and issue a new solicitation; (4) that DHS cease and desist from the conduct of discussions regarding the prices that all offerors must meet; and (5) that the Board award reasonable proposal preparation costs.

After grant of an enlargement of time,^{2/} the government filed its agency report on December 18, 1992. Therein, DHS set forth certain facts relating to the procurement. The government also argued that by virtue of the language contained in sections A.1, C.2 and B.19 of the RFP, the government never reduced its requirements from three family preservation units to one such unit. Additionally, DHS asserted that discussions with offerors were conducted properly in that: (1) there was no requirement for oral discussions, that written discussions were permissible; and (2) there was no improper assistance regarding submission of revised proposals. The government contended further that proposal evaluations were done properly and that the September 10, 1992, letter from the contracting officer represented an immaterial change to the RFP and simply referred to the manner in which proposals would be ranked after evaluation.

In further support of its position, DHS argued that notification to offerors on the limitation of funds for the procurement was proper, citing the case of *Sea-Land*, B-246784.2, 92-2 CPD ¶ 122. Finally, the government contended that protestor's allegations regarding technical leveling and violation of cost principles were vague and could not be answered.

On January 8, 1993, Koba filed its response to the agency report.^{3/} Therein, protestor argued that a substantial change was made in the RFP requirements as a result of protestor being advised orally during the August 1992 discussions that the RFP required proposals for only one family preservation unit, not three as Koba had interpreted the requirement. In support of its position, protestor contended that by changing the requirement, the government altered the basis for award, because an offeror proposing three units at costs below the combined cost of three separate offers would not even be considered for award.

^{2/}See Order dated December 9, 1992.

^{3/}Koba requested a one-day enlargement of time in which to file its response to the agency report. See Rule 307.1 of the Board's Rules of Practice. Considering the fact that Koba's response was filed prior to its request for an extension of time, the request for an extension of time was moot.

Protestor further contended that the discussions held in August 1992 concerned alleged deficiencies of which it was not previously apprised when the July 1, 1992, request for BAFO's was issued.

With regard to proposal evaluations, protestor asserted that DHS' position was unsupported because there was no indication that Koba's revised BAFO's covering three family preservation units were ever evaluated. Additionally, Koba contended that awards were not made in the best interests of the government because DHS failed to take advantage of economies of scale by rejecting offers for three units.

Significantly, protestor argued that it was not until it had received the agency report that it knew that it had been excluded from competition because it allegedly reduced parts of its technical proposal below the minimum requirements of the RFP. In essence, protestor contended that its exclusion from competition was improper.

On January 29, 1993, the government filed a reply to the protestor's response to the agency report.^{4/} Therein, with respect to allegations regarding changes in the scope of the RFP, DHS maintained its initial position. It argued that protestor had presented no evidence that an offeror which proposed less than three units would not meet the government's minimum needs; and in addition, there was no evidence that all offerors believed that a proposal for less than three units would not be responsive. DHS further contended that, in any event, the September 10, 1992, letter from the contracting officer placed all offerors on an equal footing.

With respect to discussions, DHS contended that the regulations gave it the right to re-open discussions and to require BAFO's thereafter. Furthermore, the August 1992 discussions specifically concerned deficiencies related to the July 8, 1992, BAFO's.

DHS maintained its position regarding protestor's allegations of technical leveling.

With regard to the indirect cost rate allegations, DHS maintained that the allegations remained vague and imprecise and that any explanation by protestor was untimely. The government further responded that even though the Department of Administrative Services (DAS) had not established an indirect cost rate pursuant to 27 DCMR § 1215, the contracting officer was authorized to do so; and his actions were within the parameters of the cost principles.

With respect to proposal evaluations, DHS asserted that the individual evaluators did not evaluate price, and further, that Koba was excluded from competition after September 16, 1992, because its technical proposal had been modified so that it no longer met the government's minimum needs. Specifically, protestor's proposal was not in compliance with RFP sections C.3, C.7.3 and C.8.1.

^{4/}By letter dated January 25, 1993, the government notified the Board of its intent to file a reply by January 29.

On February 17, 1993, Koba filed a response to the government's reply to protestor's response to the agency report, after requesting leave of the Board to do so. This submission was made, in essence, to counter in even greater detail the government's arguments and evidentiary submissions.

Notwithstanding the number and breadth of the parties' submissions, the Board believed that certain material facts were either vague or missing. Therefore, by Order of March 5, 1993, the Board asked the government to supplement its submissions by responding to specific issues set forth in the Order. The government responded on March 16, 1993. This submission was deemed unsatisfactory by the Board; so by Order of April 13, 1993, the Board notified the parties of its intent to convene a protest conference. The Order set forth the primary issues to be discussed and the names of individuals whose presence was sought. After a three-week delay, a conference was scheduled for and held on May 14, 1993.^{5/}

Facts

RFP JA/92046, issued on April 13, 1992, was ". . . for the establishment of three (3) community home based intensive short term, crisis intervention and family services units designed to preserve the family where the removal of a child is imminent due to physical abuse or neglect." (Agency Report, Exhibit 1, section A.1).^{6/} It was initially contemplated that the contract resulting from the RFP would be firm, fixed price ". . . with a cost reimbursement component." (*Id.*, section A.3). However, by Amendment #1, dated April 29, 1992, the contracting officer advised that the resulting contract would be a cost reimbursement contract. (AR, Ex. 2).^{7/}

^{5/}See Order dated May 4, 1993.

^{6/}Hereinafter, references to the agency report and accompanying exhibits shall be "AR, Ex(s). ____". References to the protest and accompanying exhibits shall be "PEx(s). ____". The pleading entitled "Response of Koba Associates, Inc. to Agency Report of the District of Columbia" is designated "Koba Response I"; and all references thereto and its accompanying exhibits shall be "KRI, Ex(s). ____". The filing entitled "Reply of the District of Columbia to Response of Koba Associates, Inc. to Agency Report of the District of Columbia" is designated "District Reply"; and references to it and its accompanying exhibits shall be "DR, Ex(s). ____". The filing entitled "Response of Koba Associates, Inc. to Reply of the District of Columbia to Response of Koba Associates, Inc. to Agency Report of the District of Columbia" is designated "Koba Response II"; and all references thereto and its accompanying exhibits shall be "KR II, Ex(s). ____". The submission entitled "Response of District of Columbia to Board's Order Dated March 5, 1993," is designated "District's Response to Board's Order"; and references to it and accompanying exhibits shall be "DRO, Ex(s). ____". Exhibits accepted by the Board during the May 14, 1993, protest conference shall be referred to as "ConEx(s). ____".

^{7/}The Board sought additional information from the government as to the type of cost reimbursement contract contemplated. In response, the District stated, "The District contemplated awarding a straight cost-reimbursement contract such that contractors would be reimbursed for salaries, rent, travel, administrative (continued...)"

As of January 8, 1992, there existed funding approval for family preservation services in the amount of \$1 million, \$490,550.00 from FY 92 funds and \$509,450.00 from FY 93 funds. (Con.Ex. 1). What purported to be a "cost analysis" was prepared by the program staff in or around January 1992. (DRO, Ex. B). It stated that cost for the RFP was based on staffing and salaries (\$754,695.00 annually), administrative costs (\$50,000.00 annually for each unit), flexible funds (\$24,000.00 annually for 80 families) and travel expenses (\$5,000.00 allotment for each of three units). The "cost analysis" did not make an estimate for fees. (*Id.*).^{8/}

The term of the contract to be awarded was 12 months from the date of award, with an option for an additional year, subject to the availability of funds. (AR, Ex. 1, section A.4). Closing date for receipt of proposals was May 12, 1992.

Section B.19.1 of the RFP stated:

The District Government will award one or more contracts resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the District Government, in terms of cost or price, technical and other factors specified in the solicitation. (emphasis added).

The scope of services was contained in Section C. of the RFP. Sections C.1 and C.2 emphasized the need for three community, home-based intensive service units so as to avoid the necessity of foster care placements. DHS estimated that the average, estimated number of families to be served would be 80 per community home-based facility, or a total of approximately 240 families. (AR, Ex. 1, section C.3). Section C.5.2 of the RFP defined "community based/intensive home-based service unit" as:

A unit that provides services to families where the removal of a child or children is imminent because of abuse or neglect. These services provide social, financial, psychological, and other needed resources to families in order to prevent the break-up of the family unit.

^{7/}(...continued)

costs, and client costs." (DRO, Answer 3). However, when asked by the Board during the protest conference as to the type of cost reimbursement contract contemplated, the contracting officer stated, with great reluctance, that a cost-plus-fixed-fee contract was contemplated.

^{8/}If one gives this "cost analysis" any credence, the total estimated cost for one family preservation service unit would be \$330,565.00.

Section C.5.6 defined "flexible funds" as:

[m]onies to be used in conjunction with family preservation treatment services that will be available for the purchase of goods, [sic] and services that will benefit the client family. . . . Expenditures shall not exceed \$300.00 per client family.

With respect to flexible funds, the offeror was to develop a written plan to administer the money and include guidelines for use, an authorization process, a method to "access" the money, etc. (*Id.*, section C.7.3).

Section C.8 Staff Requirements advised the offeror, at section C.8.1, that it was required to staff its facility with one Master's of Social Work (MSW) supervisory social worker, five MSW social workers and an administrative support person. In addition to a Master's Degree, all social workers were required to have an appropriate license. (*Id.*, section C.8.2). All supervisors were to have a minimum of three years' social work experience in child welfare. (*Id.*, section C.8.3). Additionally, the offeror was to ensure that each social worker serve a minimum of 15 to 18 cases per year. (*Id.*, section C.8.7).

Section D.1 of the RFP stated, in pertinent part:

. . . In the case of cost reimbursement contracts, one or more cost ceilings shall be established in the contract, based on the agreed upon estimated costs; [sic] [T]he District shall not reimburse the Contractor for any costs in excess of those ceilings except pursuant to a contract modification executed under the terms established in the contract.

Section D.2 of the RFP covered audits. That section provided:

At any time or times before final payment and three (3) years thereafter, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be reduced by amounts found by the Contracting Officer not to constitute allowable costs as adjusted for prior overpayment or underpayment.

The Evaluation Criteria were set forth in section E of the RFP. Section E.1 stated, in pertinent part:

The Contract will be awarded to the responsible offeror whose offer is most advantageous to the District, based upon the evaluation criteria specified below. Thus, while the points in the evaluation criteria indicate their relative importance, the total scores will not necessarily be determinative of award. Rather, the total scores will guide the District in making an intelligent award decision based upon the evaluation criteria. . . . (emphasis added).

The Technical Criteria, broken down into four sub-criteria (three of which contained sub-sub-criteria), were worth 70 points. (AR, Ex. 1, section E.2.1). The cost/price criteria were worth 30 points. (*Id.*, section E.2.2). Points for cost/price were to be determined as follows:

The total price for each option period must be included with the initial response to this solicitation. The District will evaluate price proposals by adding the total price for all options to the total price for the base period.... The cost/price evaluation will be objective. The offeror with the lowest price will receive the maximum points. All other proposals will receive a proportionately lower score. See the following formula:

$$\frac{\text{Lowest Price proposal}}{\text{Price of proposal being evaluated}} \times \text{Weight} = \text{Evaluated price score}$$

(emphasis added). (*Id.*, section E.3).

This procurement arose as the result of the final court order in *LaShawn A. v. Kelly*, August 26, 1991.^{2/} (Con.Supp.Ex. 1). The Order, generally, required the District "... to improve its child welfare system over the next 3 years in order to protect abused and neglected children in the District pursuant to the mandates of Federal and District law...." (Implementation Plan, Con.Supp.Ex. 2, p. 1). The Implementation Plan ("Plan") was developed by the Center for the Study of Social Policy (the Court Monitor), in collaboration with DHS and professional experts in the District of Columbia and from around the country.

One of the goals set out in the Plan was to develop community resources to assist families to care for their children. (*Id.*, p. 61) One of these components was the development of Intensive Family Service Units as necessary. According to the timelines in the *LaShawn* Order, DHS was required to establish five community-based, intensive home-based service units in the following manner:

One Unit	November 24, 1991
Second Unit	February 24, 1992
Third Unit	March 24, 1992
Fourth Unit	May 24, 1992
Fifth Unit	June 24, 1992

^{2/}*Sub nom. LaShawn A. v. Dixon*. (D.D.C.). (See AR, Ex. 1, section C.1.). On May 21, 1993, in response to the Board's request made at the May 14 protest conference, the District submitted a copy of the *LaShawn A. v. Dixon* Proposed Order, July 10, 1991, and the Implementation Plan, January 31, 1992. The Proposed Order, developed by DHS and the American Civil Liberties Union was signed by the court on August 26, 1991.

Although the District represented that the Final Order was made a part of the RFP, it clearly was not. (AR, Ex. 1, TABLE OF CONTENTS).

(*Id.*, p. 63). Estimated level of resources was \$250,000 per contract unit per year, with total costs for FY 92 at \$550,000 and total costs for FY 93 at \$1.15 million. (*Id.*, p. 64).^{10/}

Another goal set out in the Plan was for the District ". . . to create the staff capacity and implement policies and procedures to assure that all families in its care and custody receive the services they need." (*Id.*, p. 56). One component of this was staff ratios of no more than 1:17 for caseloads, ". . . in order to assure that workers have time to develop service plans with the family, to provide the direct assistance needed by the family, and to arrange other services according to the service plan. . . ." (*Id.*, pp. 57, 118).

Another stated goal was to maintain proper qualification requirements for all staff in the CFSD. That meant that all persons hired as social workers have a Master's Degree and that all persons hired or promoted into supervisory social work positions have an MSW and a minimum of three years' experience in child welfare. (*Id.*, p. 125). Supervisors' responsibilities were to be defined; and it was suggested that they not carry caseloads except in emergencies (and only then, for a maximum of two days) and that they only supervise a unit of five social workers or five social workers and one case aide. (*Id.*, pp. 126, 127).

Eleven offerors, including Koba, submitted proposals on May 12, 1992. (AR, Exs. 4 and 5). Koba's proposal was, in essence, a plan to implement three preservation units. (AR, Ex. 5). Schedule 11 of protestor's PRICE PROPOSAL stated: "As previously agreed to by DHS in recent (August 1991) negotiations for other District contracts, Koba's indirect rate is bid at 24.00 percent. Refer to Exhibit 5-4, G&A Justification, and Exhibit 5-5, Koba's Independent Auditor's FY 90 Letter."

While not stated expressly anywhere in the RFP, the terms of the solicitation permitted an offeror to submit a proposal for one, two or three family preservation units. Of the 11 offerors, only Koba and Medical Extension Services, Inc. (MESI) made an offer to provide three preservation units. (DR, Ex. B; DRO, Answer 1).

The proposals were initially reviewed between May 12 and July 1, 1992, by three program staffers. There was no formal technical scoring, and no cost analyses were made. The reviewers simply determined whether the offers conformed to the RFP requirements and whether the budgets were reasonable. On July 1, 1992, all offerors were advised in writing of deficiencies in their proposals. (AR, Exs. 6 and 7). Protestor was told, "Your proposal indicates start up costs, [sic] the [sic] RFP does not provide start up costs for these services." (AR, Ex. 6). Each offeror was advised that the budget submitted was acceptable

^{10/}On page 30 of the Plan, it is stated:

Because this Implementation Plan calls for a number of contracts to help carry out the activities, the District will need to expedite these contracts. The Plan requires the development by March 31, 1992, of written agreements governing the procurements required by this Implementation Plan within the time frames identified in the Plan.

based upon its proposal. (AR, Exs. 6 and 7). The contracting officer also requested a BAFO from each offeror by July 8, 1992, which was to include correction of the deficiencies identified in the letter, including any necessary changes in the budget. (*Id.*).^{11/}

Protestor submitted its BAFO on July 8, 1992. (PEx. 6; AR, Ex. 8).^{12/} The BAFO consisted of a revised price proposal for the base year and two option years.^{13/} Schedule 11 of the BAFO contained language regarding the 24% indirect cost rate similar to that contained in the initial proposal.

Negotiations were held with all offerors between August 11 and 13, 1992. (AR, Exs. 9 and 10; DRO, Ex. A). William Clemmons headed the negotiation team. At the beginning of the negotiation sessions, Clemmons advised all offerors that only their cost proposals would be discussed and that their technical proposals had already been evaluated. (*Id.*). With respect to protestor, Clemmons told its representatives that it was his understanding that protestor "would do one (1)" preservation unit even though the proposal covered three units. Koba representatives stated that they "would do" either, ". . . but they prefer all three." (AR, Ex. 10). At no time during the negotiation session did Clemmons make it clear to Koba that it was to submit a proposal for only one family preservation unit. In fact, Clemmons stated that he advised Koba to separate its costs for the three units because that was the only way to compare its proposal with those submitted for only one unit.

Clemmons also discussed Koba's indirect cost rate. He advised the representatives that 24% was an excessive amount and unacceptable. He stated that it was "far beyond" that of "other vendors we have come in line with." He stated that "true cost" was the best way to handle indirect costs and asked protestor to revise its indirect cost rate to make "everything cost allocable." Koba was told to submit a BAFO by October 19, 1992.^{14/} (AR, Ex. 10).

Clemmons also discussed indirect cost rates with the other offerors; and in each instance, he told them that their rates were excessive and that those costs should be directly allocated to the program. (DR, Ex. A). Clemmons did not advise any offeror as to what indirect cost rate the government had established or was willing to accept. Offerors were told that their BAFO's were due between August 18 and August 20, 1992, with each offeror given a specific date. (*Id.*).

^{11/}All offers were considered to be within the competitive range, according to the contracting officer, because the initial idea was to make award without further negotiations.

^{12/}The BAFO was entitled "BAFO In Response to JA/92046 Family Preservation," and was labeled "Revision 2".

^{13/}There is no explanation in the record as to why Koba submitted a proposal for two, instead of one, option years.

^{14/}This date was a typographical error.

Protestor's technical proposal (the July 8, 1992, BAFO) had been evaluated by four evaluators on July 28 and 29, 1992. The primary criticism among all evaluators was that protestor did not have sufficient experience in the area of child welfare. (DR, Ex. A). The only reference to this deficiency during the August 12 negotiations was as follows:

Mr. Clemmons informed offeror that we were not trying to change their proposal in any way but that [w]e are concerned with the qualifications of staff. We are looking for very experience[d] social workers with a background in family, child and youth services and caseload. Salaries appear to be a little low to get the type of staff we are looking for. . . .

(AR, Ex. 10). Nevertheless, prior to the August 12 negotiations, protestor was ranked second technically (on each of three units) of the top three offerors.^{15/} It also appears that contrary to the information provided to offerors in the August negotiations, their price proposals had also been evaluated. (DR, Ex. B).^{16/} Koba received a score of 23.10% for all three units. (*Id.*). MESI was also evaluated for three units and ranked between 29.10% and 30%. It initially had the lowest-priced proposal (for one of three units). (*Id.*). Price proposals for the other offerors, except the two excluded, were each ranked for one unit because they submitted proposals for only one unit.

On August 19, 1992, Koba submitted two BAFO's: one for one family preservation unit and the other for three units combined. (AR, Ex. 11). Each was labeled "Revision 3". The letter to the contracting officer accompanying the BAFO's stated, in pertinent part:

With respect to indirect rates, Koba's proposed indirect rate of 24% is already below its actual incurred rate as reflected on Koba's financial statements. As you know, the District Contract Cost Principles, 27 DCMR 3300 et. [sic] seq. clearly states that indirect rates shall be allocated in accordance with generally accepted accounting principles, consistently applied, and that these costs shall then be allocable to D.C. contracts if they are necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident. . . .

^{15/}Koba was ranked only .20% below the highest-ranked offeror, Progressive Life Center, Inc. (PLCI). For Love of Children (FLOC) and Partners on the Right Path (PRP) were not ranked because their option year budgets were not included in their BAFO's. (DR, Ex. B). Nevertheless, negotiations were held with FLOC and PRP.

^{16/}In the District Reply, the government provided copies of the summaries of both technical and price evaluations at Exhibit B. The first four pages dated "9/17" were the spread sheets containing the ranks of all offerors, except FLOC and PRP. They should actually be dated August 21, 1992. The last two pages of the exhibit, dated "8/21", were the separate cost/price evaluations which were incorporated into the evaluation spreadsheet. The two pages following the first four pages appear to be technical and price proposal rankings dated August 3, 1992. The three pages following are price proposal rankings performed prior to the August 11 to 13 negotiations.

The offers were evaluated and ranked again on or before August 21, 1992. (DR, Ex. B). For its technical proposals, Koba ranked 223.30% for one unit, with a price offer of \$399,048.00 for the base year and \$425,765.00 for the option year. For three units, Koba was ranked technically at 226.00%, with a price proposal of \$1,139,038.00 for the base year and \$1,232,184.00 for the option year. Again, it ranked second technically of the highest-ranked offers. MESI was also evaluated for three family preservation units.^{17/}

By letter dated September 10, 1992, the contracting officer advised all offerors that he was re-opening negotiations ". . . for the limited purpose of requesting revised cost proposals." (AR, Ex. 12). Significantly, he stated that negotiations were being re-opened ". . . due to financial constraints. . .," and that contracts could not be awarded based on current submissions. He also said:

The District intends to award three contracts, one contract to each of the three different offerors whose Best and Final Offer (BAFO) is ranked in the highest ranked combined set of three scores that can be accommodated within the total funds available for this project--which is an amount not to exceed \$1 million.

Accordingly, all BAFO's will be rescored and ranked. Then all combinations of three which come under \$1 million will be ranked based on the sum of the three component scores. The highest ranked group will be selected. . . . (emphasis added).

It was about this time that the contracting officer became aware that there was a \$1 million limitation on the funds for the procurement.

BAFO's were to be submitted by September 14, 1992. However, on September 11, 1992, the contracting officer advised all offerors that they could also revise their technical proposals. (AR, Ex. 13). Consequently, BAFO's were to be submitted by September 16, 1992.

On September 16, 1992, protestor submitted BAFO's for both one and three family preservation units. Each was labeled "Revision 4". Upon review by program staffers, Clemmons was advised that Koba and PLCI had changed their technical proposals such that they were no longer in conformance with the RFP. Clemmons conveyed the information to the contracting officer.

^{17/}As a result of the August 21, 1992, evaluations, MESI ranked sixth with respect to cost. However, the difference between protestor's and MESI's proposals was that for MESI, the cost for each unit offered was the same; whereas with Koba, its cost for three units combined could not be broken down in such a way that each separate unit had the same amount of costs associated with it. (DR, Ex. B).

On September 24, 1992, the contracting officer told Clemmons to rescore the offers and use the same evaluation team. (AR, Ex. 15). He also said:

Provide detailed justification for excluding Progressive Life and KOBA from consideration. This will leave 9 offerors, if I determine that there is adequate basis for excluding Progressive Life and KOBA.

(*Id.*).^{18/}

Sometime between September 24 and October 1, 1992, four proposals were re-evaluated because the BAFO's were revised. (AR, Ex. 15; DR, Ex. A [Revised]). Even though Koba and PLCI were to have been excluded, they received combined (technical and price) ratings of 220 and 231, respectively, and ranked second and third behind Sasha Bruce Youthwork, Inc. ("Sasha Bruce"). Sasha Bruce received the highest score of 254, although its technical proposal had consistently ranked third in the August and early September evaluations. (DR, Ex. B). The evaluation spreadsheet dated October 1, 1992, stated that the offers of Koba and PLCI were excluded. (AR, Ex. 15).

Koba's proposal was excluded because of alleged drastic reductions in its technical proposal, specifically: (1) the supervisory social worker was going to carry a caseload, contrary to the RFP requirements; (2) the proposal reduced the estimated caseload from 80 to 70, below the minimum acceptable; and (3) the proposal reduced the amount established for flexible funds. (AR, Ex. 15). PLCI was excluded for similar reasons. (*Id.*).

On or about October 4, 1992, the BAFO's were ranked for the highest combined set of three scores which did not exceed \$1 million. (AR, Ex. 16).^{19/} Both protestor and PLCI were ranked along with the other nine offerors; however, wherever they appeared in the "mathematical permutation" developed, their technical scores were not included. (*Id.*). The contracting officer, Ray Singal, was unaware of the details of the October 4 rankings.

By letter contracts dated October 27, 1992, awards were made to Sasha Bruce, Washington Family Services Associates (WFSA) and Family and Child Services of Washington, D.C. (FCS). (AR, Exs. 17A, 17B and 17C). Earlier, by letters dated October 21, 1992, the remaining offerors were advised that their proposals had not been accepted. (AR, Ex. 18).

^{18/}PLCI had the highest-ranked technical proposal as per the August 3 and August 21 evaluations. (DR, Ex. B).

^{19/}This "mathematical permutation" was allegedly developed by Patricia Watt, Deputy Director, DHS and Ray Singal's supervisor. Watt also executed, as the contracting officer, the October 1, 1992, justification for excluding Koba and PLCI from competition. There was no explanation of the reasons for Watt's direct participation in the procurement.

Koba sought a debriefing regarding its proposal, but was told that in view of its protest, the District felt that it was best not to provide a debriefing. Koba representatives did not know until after the submission of the agency report that protestor had been excluded from competition.^{20/}

In the August 3 technical evaluations, Sasha Bruce was ranked third behind PLCI and Koba. (DR, Ex. B). WFSA was ranked fourth (187.30) and FCS was ranked fifth (159.00). (*Id.*). In the price proposal evaluations made before the August 11 to 13 negotiations, Sasha Bruce was ranked sixth, WFSA was ranked fifth and FCS was ranked fourth. (*Id.*).

In the August 21, 1992, technical and price evaluations, Sasha Bruce was ranked third, WFSA was ranked fourth and FCS was ranked fifth. (*Id.*). Finally, the results of the October 1992 evaluations showed that Sasha Bruce was ranked first (254), WFSA was ranked fourth (194) and FCS was ranked fifth (168). (*Id.*).

At no time during any of the proposal evaluations were cost analyses performed, although costs were discussed with the offerors during the August 1992 negotiations. Additionally, fees were discussed with only two offerors; and both were advised that their fees were too high. (DR, Ex. A).^{21/} Furthermore, during the August 1992 negotiations, 10 offerors were told that their indirect cost rates were too high, even though the District had not established an indirect cost rate.^{22/}

D.C. Code § 1-1183.4(b) states:

Proposals shall be solicited from the maximum number of qualified sources and in a manner consistent with the nature of and the need for the supplies or services being required, with adequate public notice of the intended procurement pursuant to § 1-1183.3(a).

^{20/}See STATEMENT FROM FRANCES LORENZI REGARDING DEBRIEFING ON KOBAS FAMILY PRESERVATION PROPOSAL AND THE DISTRICT'S PRACTICE REGARDING FIXED PRICE VS. COST REIMBURSABLE CONTRACTS, dated May 19, 1993.

^{21/}Institute for Life Enrichment (ILE) and PSI Associates, Inc. (PSI) both proposed a 6% fee. Clemmons told ILE that its fee was too high in view of its 31.41% indirect cost rate. Clemmons told PSI that its fee was too high, nothing more. Interestingly, it was a FLOC official who advised Clemmons during negotiations that the Internal Revenue Service allowed a 3% fee. During the protest conference, the Board was led to believe by Clemmons that the District already knew that the IRS permitted a 3% fee for non-profit organizations. Additionally, the majority of the offerors were non-profit organizations and generally do not charge a fee.

^{22/}See DR, Ex. A (August 13, 1992, negotiation memorandum, Progressive Life Center, Inc.).

Subsections (c) and (d) state:

The request for proposals shall indicate the relative importance of each evaluation factor, including price.

Every request for proposals shall include a statement of work which shall be used as a basis for the evaluation of proposals.

Subsection (e) of the provision states, in pertinent part:

Any written or oral negotiations shall be conducted with all responsible offerors in the competitive range. These negotiations may not disclose any information derived from proposals submitted by competing offerors. . . .

Subsection (f) states, in pertinent part:

. . . [A]ward of the contract shall be made to the responsible offeror whose proposal is determined to be the most advantageous to the District government, considering price and the evaluation factors set forth in the request for proposals. . . .

Title 27 of the District of Columbia Municipal Regulations (DCMR) (July 1988) governs contracts and procurements. Chapter 16 therein governs procurements by competitive proposals. Section 1602 of 27 DCMR is applicable to the solicitation of proposals.

Section 1602.2 states:

The contracting officer shall issue written solicitations which contain all information necessary to enable prospective contractors to prepare proposals properly.

Section 1602.3 states:

The contracting officer shall furnish identical information concerning a proposed procurement to all prospective contractors receiving the RFP.

Section 1607 of 27 DCMR is applicable to amendments to requests for proposals. Section 1607.1 states, in pertinent part:

After issuance of a solicitation, but before the date set for receipt of proposals, the contracting officer may make changes in the solicitation to reflect the following:

- (a) Significant changes in quantity, specifications, or delivery schedules;
- (b) The correction of defects or ambiguities; . . .

Section 1614 of 27 DCMR governs source selection. Section 1614.1 states:

Selection of a contractor through the use by means of CSP's^{23/} shall be based on the following:

- (a) Cost or price competition between proposals that meet the District's minimum requirements stated in the solicitation; or
- (b) Competition involving an evaluation and comparison of cost or price and other factors. (emphasis added).

Section 1615 of 27 DCMR applies to changes in the government's requirements.

Section 1615.1 states:

When, either before or after receipt of proposals, the District increases, decreases, or otherwise changes its requirements, the contracting officer shall issue a written amendment to the solicitation, in accordance with §1607.

Section 1615.2 states, in pertinent part:

In deciding which firms to notify of a change, the contracting officer shall consider the state in the procurement cycle at which the change occurs and the magnitude of the change, as follows:

* * *

- (c) If the competitive range has been established, the amendment shall be sent only to those offerors within the competitive range.

^{23/}"CSP" means "competitive sealed proposal." 27 DCMR § 1602.1.

Section 1615.3 states:

If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the state of the procurement. The new solicitation shall be issued to all firms originally solicited and to any firms added to the original list, and shall be advertised in accordance with the requirements of this title.

Section 1617 of 27 DCMR covers the evaluation factors for proposals. In its entirety, that section states:

- 1617.1 The evaluation factors that will be considered in evaluating proposals shall be tailored to each procurement and shall include only those factors that will have an impact on the source selection decision.
- 1617.2 The contracting officer shall include in the solicitation the evaluation factors, including price or cost and any significant sub-factors. The solicitation shall include the minimum requirements that apply to particular evaluation factors or significant sub-factors.
- 1617.3 The contracting officer may include in the solicitation the numerical weights which may be used in the evaluation of the proposals.
- 1617.4 Evaluation factors shall be stated in descending order of importance.
- 1617.5 Price or cost to the District shall be included as an evaluation factor in each RFP.
- 1617.6 While the lowest price or lowest total cost to the District may be an important or even a deciding factor in most source selections, the District may select the source whose proposal offers the greatest value to the District in terms of technical merit and other factors.
- 1617.7 When awarding a cost-reimbursement contract, the cost proposal shall not be controlling. The contracting officer shall consider which offeror can perform the contract in a manner most advantageous to the District as determined by evaluation of proposals according to the established evaluation criteria.

Section 1618 of 27 DCMR governs proposal evaluation. Sections 1618.1 through 1618.5 state:

- 1618.1 The contracting officer shall evaluate each proposal in accordance with the evaluation criteria in the solicitation.
- 1618.2 The contracting officer shall evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract.
- 1618.3 The contracting officer shall document the cost or price evaluation.
- 1618.4 If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the contracting officer shall forward the proposals to the appropriate technical official for technical evaluation.
- 1618.5 If a technical evaluation is done, a technical evaluation report shall be prepared by the technical official and shall contain the following:
 - (a) The basis for evaluation;
 - (b) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
 - (c) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
 - (d) A summary of findings.

Section 1619 of 27 DCMR applies to discussions with offerors. Sections 1619.1 and 1619.2 state:

- 1619.1 The contracting officer shall conduct written or oral discussions with all offerors in the competitive range, except in the following circumstances:

- (a) If prices are fixed by law or regulation; or
- (b) If it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the District at a fair and reasonable price.

1619.2 If discussions are held with offerors, the contracting office[r] shall determine which proposals are in the competitive range, and shall conduct written or oral discussions with the offerors who submitted those proposals.

Section 1620 of 27 DCMR applies to the determination of the competitive range. That section states, in its entirety:

- 1620.1 The competitive range shall be determined on the basis of cost or price and other factors, in accordance with the evaluation [sic] criteria that were stated in the solicitation, and shall include all proposals that have a reasonable chance of being selected for award.
- 1620.2 If there is doubt as to whether a proposal is in the competitive range, the proposal shall be included.
- 1620.3 The contracting officer shall notify, in writing, an unsuccessful offeror at the earliest practicable time that its proposal is no longer being considered for award.

Section 1621 governs the conduct of discussions with offerors. Sections 1621.1, 1621.2 and 1621.3 state:

- 1621.1 The contracting officer shall ensure that, if discussions are held with any offeror within the competitive range, discussions are held with all offerors in the competitive range.
- 1621.2 During discussion[s] with offerors, the contracting officer shall do the following:
 - (a) Control all discussions;

- (b) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the District's requirements;
- (c) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
- (d) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process; and
- (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

1621.3 The contracting officer shall not assist an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal.

Section 1621.5 states:

The contracting officer shall not indicate to an offeror a cost or price it must meet to obtain further consideration, advise an offeror of its standing relative to another offeror, or otherwise furnish information about any other offeror's prices.

BAFO's are governed by 27 DCMR § 1622. In its entirety, that section states:

1622.1 Upon completion of discussions, the contracting officer shall issue to all offerors within the competitive range a request for best and final offers.

1622.2 The request for best and final offers shall include the following:

- (a) Notice that discussions are concluded;

- (b) Notice that this is the opportunity to submit a best and final offer;
 - (c) A common cut-off date and time that allows a reasonable opportunity for submission of written best and final offers; and
 - (d) Notice that if any modification is submitted, it must be received by the date and time specified and is subject to the provisions of this chapter covering late proposals.
- 1622.3 After receipt of best and final offers, the contracting officer shall not reopen discussions unless it is clearly in the best interest of the District to do so.
- 1622.4 Reasons for reopening discussions may include, but are not limited to, the fact that it is clear that information available at the time is inadequate to reasonably justify contractor selection and award based on the best and final offers received.
- 1622.5 If discussions are reopened, the contracting officer shall issue an additional request for best and final offers to all offerors within the competitive range.
- 1622.6 After evaluation of the best and final offers, the contracting officer shall select that source whose best and final offer is most advantageous to the District, considering only price and other factors included in the solicitation.
- 1622.7 The contracting officer shall prepare supporting documentation for the selection decision that shows that relative differences among the proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The supporting documentation shall include the basis for the selection. (emphasis added).

Cost analyses of proposals are governed by 27 DCMR § 1626. Section 1626.1 states, in pertinent part:

The contracting officer shall be required to perform a cost analysis in either of the following circumstances:

- (a) The award of any contract in excess of five hundred thousand dollars (\$500,000);. . .

Sections 1626.2 through 1626.6 state:

1626.2 When cost analysis is required, the contracting officer shall perform cost analysis by using the techniques and procedures set forth in this section.

1626.3 The contracting officer shall verify cost or pricing data [sic] and evaluate the cost elements, including the following:

- (a) The necessity for and reasonableness of the proposed cost, including allowances for contingencies;
- (b) A projection of the offeror's cost trends on the basis of current and historical cost or pricing data;
- (c) A technical appraisal of the estimated labor, material, tooling, and facilities requirements and of the reasonableness of scrap and spoilage factors; and
- (d) The application of audited or negotiated indirect cost rates, labor rates, and other factors.

1626.4 The contracting officer shall evaluate the effect of the offeror's current practices on future costs. In conducting this evaluation, the contracting officer shall ensure that the effects of inefficient or uneconomical past practices are not projected into the future.

1626.5 The contracting officer shall compare the costs proposed by the offeror for individual cost elements with the following:

- (a) Actual costs previously incurred by the same offeror;

- (b) Previous cost estimates from the offeror or from other offerors for the same or similar items;
- (c) Other cost estimates received in response to the District's request;
- (d) Independent District cost estimates by technical personnel; and
- (e) Forecasts or planned expenditures.

1626.6 The contracting officer shall verify that the offeror's cost submissions are in accordance with the contract cost principles and procedures set forth in chapter 33 of this title. (emphasis added).

"Cost analysis" is defined as:

. . . the review and evaluation of the separate cost elements and proposed profit of an offeror's or contractor's cost or pricing data and the judgmental factors applied in projecting from the data to the estimated costs, in order to form an opinion on the degree to which the proposed costs represent what the contract should cost, assuming reasonable economy and efficiency.

27 DCMR § 1699.1.

Section 1215 of 27 DCMR governs indirect cost rates. In its entirety, that section states:

1215.1 The establishment of final indirect cost rates shall provide the following:

- (a) Uniformity of approach with a contractor when more than one (1) contract or agency is involved;
- (b) Economy of administration; and
- (c) Timely settlement under cost-reimbursement contracts.

1215.2 Billing rates shall be established as a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

- 1215.3 The Director shall be responsible for establishing indirect cost rates for each contractor. These rates shall be binding on all agencies and their contracting offices, unless otherwise specifically prohibited by statute.
- 1215.4 Billing rates and final indirect cost rates shall be used in reimbursing indirect costs under cost-reimbursement contracts and in determining progress payments under fixed-price contracts. (emphasis added).

Section 3300 of 27 DCMR contains the cost principles applicable to District of Columbia procurements.^{24/} Section 3300.3 requires that cost principles be used, *inter alia*: (1) in the pricing or estimation of costs in contracts based on other than competitive sealed bidding; and (2) in determining allowability of costs under contract provisions which provide for reimbursement of costs.^{25/} Sections 3312 and 3313 cover direct and indirect costs, respectively. Section 3313.4 provides in part that the contracting officer shall examine a contractor's method of allocating indirect costs when:

- (1) A substantial difference exists between the cost patterns of work performed under the contract and the contractor's other work;
- (2) A significant change occurs in the nature of the contractor's business;...
or
- (3) Indirect cost groups developed for a contractor's primary location are applied to off-site locations. . . .

DECISION

Change In Scope Of Work/Notification To Offerors

The RFP was for the procurement of three (3) community home-based family service units. Section B.19.1 of the RFP stated that the government would award one or more contracts to the responsible offeror whose offer, conforming to the solicitation, would be most advantageous to the District, considering cost or price, technical and other factors. Section E.1 of the RFP reiterated that the contract would be awarded to the responsible offeror whose offer was the most advantageous to the District, based upon the evaluation factors contained in the solicitation.

^{24/}Cost principles were made applicable to this procurement pursuant to section D.1 of the RFP.

^{25/}See also, 27 DCMR § 3300.2.

Section E.3 of the RFP set forth the manner in which price would be evaluated and provided a formula for the determination of the lowest price.

On May 12, 1992, protestor and 10 other offerors submitted proposals. Koba's proposal encompassed three family service units, as did that of MESI. Nine offerors submitted proposals for only one family service unit. After receipt of proposals, the contracting officer determined all offerors to be in the competitive range; and on July 1, 1992, he notified them of the particular deficiencies in their proposals and called for submission of BAFO's. Protestor's and MESI's BAFO's covered three family service units; but their technical and cost proposals were evaluated on the basis of both one and three units. All other proposals were evaluated on the basis of one unit.

During the August 1992 negotiations with DHS, Koba was told that it was DHS' understanding that protestor "would do" one unit, with protestor responding that it "would do" one or three units, but preferred three. Thereafter, on August 19, 1992, Koba submitted BAFO's for one and three units. MESI's BAFO, after the August 1992, negotiations, also covered three units.

After the August 1992 BAFO's were evaluated, the contracting officer advised all offerors by letter dated September 10, 1992, that he was re-opening negotiations for the purpose of submitting revised cost proposals. In the letter, he stated:

The District intends to award three contracts, one to each of three different offerors whose Best and Final Offer (BAFO) is ranked in the highest combined set of three scores that can be accommodated within. . . an amount not to exceed \$1 million. . . (emphasis added).

The contracting officer went on to say that BAFO's would be re-scored and ranked and

. . . [t]hen all combinations of three which come under \$1 million will be ranked based on the sum of three component scores. The highest ranked group will be selected. . . (emphasis added).

Protestor claimed that by virtue of the August 1992 discussions and the contracting officer's September 10, 1992, letter, there was a substantial change made in the RFP requirements, in that the RFP required proposals for only one family service unit, as opposed to three. Koba also claimed that the basis for award was altered because an offeror proposing three units at costs below the combined cost for three different offerors would not be considered for award.

In order to determine whether a substantial change was made, we look to the requirements and language of the RFP. Here, we need not make too deep an analysis because the procuring agency admitted that the language of the RFP was ambiguous in that an offeror could have submitted a proposal which encompassed one, two or three family preservation units. In our view, the RFP requirements were both ambiguous and misleading.

A solicitation is ambiguous when it is susceptible to two or more reasonable interpretations. *Energy Maintenance Corp.*, B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. Although a bidder's particular interpretation need not be the most reasonable one for a finding of ambiguity, that bidder's interpretation of the language of the solicitation at issue must be reasonable. *TUMI Int'l, Inc.*, B-235348, Aug. 24, 1989, 89-2 CPD ¶ 174. To be reasonable, an interpretation must be consistent with the solicitation, read as a whole and in a reasonable manner. *Vitro Servs. Corp.*, B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136. When a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the dispute by reading the solicitation as a whole and in a manner that gives effect to all its provisions. *TUMI Int'l, Inc.*, B-235348, *supra*.

DJ's Services, Inc., B-240623, December 5, 1990, 90-2 CPD ¶ 459. See *FirstPage of Virginia*, B-243747, August 2, 1991, 91-2 CPD ¶ 121; *Loral Terracom*; *Marconi Italiana*, B-224908, B-224908.2, 66 Comp. Gen. 272 (1987).

If one is to believe that the September 10, 1992, letter from the contracting officer was an amendment to the RFP, when both Koba and MESI submitted proposals for three family preservation units in May 1992, the contracting officer should have known that something was amiss, because there was obvious confusion among the bidders. See *Baytex Communication, Inc.*, B-237183, February 8, 1990, 90-1 CPD ¶ 164. Nevertheless, Koba and MESI were both considered responsive to the RFP as reflected in the fact that they were determined to be within the competitive range and by the fact that BAFO's were sought from them on July 1, 1992. Additionally, protestor's July 8 BAFO for three units was evaluated both technically and for cost and was ranked second among the top three offerors.

However, it was not until the August 1992 discussions that Koba was advised orally, in vague and uncertain terms, that DHS wanted a proposal for only one family preservation unit; but again, DHS accepted, without comment, BAFO's from Koba for one and three preservation units. The final determination of the agency's needs did not come until September 1992, when the contracting officer informed all offerors that three separate contracts would be awarded to three different offerors and requested a third round of BAFO's.

The contracting officer stated in his September 10, 1992, letter that "financial constraints" led him to issue the letter because awards could not be made on current submissions. However, as of January 1992, the contracting officer knew, or should have known, that only \$1 million was available for the procurement. Additionally, the contracting officer's rationale of assurance of continuity of services in making awards to three different offerors is unsupportable because potential problems with continuity of services could arise no matter how many (or few) separate awards were made. Furthermore, as of August 21, 1992, the only offeror of the top three whose proposed cost for three units was over \$1 million was protestor; and the proposed costs combined for all of the top three offerors^{26/}

^{26/}Using Koba's cost proposal for one unit.

was \$1.15 million.^{27/}

Thus, in our view, by deciding to award three separate contracts to three different offerors (whose combined costs were \$1 million or less), the procuring agency wanted to be sure that it received proposals of \$1 million or less combined, and therefore made a substantial change to the RFP requirements which had a significant effect on preparation of proposals and the evaluations for award. However, what did not change was the requirement for three family preservation units.

This determination, however, does not dispose of the issue. It is a fundamental principle of procurement that a contracting agency must treat all offerors equally and that they must be furnished with identical statements of the agency's requirements in order to provide a common ground for preparation and submission of competitive proposals. *Loral Terracom; Marconi Italiana, supra*. See 27 DCMR §§ 1602.2 and 1602.3. Therefore, when an agency's needs change so that a material discrepancy is created between the RFP's stated requirements and the agency's needs and/or the ground rules for conducting the procurement, the RFP should be amended in writing and all within the competitive range be given an opportunity to revise their proposals accordingly. *Id.*

In this regard, Koba was informed during discussions that DHS thought it "would do" one family preservation unit; and that if protestor submitted a proposal for three units, its costs for each unit within the three should be broken down so as to enable an accurate comparison of proposals. At this point, DHS should have issued a written amendment to the RFP. Yet, despite this failure, it appears that protestor was not prejudiced because it subsequently submitted a BAFO for one unit, as well as one for three units. Thus, in our opinion, an offeror is not prejudiced, despite the agency's failure to issue a written amendment, when the agency informs the offeror during negotiations of any changed requirements, regardless of any resulting inconsistency with the terms of the RFP. *Ram Enterprises, Inc.*, B-221924, June 24, 1986, 86-1 CPD ¶ 581. Cf. *Loral Terracom; Marconi Italiana, supra*.

Furthermore, in September 1992, the contracting officer did advise all offerors of a change in its needs; and Koba submitted a BAFO accordingly. At this point, all offerors were competing on a common and equal basis. See 27 DCMR §§ 1607, 1615.1, 1615.2, 1615.3; *Professional Services Unlimited, Inc.*, B-245453, December 30, 1991, 92-1 CPD ¶ 18. Cf. *Baytex Communication, Inc., supra*. With respect to the September 10, 1992, letter itself, we believe that it is beyond cavil that it was an amendment to the RFP. This is so because it changed significantly the basis for award. Furthermore, the letter was furnished to all offerors in the competitive range; and the information contained therein was binding on all of them. Thus, that no formal amendment was issued is of no moment because protestor clearly understood the letter's import and acted accordingly. See *Ingersoll-Rand*, B-225996, May 5, 1987, 87-1 CPD ¶ 474.

^{27/}MESI's total cost for three units was \$989,601.00. However, it was offering the same cost for each unit separately.

Consequently, our view is that while there was clearly a significant change in the manner in which the procurement was to be conducted, and while the contracting officer knew or should have known of the existence of an ambiguity and the need for clarification long before September 1992, his issuance of the September 10 letter, and the negotiator's earlier disclosure, placed all offerors on an equal footing, such that protestor was afforded an opportunity to meet the agency's technical and cost requirements. Thus, we find no prejudice to Koba in this regard and will not disturb the procurement on the basis of changed requirements and notice thereof. See *Honeywell Information Systems, Inc.*, B-191212, July 14, 1978 (unpub.).

Discussion With Offerors

The facts show that discussions with all offerors occurred after receipt and evaluation of July 8, 1992, BAFO's; and there is no dispute that the first round of BAFO's was requested prior to discussions. Protestor claimed that requests for BAFO's before any discussions were conducted was violative of 27 DCMR §§ 1621.2 and 1621.3. Koba claimed further that the August 1992 discussions were improper because they concerned alleged deficiencies of which it was not apprised prior to July 1, 1992.

Here, the regulations are clear that the contracting officer is not required to hold discussions with offerors prior to issuing a request for BAFO's. 27 DCMR § 1621.1. However, if he or she does so, the discussions must be held with all offerors in the competitive range. *Id.* The facts adequately demonstrate that discussions were held with all offerors in the competitive range between August 11 and 13, 1992, concerning the BAFO's submitted on July 8, 1992. See also 27 DCMR §§ 1619.1 and 1619.2.

The problem arises here, however, as to whether the discussions with the offerors were meaningful and conducted in conformance with the applicable regulations. In conjunction with this issue, the question arises as to whether the proposal evaluations were made in such a way as to make the discussions meaningful.

For discussions in a negotiated procurement to be meaningful, contracting agencies must advise offerors in the competitive range of deficiencies in their proposals and afford them the opportunity to correct the deficiencies by submitting revised proposals. (citations omitted). Agencies need not afford offerors all-encompassing discussions, or discuss every element of a technically acceptable proposal that received less than the maximum possible rating; rather, agencies need only lead offerors into the areas of their proposal which require amplification. (citation omitted).

Signal Corporation, B-241849.2, B-241849.3, February 26, 1991, 91-1 CPD ¶ 218.

For our analysis here, we must emphasize that DHS contemplated award of a cost-reimbursement contract. Consequently,

[w]hen an agency evaluates proposals for the award of a cost reimbursement contract, the offerors' proposed estimated costs of contract performance are not considered as controlling, since they may not provide valid indicatives of the actual costs which the government is, within certain limits, required to pay. . . . (citation omitted).

Signal Corporation, supra; United Engineers & Constructors, Inc. Stearns-Rogers Division, B-240691, B-240691.2, December 14, 1990, 90-2 CPD ¶ 490. As a result, the agency must conduct a cost realism analysis to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. *Id.* Evaluated costs provide a sounder basis for determining the most advantageous proposal to the government. *Polaris, Inc., B-220066, December 16, 1985, 85-2 CPD ¶ 669.* Because a cost realism analysis is a judgment matter on the part of the agency, our review is limited to a determination of whether the agency's cost evaluation was reasonably based and was not arbitrary, capricious and in violation of statute and regulation. *Id.; PTL Environmental Services, B-230070, May 27, 1988, 88-1 CPD ¶ 504.*

Our review of the record leads us to conclude that the cost evaluations were performed so improperly that no meaningful discussions were (or could have been) conducted with any of the offerors. The facts demonstrate that the only thing the agency did here was to compare the cost proposals to its own questionable estimate of what the effort should cost;^{28/} and while discussions covered cost matters, no meaningful cost or price analyses were performed.^{29/}

Furthermore, with respect to indirect cost rates, the record is abundantly clear that the agency had not established an acceptable rate ceiling and did not even understand the bases for the offerors' indirect rates. This position is supported by the fact that the chief negotiator attempted to force offerors to change their indirect costs to direct costs solely allocable to the procurement. Here, the agency should have either conducted audits of the indirect cost rates or used other appropriate cost analysis techniques. *See 27 DCMR §§ 1626.2 through 1626.6.* None of that was done here.^{30/}

^{28/}We believe that the so-called cost analysis prepared in January 1992 had no basis in fact; or if there was a basis, it was not presented to the Board. In fact, we tried to compare the estimate to the recommended costs set out in the *LaShawn A.* Implementation Plan, but that effort was unavailing.

^{29/}In April 1992, the RFP was amended to advise offerors that the resulting contract would be a cost reimbursement contract. (AR, Ex. 2). However, section E.3 of the RFP was not modified accordingly because the evaluation of proposals remained based on price, not cost, for both the base and option years. Clearly, the procurement officials did not properly account for this change.

^{30/}*See also* sections D.1 and D.2 of the RFP. Furthermore, Koba had, in April and August 1992, entered into fixed price contracts with DHS for similar services. Curiously, Ray Singal was the contracting officer for those procurements. *See fn. 2, supra.* None of these contracts were considered in evaluating protestor's proposals. *See DCMR §§ 1626.2 to 1626.6, supra.*

As we held in *Koba Associates, Inc.*, CAB Nos. P-344 and P-359, March 3, 1993, 5 P.D. 5036 and *Koba Associates, Inc.*, CAB No. P-325, March 12, 1993, 5 P.D. 5056, a contracting agency is free to use any reasonable ceiling when evaluating proposals for the purpose of cost realism analyses. Further, establishment of a ceiling on any cost element is not illegal *per se*. See *PTL Environmental Services, supra*; *United Engineers & Constructors, Inc., supra*. However, where, as here, no indirect cost rate was established and where the agency tried to persuade offerors to change indirect costs to direct costs, the actions of the agency were improper and made a mockery of the discussions.^{31/}

In addition, protestor contended that because DHS attempted to force it to re-allocate its indirect costs (thereby changing its indirect cost rate), the agency engaged in impermissible technical leveling. Technical leveling happens when an agency assists an offeror in bringing its proposal up to the level of other proposals through successive rounds of discussions and discloses weaknesses in a proposal due to a lack of diligence, competence or ingenuity in preparing a proposal. *United Engineers & Constructors, Inc., supra*; *Loral Terracom*; *Marconi Italiana, supra*, fn. 3. Based upon our review of the record, there is no evidence that such a situation occurred; for there was only one round of discussions with all offerors, 10 of whom were advised that their indirect cost rates were too high compared to the government's nonexistent cost rate ceiling.

In our view, the cost evaluations and resultant cost discussions were improperly conducted and violative of law and regulation because no indirect cost rate was established, no cost analyses or cost realism analyses were performed; and the government failed to avail itself of the resources upon which to make an informed judgment as to the reasonableness, allocability and allowability of the offerors' proposed costs.^{32/}

Exclusion From Competitive Range

After BAFO's were submitted as a result of the contracting officer's September 10, 1992, letter, the agency determined that Koba and PLCI had changed their technical proposals so as to make them noncompliant with the material requirements of the RFP. For Koba, its proposal failed to meet the requirements of sections C.3, C.7.3 and C.8.1 of the scope of services.

Section C.3 estimated that 80 families should be served by each community home-based facility. This estimate was comparable to the proposed staff ratio set out in the *LaShawn A.* Implementation Plan, which suggested a 1:17 ratio for social worker

^{31/}There is nothing in the regulations which gives the contracting officer the authority to establish indirect cost rates. 27 DCMR § 1215.3. See *Koba Associates, Inc.*, CAB No. P-325, *supra*.

^{32/}Cost analyses should have been done in any event because awards under this procurement were over \$500,000.00. 27 DCMR § 1626.1.

caseloads.^{33/} This recommendation was made ". . . in order to assure that workers have time to develop service plans with the family, to provide the direct assistance needed by the family, and to arrange other services according to the service plan. . . ." (Conf.Supp. Ex. 2, pp. 57, 118). When this requirement is viewed in conjunction with the *LaShawn A.* court's mandate, protestor's reduction of the caseload for MSW's did indeed make its BAFO noncompliant with a material requirement of the RFP.

The same is true with respect to protestor's noncompliance with section C.8.1. That section required one MSW supervisor and five MSW's. This comported with the Plan, which suggested that supervisors not carry caseloads except in emergencies. That Koba's BAFO stated that its supervisors would carry a caseload was clearly not in compliance with the RFP requirements.^{34/}

Furthermore, while the Board initially had difficulty understanding the contracting officer's instructions to the District's chief negotiator (AR, Ex. 15), consideration of all of the evidence leads us to conclude that Koba's (and PLCI's) exclusion from the competitive range was justified.^{35/}

The record of this matter shows that protestor was not aware of its exclusion from the competitive range until after it received the agency report. Indeed, when it requested a debriefing, Koba was told that in view of its protest, it was better that a debriefing not be held. While we are unaware of any law or regulation that prohibits a debriefing in the face of a protest, and even if we assume that DHS improperly failed to notify protestor of its exclusion from the competitive range, this omission was a procedural defect which did not affect the validity of the awards and does not provide a basis for sustaining the protest. *RDA International, Inc.*, B-244271.2, December 9, 1991, 91-2 CPD ¶ 526.

Conclusion

There is no doubt in our minds that under all of the facts and circumstances, DHS did the best that it could with the instant procurement. Clearly, at the time the RFP was issued, DHS was very much behind schedule in its compliance with the *LaShawn A.* Order and Plan. Additionally, the contracting officer was clearly not aware of certain significant matters, e.g., \$1 million limitation on funds which, if nothing else, led to initial confusion

^{33/}If each facility required five MSW's, and each MSW carried a caseload of 17, the total number of families served would have been 85.

^{34/}Because of ambiguity in the language in section C.7.3 of the RFP regarding flexible funds, we are unable to determine whether the \$300.00 allocated per family was a material RFP requirement.

^{35/}After Koba and PLCI were excluded from the competitive range, they should not have been evaluated at all. That they were evaluated (on their costs alone) in combination with other offerors' technical and cost ratings raises a question in our minds as to the mathematical validity of the final rankings and resultant validity of the awards. (AR, Ex. 16). However, we will leave the matter alone, with the caveat that such actions give rise to the appearance of an impropriety which should, in the future, be avoided.

among the offerors as well as a delayed substantial change in the RFP requirements. Nevertheless, because Koba was made aware of the changes in the agency's needs and responded accordingly, it was not prejudiced by the agency's actions.

In spite of this position, the procurement remained flawed as a result of the procuring officials' failure to use the proper techniques to be used in evaluating cost proposals. From the record of this case, we do not know whether proper cost evaluations and cost analyses would have resulted in an award to Koba. We do know that the failure to conduct proper cost evaluations was unreasonable and arbitrary and, as stated earlier, violated the law. Indeed, in our view, no awards should have been made under the RFP. *See Commercial Energies, Inc.--Recon. and Declaration of Entitlement to Costs*, B-243718, B-243718.2, December 3, 1991, 91-2 CPD ¶ 499.

Accordingly, this protest is **SUSTAINED** in part and **DENIED** in part.

Our statute provides that when requested, the Board may award reasonable bid or proposal preparation costs if we find that the District government's actions towards the protestor were arbitrary and capricious. D.C. Code § 1-1189.8(e)(2). Consequently, because of the faulty and improper cost evaluations and discussions, Koba's treatment was indeed arbitrary and capricious. Therefore, it should recover its reasonable proposal preparation costs, including those associated with the preparation of BAFO's.

Thus, it is hereby

ORDERED, that within 15 days of receipt of this Opinion and Order, protestor submit to the Board a verified, detailed statement of its proposal preparation costs; and it is


FURTHER ORDERED, that within 15 days of receipt of protestor's submission, the District submit a response, if any.

DATE: June 16, 1993



TERRY HART LEE
Administrative Judge

CONCUR:



ZOE BUSH
Chief Administrative Judge