



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ameriko, Inc.

File: B-262029

Date: November 6, 1995

Christopher Solop, Esq., Ott & Purdy, for the protester.

William A. Roberts III, Esq., Lee P. Curtis, Esq., and Brian A. Darst, Esq., Howrey & Simon, for Del-Jen, Inc., an interested party.

Eric W. Hanger, Esq., and Diane D. Hayden, Esq., Department of the Navy, for the agency.

Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Allegation that agency improperly caused protester to increase its price in its best and final offer is denied where record shows only that protester was invited to "provide a breakdown" of the prices in question; protester's determination to increase its prices in response reflects its own business judgment.

DECISION

Ameriko, Inc. protests the award of a contract to Del-Jen, Inc. under request for proposals (RFP) No. N44255-95-R-6046, issued by the Department of the Navy for base operating services for the Naval Station Everett Family Support Complex, Marysville, Washington. The protester contends that the Navy misled it during discussions into increasing its offered prices.

We deny the protest.

The RFP, issued on February 2, 1995, contemplated the award of a contract which consisted primarily of fixed-price line items, and also included a number of relatively small indefinite quantity line items, for a base year with 2 option years to provide base operating services, such as building and grounds maintenance, pest control and custodial services. The RFP advised that award would be made to the responsible offeror whose offer was most advantageous to the government and that technical merit and price were of equal importance. The RFP provided that technical proposals were to be evaluated under the subfactors of (1) experience and past performance; (2) proposed staffing; (3) resources; and (4) quality control, with the first subfactor equal to the total of all other subfactors, and the remaining subfactors of equal importance.

On February 23, proposed offerors were taken on a site visit; however the participants were confined to a bus because the Family Support Complex was still under construction. Five offerors submitted initial proposals by the March 17, closing date. Ameriko's proposal received an acceptable technical rating, and its total price of \$2,641,143 was second low. Del-Jen's proposal received a highly acceptable technical rating, and its price of \$3,624,016 was the highest received. The government estimate was \$3,157,998.81. After evaluation, three proposals, including Ameriko's and Del-Jen's, were included in the competitive range.

The agency concluded that discussions were necessary because the prices offered could not be determined reasonable or realistic on the basis of the available information. The agency first conducted written discussions with each offeror whose proposal was in the competitive range. Among other things, the agency informed Ameriko during discussions that its firm, fixed price (FFP) component of \$825,756 for the base year was too low, and asked for a breakdown of the major elements of its price. The agency also informed Ameriko that it considered its indefinite quantity (IQ) component price of \$54,625 to be unrealistically high and asked for a similar breakdown. The agency was concerned that Ameriko's proposal was unbalanced between the FFP and IQ components. The agency advised Del-Jen that it viewed its FFP of \$1,181,037 and its IQ price of \$35,530 for the base year to be high, and asked for a breakdown of these prices. In order to provide an opportunity to more carefully examine the entire facility, each competitive range offeror was given a personal site visit of the entire, virtually completed, facility.

Revised proposals were received by May 12. The technical ratings and the total revised prices for the three competitive range offerors were as follows:

	Technical Rating	Technical Rank	Price (3 years)
Del-Jen	highly acceptable	1	\$3,225,483.00
Offeror A	highly acceptable	2	\$3,039,304.23
Ameriko	highly acceptable	3	\$2,819,463.65

The revised government estimate was \$3,145,609.50. In its revised proposal Ameriko lowered its IQ price to \$43,548.96, and raised its FFP for the base year to \$889,661.88. Following evaluation of the revised proposals, the agency determined that further discussions were not necessary.

BAFOs were received by June 26. The technical ratings and BAFO prices for the three competitive range offerors were as follows:

	Technical Rating	Technical Rank	Price (3 years)
Del-Jen	highly acceptable	1	\$2,627,457.00
Offeror A	highly acceptable	2	\$3,038,040.00
Ameriko	highly acceptable	3	\$2,798,236.50

The agency determined that Del-Jen's proposal offered the best value to the government and made award to that company on July 16.

Ameriko protests that it was improperly misled by the agency during discussions into substantially increasing the FFP portion of its price, which resulted in a substantial increase in its BAFO price.

Agencies are required to conduct meaningful discussions with all offerors whose proposals are in the competitive range; the requirement is satisfied by advising them of weaknesses, uncertainties, excesses, or deficiencies in their proposals which require amplification or correction and by affording them the opportunity to submit revised proposals. Federal Acquisition Regulation (FAR) § 15.610(c)(2) and (5); Crestmont Cleaning Serv. & Supply Co., Inc.; Scott & Sons Maintenance, Inc.; Son's Quality Food Co., B-254486 et. al., Dec. 22, 1993, 93-2 CPD ¶ 336.

The protester's initial price for the FFP work was approximately 18 percent below the agency's FFP estimate. The Navy's written discussions statement was "[t]he Government considers your price for item 0001 (the price for the FFP work for the base year) to be too low. Please provide a breakdown of the major elements of your prices using the attached format." We see nothing misleading or coercive about this statement, and the record provides nothing which suggests that during oral discussions, Ameriko was otherwise instructed or coerced into raising its price. Rather, in response to written and oral discussions, Ameriko responded that it had made a "lengthy and detailed examination of all elements of our price for CLIN 0001, and have raised our price accordingly"; this statement suggests that Ameriko's price increase was based on judgments it made in response to its own review. See Eagle Technology, Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468. In this regard, the agency has submitted a declaration from the contracting officer, who personally

conducted Ameriko's second site visit, in which he related statements made by an Ameriko representative that its price would increase based on information gained as a result of the second site visit. This statement belies the assertion that Ameriko was coerced into raising its prices, and indicates that the change reflects business judgment based on a better appreciation of the nature and scope of the required work.

Ameriko also objects that the agency abandoned its initial price analysis method, upon which the discussion questions were based, in its subsequent price analyses. Specifically, the agency based its discussion questions on a comparison of Ameriko's prices and the other prices received and the government estimate, but in subsequent price analyses compared Ameriko's revised prices to the other prices received and only used the FFP portion of the government estimate for comparative purposes.

However, rather than being prejudiced by the agency's failure to use the IQ portion of the government estimate after the initial evaluation, if anything, Ameriko benefited from the discussion question concerning its IQ prices. Ameriko was informed by the agency during discussions that it considered its IQ prices too high, and Ameriko lowered its IQ prices. As a result, Ameriko's IQ price compared more favorably to other offerors' IQ prices than it otherwise would have. Under the circumstances, the agency's alleged error was not prejudicial to Ameriko. Prejudice is an essential element of every viable protest. See Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.¹

The protest is denied.

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¹Ameriko also argues that the agency's release during the protest process of Ameriko's protest, which was marked with the legend, "PROTECTED MATERIALS NOT TO BE DISCLOSED," to Del-Jen, violated the procurement integrity provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423, and its implementing regulations, FAR § 3.104. Clearly this release of information had no impact on the propriety of the award, and in any event, the inadvertently released material consisted only of bottom line prices, which should not have been considered confidential in any event.