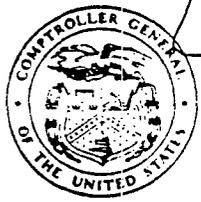


DIVISION LOS  
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**DECISION**

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

40371

FILE: B-179030

DATE: January 24, 1974

MATTER OF: Bellmore Johnson Tool Company

**DIGEST:** Protest of unsuccessful offeror submitting lowest estimated cost proposal under negotiated procurement for cost-reimbursement R&D contract denied since award of such contracts need not go to offeror with lowest estimated costs. ASPR 3-805.2(c). Furthermore, failure to conduct discussions regarding deficiencies of proposal in competitive range on basis that such discussions may result in technical transfusion, even though of doubtful propriety, does not result in patently illegal award where successful offerors' technical superiority based upon factors unrelated to such deficiencies in unsuccessful offeror's proposal. Also, no provision in procurement statutes or regulations for preferential treatment of small business concern in absence of small business set-aside.

Request for quotations (RFQ) No. DAAD05-73-Q-0934, issued February 19, 1973, by the Department of the Army, Procurement Directorate, Aberdeen Proving Ground, Maryland, was for two cost-plus-fixed-fee research and development (R&D) contracts for a full caliber training round for the 40 MM grenade launcher family in accordance with certain specified performance characteristics. Offerors were to submit their own concepts, and contract awards were to be predicated upon the "best buy" to the Government in terms of technical proposal and evaluated cost proposal. The RFQ set forth the following basic factors to be utilized in the evaluation and scoring of proposals:

- A. Technical Approach
- B. Quality of Proposal
- C. Organization, Personnel & Facilities
- D. Cost

Factor A was stated to be 2½ times as important as factor B, and 4½ times as important as factor C. Cost was not specifically weighted.

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However, it was expressly stated in the RFQ that cost was secondary to quality and that the procurement was not intended to achieve a minimum standard at the lowest cost.

The record indicates timely receipt of 15 quotations ranging from \$31,388 to \$96,581 for estimated costs and fees. A memorandum in the administrative file dated April 9, 1973, includes a scoring and ranking of technical proposals on the basis of the weighted criteria set forth above. A competitive range was established and included the 4 firms with the highest technical ratings. Bellmore Johnson (BJ) was third in technical ranking behind MB Associates and Remington Arms, Incorporated, while BJ's estimated cost and fee was the lowest. The memo of April 9, 1973 stated that no further technical negotiations would be required. Therefore, by letter of May 7, 1973, best and final offers were requested from each of the 4 firms in the competitive range. BJ's final quotation was still the lowest of the four and the technical ranking remained unchanged.

MBA was selected as one contractor on basis of its highest-ranked technical proposal and its relatively low estimated cost and fee. With regard to the other award, the record shows that while the Source Selection Committee considered the concepts of both Remington and BJ to be "technically acceptable", Remington's higher technical ranking (83.3 to 79.3) was considered to outweigh the low cost and fee proposed by BJ. In memoranda dated May 22 and June 5, 1973, from the Chairman of the SSC to the Procurement Directorate the justification for selecting Remington Arms over BJ is set forth as summarized below:

A. Technical Competence

- (1) While BJ was considered competent in small caliber rifle design and production, there were several areas in which its proposal was considered inferior to Remington's; these include aerodynamics, ballistics, experience in large caliber ammunition design, and design and production of plastic components such as required in the proposed design.
- (2) Remington's proposal was evaluated as stronger in these areas since Remington was a large company with personnel experienced in the development of plastic cases as well as a broad line of ammunition. Additionally, laboratories and facilities were available "in-house" for aerodynamic ballistic studies and experimentation with plastics.

B. Estimate of Development Effort Required

- (1) The Government estimate for the project was 2300 manhours. When compared with BJ's estimate of 940 manhours, Remington's proposed 2600 manhours were considered more likely to assure a successful development program and were considered more compatible with the complexity of the contemplated program.

C. Reliability of Marking at Impact

- (1) Remington's concept presented the prospect of improved reliability at impact, especially with soft materials, since it was predicated upon inertial energy rather than impact.
- (2) BJ's concept was considered to be of greater risk for successful development of reliability of marking at impact with such materials as mud and snow. The additional element of risk in its proposal was attributed to the departure of its concept from the standard service round in weight and firing characteristics.

D. Control of Development Program

- (1) In as much as BJ proposed to subcontract approximately one third of the work as opposed to Remington's proposal to perform the entire work on an "in-house" basis, BJ's proposal was considered to present a higher degree of risk for successful completion of the program since Remington would be able to exercise more positive control over program development.

BJ predicates its protest on the following grounds:

- (1) Its estimated cost proposal was lower than those of the two firms receiving awards.
- (2) It is a small business and, notwithstanding the fact that the procurement was not effected under a small business set-aside, it should have "received consideration, all other factors being equal."

- (3) In conversations with the Procurement Directorate it was advised that numerical scoring was not utilized in the evaluation process and, therefore, the numerical scoring must have been prepared after the protest was filed.
- (4) With regard to the unfavorable evaluation of the number of manhours and excessive subcontracting, it contends that since it was within the "zone of consideration" it should have been afforded an opportunity to resolve these matters through discussions or negotiations with the procuring activity. Moreover, the RFQ should have set forth the specified number of manhours if they were to be an evaluation factor.

With regard to the contention concerning BJ's lower cost proposal, the RFQ provided that the procurement was not intended to achieve a minimum standard at the lowest cost and, therefore, cost was considered secondary to technical competence. As noted above, Remington Arms achieved a higher technical ranking and it was determined that such technical superiority outweighed any possible cost savings offered by BJ's estimated lower costs and proposed fees.

Armed Services Procurement Regulation (ASPR) 3-805.2(c) addresses the contractor selection process with regard to cost-reimbursement type contracts in the following terms:

"\* \* \* estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (1) the lowest proposed cost \* \* \* the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government."

Our Office has recognized the application of this provision to cost-plus-fixed-fee research and development contracts and, accordingly, has interposed no legal objection to the award of such contracts at higher estimated costs where technical superiority justifies the cost premium. See B-174756, June 30, 1972. We are unable to disagree

with the administrative determination in the instant case that such cost premium was justified. Even though the point spread between the Remington Arms and BJ technical proposals was not particularly significant, we believe that the narrative explanation of the differences, set forth above, amply justifies the selection.

BJ states that since it is a small business firm special consideration should have been given to its proposal as "all other factors were equal." Such argument is premised on the assumption that the proposals were equal when, in fact, they were not so considered. Furthermore, there is no provision in the applicable procurement statutes or regulations for preferential treatment of small business offerors in the absence of a designated set-aside. Therefore, we find no validity in this contention.

The agency denies BJ's assertion that it was told that numerical scoring was not utilized in the evaluation of proposals. Furthermore, the numerical scoring of technical proposals is included in the record as an attachment to a memorandum dated April 9, 1973. Therefore, we cannot conclude that the scoring was compiled following the institution of BJ's protest as is contended.

BJ contends that the subject procurement was not stated to be predicated on a particular "level of effort" and, therefore, the Government should not have based its selection on a specified number of manhours without such factor having been set forth in the RFQ.

Our Office has taken the position that sound procurement practice dictates that offerors be informed of all evaluation factors and of the relative weights to be attached to each factor. 47 Comp. Gen. 336, 342 (1967). However, the record shows that while the Government estimated a 2,300 manhour effort for the project, there was no required "level of effort" as it was recognized that each technical concept was unique and the proposed number of manhours would vary according to the particular concept and other factors. In this connection, we note the procuring activity considered one successful offeror's proposal of 1840 manhours acceptable in terms of the concept proposed and its prior development effort, while the 2600 manhours proposed by the other successful offeror were considered warranted by the complexity of the program which that concept contemplated.

Therefore, we cannot conclude that the Government's 2300 manhour estimate was a required "level of effort" or an evaluation factor, per se, which should necessarily have been set forth in the RFQ. It would appear, rather, that the procuring activity's consideration of

the respective number of proposed manhours was related to an offeror's capability to accomplish its technical concept and the realism of its cost proposal. In this regard, the record states that BJ's estimated 940 manhours indicated a low probability that its development program would be completed without additional funding. Inasmuch as the RFQ expressly stipulated that cost proposals would be evaluated, inter alia, as to cost realism, it would appear that the procuring activity's evaluation of BJ's proposed number of manhours was on the basis of this express evaluation factor rather than an unstated "level of effort."

Finally, BJ takes the position that the agency's doubts concerning manhours and subcontracting could have been resolved to its satisfaction had it conducted discussions with BJ. Moreover, since BJ was within the "zone of consideration" or "competitive range", it is contended that the failure of the procuring activity to provide BJ with an opportunity to resolve such alleged deficiencies was in derogation of 10 U.S.C. 2304(g) and ASPR 3-805.1(a), requiring written or oral discussions with offerors whose proposals fall within a competitive range.

The procuring activity has stated that negotiations were limited to discussions of cost matters and a request for best and final offers since:

- (1) each proposal was considered technically acceptable as submitted, and
- (2) a possibility existed that more extensive negotiations might introduce Government ideas to the detriment of other offerors, or inadvertently infringe on the concepts of other offerors.

Under some circumstances, an opportunity to revise prices or a request for best and final offers has been deemed to satisfy the statutory and regulatory requirements for "discussions". See 52 Comp. Gen. 161, 165 (1972). On the other hand, discussions should be meaningful, which in particular circumstances requires furnishing information to all offerors within the competitive range as to the areas in which their proposals are believed deficient. 50 Comp. Gen. 117, 123 (1970). The mere fact that initial proposals may be rated "acceptable", as in the instant case, does not necessarily invalidate the requirement for discussions of their weaknesses, excesses or deficiencies. 50 Comp. Gen. 117, 123, supra.

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Our Office has recognized the potential in research and development procurements for the disclosure to other competitors of the fruits of an offeror's innovative efforts, and has acceded to determinations in particular cases that technical negotiations be curtailed to the extent necessary to avoid such divulgence or technical transfusion of concepts. B-177542(1), May 23, 1973, 53 Comp. Gen. \_\_\_\_\_. However, as pointed out in that case, a decision not to conduct technical discussions in a given case should be given close scrutiny as there may be instances where certain weaknesses, inadequacies or deficiencies in proposals may be discussed without risk of technical transfusion or the divulgence of other offerors' proprietary concepts. In the instant case, we believe it is questionable whether technical negotiations limited to clarification discussions of BJ's proposed manhours and subcontracting would have run the risk of technical transfusion or divulgence of other offerors' concepts.

However, we are unable to conclude that this possible deficiency in the negotiation procedure resulted in a patently illegal award as it is our view that it is doubtful, at best, that satisfactory resolution of the questions in these areas would have affected the relative ranking between Remington Arms and BJ. We believe it is clear from the technical narrative above that Remington Arms' selection resulted primarily from affirmative findings with respect to its experience in certain critical areas, greater "in-house" laboratory and facility capability, and a concept presenting the prospect of improved reliability at impact, rather than from any negative findings with respect to the adequacy of BJ's manhours or excess subcontracting.

In view thereof, the protest is denied.

  
Deputy Comptroller General  
of the United States