

# DECISION



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

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FILE: B-182979

DATE: September 12, 1975

MATTER OF: Corbetta Construction Company of Illinois, Inc.

## DIGEST:

1. By accepting offeror's initial turnkey housing proposal-- regarded as most favorable to Government--which nonetheless substantially varied from specific RFP requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change in specifications, without complying with provisions of ASPR § 3-805.4 (1974 ed.), deprived other offerors of equal opportunity to compete and Government of benefits of maximum competition.
2. Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. § 2304(g) (1970) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Government can be assured of obtaining most advantageous contract.
3. Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (see ASPR § 7-2002.4 (1974 ed.)) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held with other offerors in competitive range.
4. Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing

relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal.

Corbetta Construction Company of Illinois, Inc., and Joseph Legat Architects (hereinafter Corbetta) have protested against the award of a contract to Towne Realty, Inc., Woerfel Corporation and Miller, Waltz, Diedrich, Architect & Associates, Inc., a joint venture (Towne) under request for proposals (RFP) No. N62472-72-R-0298, issued by the Northern Division, Naval Facilities Engineering Command. The RFP sought offers to design and construct 210 family housing units at the Naval Training Center, Great Lakes, Illinois. Corbetta seeks termination of the Towne contract and an award to itself. Also, Corbetta claims its proposal preparation costs.

Corbetta's several submissions make numerous and detailed allegations of error by the Navy in the conduct of the procurement. For its part, the Navy has responded with detailed reports denying the protester's contentions. All of the issues raised have been considered, but this decision concentrates on the resolution of those issues which we believe are dispositive of the matter.

Corbetta's principal contentions are as follows:

--The Navy improperly evaluated the Towne technical proposal by failing to adequately penalize it for not less than 124 deficiencies. By accepting a proposal which should have been judged unacceptable, the Navy improperly waived certain essential technical requirements of the RFP.

--In regard to the foregoing, the Navy failed to comply with the requirements of the Armed Services Procurement Regulation (ASPR (1974 ed.)) concerning the conduct of discussions with all offerors within the competitive range.

--If the Navy had allowed Corbetta to compete upon the basis of the "relaxed" requirements applied to Towne, Corbetta could have made a substantial reduction in its offered price and its proposal would have become the most advantageous, price and other factors considered.

--Even accepting the results of the erroneous technical evaluation, Corbetta should have received the award for other reasons. The Navy improperly refused to consider three attempts by Corbetta, after the receipt of initial proposals, to substantially reduce its offered price. Nevertheless, the Navy accepted an extension of the Towne offer conditioned upon a \$247,640 increase in its offered price. The acceptance of Corbetta's offered price reductions, either with or without considering the \$247,640 Towne price increase, would have made Corbetta's the most advantageous proposal under application of the price/quality evaluation ratio stipulated in the RFP.

For the reasons which follow, we sustain the protest and recommend, inter alia, that the RFP be reinstated and negotiations opened with all offerors within the competitive range. In view of our recommendations, we see no need to consider further Corbetta's claim for proposal preparation costs.

#### BACKGROUND

The RFP, issued April 22, 1974, solicited "basic" proposals (including offered prices for the entire work set forth in the RFP), prices for four deductive items (specific items which might be deleted), and also allowed offerors to list other deductive items which were over the minimum requirements and which the offeror was willing to delete. Eight offerors submitted proposals. The proposals were identified only by number, but for purposes of clarity will be discussed here by name. One proposal was rejected for failure to submit a bid bond, and the remaining seven were evaluated.

Corbetta's basic proposal received the highest technical rating (772 out of a possible 1,000); Towne ranked second (647), and the remaining five offerors were ranked from 584 to 476. Towne's basic proposal price was lowest (\$6,191,000); Corbetta was second lowest (\$7,690,400) and the remaining five offerors' prices ranged from \$7,790,000 to \$8,949,500.

In this regard, the record does not reflect any formal determination of a competitive range. However, the Navy representative who attended the May 29, 1975, conference on the protest at our Office indicated that the seven offerors whose proposals were evaluated were considered to be within the competitive range for this procurement.

In a report dated September 25, 1974, to the Commanding Officer, Northern Division, Naval Facilities Engineering Command, the Navy

Contract Evaluation and Selection Board recommended award to Towne. The Board's report recognized that Corbetta, considering both the basic proposal and the basic less all combinations of deductive items, provided "significantly more quality" than Towne. However, the Board noted that Towne's price was lower, and that the price/quality ratio was roughly the same for both. In this regard, The Navy's Standard Technical Evaluation Manual (TEM) for Turnkey Family Housing provides for use of the price/quality ratio (price ÷ quality points) as an evaluation and selection technique, and that selection will normally be on the basis of the lowest price/quality ratio. As applied to Towne and Corbetta, the ratio yielded the following basic proposal dollars-per-points figures:

$$\text{Towne} : \frac{\$6,191,000}{674} = \$9,569$$

$$\text{Corbetta: } \frac{\$7,690,000}{772} = \$9,962$$

In this regard, we note that the modified version of the TEM which was released to the offerors did not disclose the Navy's use of the price/quality ratio or its significance in the evaluation and selection process, nor was this information contained in RFP section 1C.14, "Evaluation Criteria."

Notwithstanding the September 1974 recommendation of an award to Towne, the Navy report to our Office indicates that no award was possible at that time. This was because all offerors' proposed prices, even with all deductives, exceeded the applicable statutory cost limitation. In this regard, section 502(b) of Public Law 93-166, November 29, 1973, 87 Stat. 675, provided that the average unit cost for each military department for all units of family housing constructed in the United States shall not exceed \$27,500. The statutory cost limitation as applied to this procurement (210 units x \$27,500) was therefore \$5,775,000. The Towne basic proposal with deductives, priced at \$5,923,000, reflected an average cost per unit of \$28,205. As noted supra, all other proposals were higher in price.

The Navy report indicates, however, that in September 1974 Congress was considering the Fiscal Year 1975 military construction authorization bill, and it was anticipated that the average unit cost limitation would be raised to \$30,000. On this basis, the statutory cost limitation for the project would be \$6,300,000. The selection board relied on the expected future limitation in recommending award to Towne.

Between September 30, 1974, and October 15, 1974, Corbetta submitted three unsolicited reductions to its offered price, which the Navy rejected. In the meantime, the Navy requested all seven offerors to extend their offers to December 6, 1974, because the Fiscal Year 1975 authorization bill had not yet been enacted. All offerors granted the extension; Towne's extension was conditioned upon a \$247,640 increase in its price "due to the current economic situation," in Towne's words. Further extensions through January 6, 1975, were sought and obtained from the offerors without changes in the offers. Public Law 93-552, enacted December 27, 1974, 88 Stat. 1757, provided for an average cost limitation of \$30,000. A notice of contract award, dated January 6, 1975, was issued to Towne. The award, which reflected the above Towne price increase, was made at a total price of \$6,235,840 for the basic proposal with certain deductives.

The record does not indicate that any written or oral discussions were conducted with the offerors at any time up to the award. The Navy report indicates that the accepted \$247,640 increase in Towne's price was the only change to the proposals as originally evaluated.

TECHNICAL EVALUATION OF TOWNE PROPOSAL--  
REQUIREMENT TO CONDUCT DISCUSSIONS

Before considering specific issues in this area, it is useful to describe generally some of the contents of the RFP and what offerors were asked to submit. In this regard, the RFP Standard Form 21, Modified Proposal Form, contained a "CAUTION" that "PROPOSALS SHOULD NOT BE QUALIFIED BY EXCEPTIONS TO THE CONDITIONS CITED IN THE REQUEST FOR PROPOSAL." Page 1 of the RFP, bearing the heading NAVFAC SPECIFICATION NO. 04-72-0298, stated "This specification consists of 143 pages." Further, section 1A.2 stated:

"The specification and attachments outline the criteria and requirements to be used by proposers in submitting their proposal. Proposals must be submitted in accordance with this specification and include the 'Required Data,' as specified herein."

Section 1C.2 sets forth the required data to be submitted with proposals. Among this information was "required technical data" (section 1C.13), including specifications (showing, among other

things, quality of materials and fixtures); drawings (showing overall site layout, site plan, floor plans, elevations, and other features); and an equipment schedule (identifying equipment size, capacity, manufacturer, model, and other information).

In addition, section 1C.13 cautioned that failure to submit all data might be cause for determining a proposal "nonresponsive"; section 1C.8 mentioned "failure to comply with technical features" as an illustration of a circumstance which might result in a proposal being held "nonconforming" and ineligible for award.

In addition to the requirements applying to submission of proposals, section 1B.22(a) provided that after award the contractor would be required to submit construction drawings, specifications, and design calculations:

"The contractor shall submit for review within 60 days after award six copies of final construction drawings and specifications, which will be in accordance with the requirements of the RFP, the contractor's proposal, and all other terms and conditions affecting contract award. Upon completion of Navy review of the plans and specifications, the contractor shall furnish one reproducible copy of the drawings and specifications. Design calculations shall be submitted for mechanical, electrical, structural (particularly wind loading analysis and design) and plumbing work, pavements, all utilities, storm drainage, heat transmission coefficients, and as otherwise necessary for a complete review of all engineering design work. Electrical design calculations shall include voltage drop computations, short circuit analysis, load calculations, and lighting calculations. Design calculations which are developed for standardized or repetitive features of the housing units shall be extended, as may be appropriate, to account for non-standard siting features such as building orientation, 'end unit' requirements in multi-unit buildings and variations in terrain which impact housing water service pressure and drainage characteristics. Final drawings and any subsequent changes to these drawings shall be approved by a registered professional architect or engineer before submittal for review. Such review does not constitute approval or acceptance of any variations from the RFP or from the proposal unless such variations have been specifically pointed out in writing by the contractor and specifically approved in writing by the Navy."

As noted supra, Corbetta has argued that the Navy failed to properly evaluate the Towne technical proposal as regards 124 omissions, deficiencies or other shortcomings, and that in so doing the Navy in effect waived certain requirements of the RFP.

The Navy's position is that the RFP did not require the proposals to be final designs of the housing project, but only that they be in sufficiently concrete form so as to be susceptible of evaluation under the factors stated in the RFP. Thus, the Navy is of the view that the technical evaluators properly would not object to missing details or nonconforming items in initial proposals, as RFP section 1B.22(a), supra, contemplated that the final design will be accomplished during contract performance. The Navy indicates that upon reviewing the contractor's submission of data under section 1B.22, it will insure that all "inchoate" elements of the Towne proposal conform to the RFP requirements.

In contrast to a proposal with "missing details or nonconforming items," the Navy report notes that "Obviously clarification will be sought and obtained at the proposal stage when the proposal affirmatively and significantly deviates from the requirements of the RFP."

Consideration of applicable legal principles must begin with 10 U.S.C. § 2304(g) (1970) which establishes a general requirement to conduct written or oral discussions with all responsible offerors within a competitive range in a negotiated procurement. The statute and implementing regulations (see ASPR § 3-805.1 (1974 ed.)) provide exceptions to this requirement. In this regard, ASPR § 3-805.1(a), (b) (1974 ed.) states in pertinent part:

"(a) Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:

\* \* \* \* \*

(v) in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however, that the solicitation notified all offerors of the possibility that award might be made without

discussion, and provided that such award is in fact made without any written or oral discussion with any offeror.

"(b) For the sole purpose of eliminating minor uncertainties or irregularities, such as discussed in 2-405, an inquiry may be made to an offeror concerning his proposal. Such inquiries and resulting clarification furnished by the offeror shall not constitute discussions within the meaning of this paragraph 3-805. If the clarification prejudices the interest of other offerors, award may not be made without discussion with offerors in the competitive range."

ASPR § 3-807.1(b)(1) (1974 ed.) further describes "offers responsive to the expressed requirements of the solicitation" as one of the necessary components of "adequate price competition."

Where an exception to the statutory requirement is not invoked and negotiations are conducted, it has been held that the failure to conduct written or oral discussions with offerors to the extent necessary to resolve uncertainties relating to the work requirements or the price to be paid violates the requirement for meaningful negotiations. See Signatron, Inc., 54 Comp. Gen. 530 (1974).

In addition to the competitive benefits to be derived from meaningful negotiations with the offerors, negotiations may be required to insure that all offerors are competing on an equal basis. It is a fundamental principle in Government procurement that the competition be conducted on the basis of the work actually to be performed, that is, that the contract awarded is the contract that bidders or offerors have competed for. See A&J Manufacturing Company, 53 Comp. Gen. 838, (1974).

In this regard, ASPR § 3-805.4 (1974 ed.) provides in pertinent part:

"3-805.4 Changes in Government Requirements.

"(a) When, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the solicitation. When time is of the essence, oral advice of changes may be given if (i) the changes involved are not complex in nature, (ii) a record is made of the oral advice given, (iii) all firms to be notified (see (b) below) are notified as near to the same time as feasible, preferably the same day, and (iv) the oral advice is promptly confirmed by the written amendment.

\* \* \* \* \*

"(c) When a proposal considered to be most advantageous to the Government involves a departure from the stated requirements, all offerors shall be given an opportunity to submit new or amended proposals under (a) or (b) above on the basis of the revised requirements, provided this can be done without revealing to the other offerors the solution proposed in the original departure or any information which is entitled to protection under 3-507.1."

Thus, in a situation where the RFP called for "100%" compliance with a stated requirement, the agency's acceptance of a different approach to meeting the requirement represented a change in the requirement, and the failure to amend the RFP so as to allow competing offerors the opportunity to submit revised proposals was held to be a departure from ASPR § 3-805.4 (1974 ed.). Unidynamics/St. Louis, Inc., B-181130, August 19, 1974. The same principle applies where a protester has been misled into believing that the solicitation requires it to meet certain stated requirements, whereas, in fact, this was not the agency's intention, and an offer to meet lesser requirements was considered to be acceptable. See Instrumentation Marketing Corporation, B-182347, January 28, 1975. In that decision we stated: "\* \* \* it was incumbent upon the contracting officer to issue a written amendment

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which clearly set forth the Government's actual requirements and to allow the submission of offers based on those requirements." To the same effect, see Annandale Service Company et al., B-181806, December 5, 1974; Signatron, Inc., supra; and Computek Incorporated et al., B-182576, June 25, 1975, 54 Comp. Gen. \_\_\_\_.

To be compared with the foregoing cases is the situation where the agency properly amends the RFP advising offerors of the change in requirements, so that competition may then proceed on an equal basis. See Connelly Containers, Inc., B-183193, June 16, 1975.

None of the foregoing decisions involved turnkey military family housing procurements, but our Office has recognized that the principle of providing an equal opportunity to offerors to revise their proposals in response to changes in requirements does apply in this context. See 51 Comp. Gen. 129, 133 (1971); B-170731(2), July 21, 1971.

Moving to the specific points of technical nonconformity in the Towne proposal alleged by Corbetta, we must state at the outset that we do not consider it necessary to review here each and every allegation made. We think that the following discussion is adequate for the purposes of resolving the matter.

The following are summary statements of 26 instances of alleged omissions in the Town proposal. References in parentheses are to sections of the RFP:

- (2A.4.A(10)) No provision made to widen existing waterway due to reduction in flood plain.
- (2A.4.B(1)) Main collector roads do not provide for required on-street parking because of minimum widths shown.
- (2A.4.C(1)) Water traps (ponding) are present in several locations.
- (2A.4.C(11)) Required new pipe to Skokie drainage ditch is omitted from proposal drawings.
- (2A.4.D(2)) Insufficient sectional control valves in water system.

- (2A.4.D(6)) Failure to provide master metering of utilities on major supply lines into housing sites.
- (2A.4.E(5)) Three unauthorized sewer line connections.
- (2A.4.F(5)) Only one-half of the required gas plug valves are provided.
- (2A.4.G(10)) Excessive distance between some street lights.
- (2A.4.I(1)) "Tot lots" are not fenced.
- (2A.4.B(4)) In a number of locations there is a failure to provide sidewalks on both sides of the street.
- (2A.4.A(2)) Failure to provide backyard screening. In 48 units the living and dining room view is a 7-foot wire fence along a drainage ditch. Towne's proposal drawing number 1 indicates that in four units along Superior Street, when back door is opened occupants would exit into drainage ditch were it not for the fact that the 7-foot fence prevents the back door from opening.
- (2A.5.C(3)) Failure to provide bedroom windows not more than 48 inches above the floor to permit escape of occupants in emergencies.
- (2A.5.F(9)) Proposal offers semigloss paint rather than required vinyl wall covering in bathrooms.
- (2A.10.A(1)(b)) Failure to provide distribution of heating or cooling to any of the bathrooms.
- (2A.10.A.1(e)) Towne has proposed insulating the attics with blown fiberglass. This would tend to close off the attic ventilation. Also, Towne drawings Nos. 14, 15 and 16 do not show any provision for access to the attics, which is necessary in order to check the insulation and/or repair the television antennas.
- (2A.6.B(11)) Failure to indicate that steel embedded in concrete will be galvanized and asphalt coated.
- (2A.6.C) Proposal offers aluminum-on-galvanized-steel gutters and downspouts whereas RFP prescribed nonferrous gutters and downspouts.

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- (2A.6.I) Failure to provide pressure treated wood protection at foundation sills/plates.
- (2A.6.M) Failure to indicate information necessary to determine compliance with weatherstripping and threshold requirements.
- (2A.7.D) Failure to indicate that glass extending to within 18 inches of floors will be fully tempered safety glass.
- (2A.10.B(14)) Failure to indicate ground fault electrical circuit interruption for west area and exterior locations.
- (2A.10.B(10)) Failure to furnish lighting fixture and outlet in carport area.
- (2A.10.C(14)) Failure to provide hose bibs at front and rear of each unit.
- (2A.3.C) Failure to indicate pressure relief valve and discharge drainage line for the water heater.
- (2A.10.C(13)) Failure to show 4-inch dryer vents for clothes dryers.

The Navy report makes the following identical reply to each of the foregoing items cited by the protester:

"The G-73 [Towne] proposal is in strict accordance with all provisions of the RFP. Although this item is not clearly presented on the proposal drawings, it will be properly shown in the final design documents and will be thoroughly reviewed by the Government."

In considering the foregoing, we must first direct our inquiry to the nature of the RFP specifications, such as the 26 particular sections cited above, and to their meaning within the context of a negotiated turnkey housing procurement. In this regard, the following observation from 51 Comp. Gen. 129, supra, at page 131, is pertinent here:

"Briefly stated, under the 'turnkey' method, a developer builds in accordance with plans and specifications prepared by his own architect and to a standard of good design, quality and workmanship. Necessarily,

the guidance in the solicitation is limited to an indication of the features required, such as style of house, number of bedrooms and baths, etc., and an indication of where the housing is to be located on the site--essentially, performance specifications.  
\* \* \*

We note that some of the RFP specifications do set forth a rather general description of the Navy's needs in permissive or precatory terms. For example, section 2A.4.A, dealing with site design and construction, advises that "Variety in groupings, arrangements, and siting configurations of houses is encouraged \* \* \*" and that "Maximum attention to solar orientation is recommended \* \* \*." Yet the same section also states: "The proper grouping of units will provide backyard screening, separation of pedestrian and vehicular traffic, recreation, and natural open spaces. \* \* \* Appropriate buffer areas suitably landscaped shall be provided to separate and screen from undesirable external influences." (Emphasis added.) It would be difficult to conclude that these terms represent anything but mandatory, albeit general, requirements. See, in this regard, the protester's argument concerning Towne's failure to provide backyard screening, supra.

Of even greater significance is the fact that other sections of the RFP set forth highly specific requirements. Consider, for example, section 2A.4.I(1): "Provide fencing around tot lots which are near to streets." In this regard, it is of interest to note that the award to Towne apparently deleted the tot lots altogether, although the specification only mentions submitting a deductive price for the omission of tot lot equipment. Also, section 2A.4.B(4) states: "Sidewalks on both sides of the streets shall be included in basic scope of proposals." Section 2A.4.C(1): "Ponding anywhere on the site will not be acceptable." Section 2A.6.B(11): "Steel embedded in concrete \* \* \* shall all be galvanized and \* \* \* the entire embedded length \* \* \* shall be asphalt coated." We believe it is unnecessary to go into further detail except to indicate that the 26 illustrations cited above appear to involve features or items stated as mandatory requirements of the RFP, many of which are highly specific.

In this light, we have considerable difficulty with the Navy's view that the elements of the Towne proposal cited above merely involve somewhat unclear items or minor details which, under the scheme of turnkey procurement, can properly be corrected in the final design review. We agree with the sense of Corbetta's comment

that where a specific required item is not shown at all in the proposal, it can hardly be classified as not clearly presented.

The Navy has stated, however, that the Towne proposal is in strict accordance with all provisions of the RFP. While the basis for this statement is not clear, it possibly refers to a cover letter dated July 5, 1974, submitted with the Towne proposal. This letter stated in pertinent part:

"In compliance with the Request for Proposal, the undersigned proposes to perform all design and construction for the 210 units of Military Family Housing project at the Naval Training Center (Forrestal Village), at Great Lakes, Illinois, in strict accordance with the general provisions, plans, specifications, schedules, drawings and conditions for the consideration of the prices stated. \* \* \*"

We have held that where an RFP requires offerors to submit detailed technical proposals, a blanket offer of compliance is not an adequate substitute. See 53 Comp. Gen. 1 (1973). Similarly, we think that given the detailed specifications stated in mandatory terms, Towne's blanket offer is insufficient to cure the proposal's omissions or deviations from the specific requirements of the RFP. We believe that the reasonable interpretation of the Towne proposal's omitted items is that the offeror is not offering to furnish these items. This result is in accord with the principle of interpretation that the meaning of an instrument's specific provisions will govern over more general statements. 4 Williston on Contracts, Third Edition Section 619.

Likewise, we do not believe that the instances of omission in the Towne proposal could properly be characterized as "minor details." It may be true that the price impact of individual items is relatively small. For example, the protester estimates the price of the light fixtures and outlets in the carport area at \$12,500, and the hose bibs and piping at \$33,600. But we think it is apparent that the overall price impact, given the volume of omissions, could well be substantial. Corbetta speculates that conformance with all RFP requirements would increase Towne's price by \$650,000. Conversely, the protester contends that if it had been allowed to compete on the basis of the relaxed requirements applied to Towne, it could have decreased its price to \$5,817,000. Whatever the actual impact, the vital point is that such questions should not be left to speculation, but should be tested by means of discussions with all offerors in the competitive range and an opportunity for offerors to submit revised

proposals. See, in this regard, B-170731(1), July 21, 1971, where this principle was discussed in connection with the price impact of an offeror's substitution of cedar roof shingles for asphalt shingles in a Navy turnkey housing procurement.

In addition to the omissions, we note that there appear to be several instances where the Towne proposal either affirmatively deviated from the RFP requirements, or contained inconsistent or ambiguous responses to the requirements. A brief summary of nine of these elements of the Towne proposal as cited by the protester and the Navy's responses follows:

--Towne's overall site plan layout drawing, 1"-100' scale does not show gas utility lines as required by RFP section 1C.13.

Navy: Gas utility lines are shown. Some are incorrectly located, but Towne has been directed to properly locate them.

--Towne's erosion control drawings, 1"-40' scale, show six housing units located within the 40-foot restriction line (established by RFP section 2A.4.A(5), as amended by RFP amendment No. 1) of the Skokie drainage ditch.

Navy: Towne's site design drawings, 1"-100' scale, indicate compliance with the 40-foot setback.

--Eight housing units cannot use an existing fire hydrant, as proposed by Towne, because of the intervening 7-foot high fence (RFP section 2A.4.D(3)).

Navy: Towne has been directed to investigate the possibilities of using the existing fire hydrant. This is a matter of final design review.

--Towne's specifications information furnished under RFP section 1C.13(a) indicates no building paper under exterior walls whereas RFP section 2A.6.D required building paper under all siding materials.

Navy: Towne's drawing No. 20 (furnished pursuant to RFP section 1C.13(b)) indicates building paper.

--Towne proposal drawings Nos. 14, 15 and 16 indicate sliding glass doors, which are prohibited by RFP section 2A.7.E.

Navy: Towne drawings Nos. 17, 18 and 19 (elevations) do not indicate sliding glass doors.

--Towne's proposal fails to provide either a master cable TV system or a common antenna system as required by RFP section 2A.10.B(13).

Navy: TV outlets are indicated on floor plans of living and family rooms.

--Towne proposal drawings Nos. 14, 15 and 16 show heating/cooling supply outlets in the second floor--a feature prohibited by RFP section 2A.10.A.1(b).

Navy: Indications on these sheets do not necessarily mean the supplies will be in the floor.

--The Towne proposal offers locksets which do not conform to the RFP specifications. (Section 2A.6.M.5(a))

Navy: Towne has been directed to install locksets which meet the RFP requirements.

--Towne's proposal drawing No. 20 identifies exterior siding as "hardboard siding" whereas Towne's specifications information indicates exterior walls as "plywood \* \* \* 5/8". The installation method for each is different and Towne has failed to provide sufficient information as to its intentions.

Navy: Towne will conform to the typewritten portions of the contract. The contract requires the plywood properly installed.

Where a turnkey housing proposal provides at least some response to specific requirements of the RFP, we do not disagree with the Navy's general observation that expert technical evaluators might properly decide not to question relatively minor details or areas in which the proposal might appear to be somewhat unclear. It must also be noted that the content and extent of discussions necessary to meet the statutory requirement is a matter of judgment primarily for determination by the contracting agency and is not subject to objection

by our Office unless clearly without a reasonable basis. See Austin Electronics, 54 Comp. Gen. 60 (1974).

But where, as here, it appears that no aspect of the successful proposal has been subjected to question through discussions, and portions of the proposal admittedly depart from the requirements or are unclear, we think the same difficulty is present as is involved in the case of outright omissions in the proposal. That is, where an offeror proposes to furnish something different from what is called for, the reasonable interpretation is that its offer is thereby limited to what it proposes to furnish, and that by accepting the offer the Government is changing its requirements.

Also, where the offer is unclear, e.g., contains inconsistent or ambiguous responses to specific RFP requirements, it becomes uncertain what the offeror is proposing to furnish and what the Government is contracting for. In this regard, we note that the Navy's April 18, 1975, report contains an enclosure, apparently prepared by the Navy technical evaluators, which discusses the technical quality of the Corbetta and Towne proposals. This document concludes by stating: "Many parts of \* \* \* [Towne's] proposal are questionable or unclear and will require careful scrutiny at final design." It is our view that, as with the case of omissions, the cumulative weight of deviations and uncertainties in the offer tends to offset a contention that the items are minor details.

Aside from Towne's proposal, an additional consideration is the effect of deviations, omissions and uncertainties present in the other six offers in the competitive range. In this regard, the Navy's April 18, 1975, report asserts that there were more than 15 nonconforming items in Corbetta's proposal. We note that the other five offers in the competitive range received substantially lower technical ratings than Corbetta and Towne. Under these circumstances, we think it unlikely that these offers contained no deviations, omissions or uncertainties which properly would call for discussions.

As noted previously, one of the necessary criteria of "adequate price competition"--the only apparent basis which could be relied on here to justify an award on the basis of the initial proposals--is that there are at least two offers responsive to the expressed requirements of the solicitation. We think the foregoing facts raise some doubts as to whether this criterion was met. In any event, it is our view that the existence of substantial technical uncertainties in initial proposals--whether due to the proposals' failure to conform to a key technical requirement, or to the cumulative effect of a large number of relatively minor items--requires the conduct of written or

oral discussions to the extent necessary to resolve the uncertainties. This conclusion follows from the statutory requirement to conduct discussions and from the limited nature of the exception to this requirement that award can sometimes be made on the basis of the initial proposals. Unlike an advertised procurement, where competition is solely on the basis of price, a negotiated procurement involves consideration of both price and "other factors," i.e., technical considerations. In this connection, we understand that the concept of negotiated turnkey housing procurement represents a departure from the prior practice of advertising for this work and an attempt to obtain housing which represents the best value to the Government, considering both price and technical quality.

Where the Government's technical evaluators have noted a substantial number of questionable and uncertain areas in the initial proposals and no discussions are conducted, it becomes uncertain whether the Government is obtaining the most advantageous contract from a price and technical standpoint by making an award on the basis of the initial proposals. We believe discussions are required to clarify the actual technical quality being offered and also to determine whether any of the Government's requirements should be modified. We believe this is so regardless of whether the initial proposals are rated, in an overall sense, as technically acceptable, or whether they contain blanket offers to conform to the requirements.

We would also note that where, as here, substantial technical uncertainties in the initial proposals are involved, it is clear that ASPR § 3-805.1(b) (1974 ed.), quoted supra--which provides that clarification obtained to eliminate minor uncertainties or irregularities in initial proposals does not constitute "discussions"--is not pertinent. By way of comparison, for a case in which minor uncertainties were properly clarified in accordance with ASPR § 3-805.1(b) (1974 ed.), see Ensign Bickford Company, B-180844, August 14, 1974.

The Navy has asserted that it will insure that Towne's performance of the contract fulfills the requirements of the RFP. In this regard, the agency cites the RFP's Precedence clause, section 1B.4.1.5, which indicates that the provisions of the RFP take precedence over the contents of the contractor's proposal. Whether or not the contractor's performance will conform to the requirements is immaterial as far as the present protest is concerned. The issue here is not whether Towne will conform to the RFP requirements, but whether the requirements of competitive negotiation were complied with in the procurement. See Instrumentation Marketing Corporation, supra.

In any event, we are of the view that notwithstanding the Precedence clause, a situation of this kind is ripe with the potential for disputes between the Government and the contractor. We note that in the context of a contractor's claim of compensation for additional work it does not believe it is required to furnish, it may be open to question whether a statutory cost limitation can provide an effective barrier to the Government's involuntarily incurring additional costs. See, for example, Ross Construction Corporation v. United States, 392 F.2d 984 (Ct. Cl. 1968). Also, any voluntary modifications to the Towne contract which might be needed to require it to meet all the RFP requirements and which involve additional costs to the Government would, of course, amount to a noncompetitive procurement between the Navy and Towne for requirements which should have been competed for prior to award. These potential difficulties and risks could and should be minimized by meeting the requirement to conduct meaningful discussions with all offerors prior to award.

Based on the foregoing, we are satisfied that the Towne proposal was substantially at variance with the RFP's requirements. We need not decide, as the protester urges, that Towne's proposal therefore should have been rejected as technically unacceptable. The flexibility of negotiated procurement permits consideration of proposals which do not fully conform to the specifications. But, by the same token, the flexibility of negotiated procurement cannot be used to effect changes in the Government's requirements by accepting the most favorable initial proposal which substantially varies from the RFP's stated requirements. We believe that by such action, the contracting agency waives, for the purposes of the competition among the offerors, the stated requirements as to which the successful proposal fails to conform. In these circumstances, the contracting agency has departed from the requirements of ASPR § 3-805.4 (1974 ed.), other offerors have not been given an equal opportunity to compete, and the Government has been deprived of the benefits of the maximum competition contemplated by the statute and regulations. Also, we believe that the presence of uncertainties as to the technical aspects of the various proposals precluded an award on the basis of the initial proposals and required the conduct of written or oral discussions with all offerors within the competitive range.

The foregoing circumstances, considered together with our conclusion, infra, concerning the Navy's acceptance of Towne's late price increase, compel the finding that the award to Towne be judged improper and that the protest be sustained.

LATE MODIFICATIONS TO CORBETTA  
AND TOWNE PROPOSALS

Corbetta contends that the Navy should have accepted its three attempted price reductions (apparently totaling \$325,400) and should have rejected the \$247,640 Towne price increase. The Navy, on the other hand, believes that Corbetta's late price reductions were properly rejected under the RFP's late proposal clause. As for the Towne price increase, the Navy contends that once an offer expires, the offeror is free to review the offer on whatever terms it then deems desirable. Further, the Navy submits that to deny an offeror the ability to revise its price on extension would result in continued participation in the procurement under economic duress, or a refusal to extend. The Navy cites B-164569, December 6, 1968, in support of the principle that an offeror can revise its price upon extending its offer; B-161513, July 24, 1967 and 49 Comp. Gen. 625 (1970) are cited to establish a distinction between the propriety of rejecting Corbetta's late price reductions, on the one hand, and the propriety of accepting Towne's price increase, on the other.

Judging from the facts of record at the time in question, and without the benefit of knowledge of changes in offers which would have resulted from technical discussions had they been conducted, we must conclude that the Navy acted properly in rejecting Corbetta's late price modifications.

Section 1B of the RFP contained a clause entitled "LATE PROPOSALS, MODIFICATION OF PROPOSALS OR WITHDRAWAL OF PROPOSALS (1973 SEP)." This clause is substantially identical to the one set forth in ASPR § 7-2002.4 (1974 ed.). It provides generally that late proposals shall be rejected, with three specified exceptions, none of which is relevant here. The clause also provides that late modifications, except those resulting from a request for best and final offers, are subject to the provisions regarding rejection of late proposals. This exception likewise is not pertinent here. Under the circumstances, we conclude that the Navy properly rejected Corbetta's late modifications notwithstanding the protester's contention that the price reductions would have given it the most favorable price/quality ratio.

Corbetta has referred to a provision in the clause that a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any

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time it is received. However, we note that prior to the attempted price reductions, Corbetta's proposal was not "an otherwise successful proposal" within the meaning of the provision. At that time, the only otherwise successful proposal was Towne's, which had the most favorable price/quality ratio and which had been selected for award.

Though rejection of Corbetta's late modifications was proper, we believe the Navy erred in accepting Towne's price increase. We first note that since Towne's price increase was obviously not favorable to the Government, the RFP's late proposal clause could not justify its acceptance. Moreover, we do not view B-164569, supra, as lending support to the Navy's position. B-164569 involved a situation where the contracting officer had properly decided to make an award on the basis of the initial proposals without negotiations. The decision held that while the contracting officer could have asked for and considered price revisions in conjunction with his request for extensions of the period during which offers could be accepted, he was not, as the protester contended, required to do so. We believe that the decision read as a whole clearly indicates that any request for and consideration of price revisions would have to be undertaken consistent with the requirement to conduct discussions with all responsible offerors within a competitive range.

See, in this regard, 51 Comp. Gen. 479 (1972), where, based upon the initial proposals, three offerors were considered to be within the competitive range, and the agency asked one of the three to review its price. As a result, the offeror submitted a price reduction. We held that the offer of a price reduction and the Government's acceptance constituted discussions, and that discussions with one offeror necessitated discussions with all offerors within the competitive range, citing 50 Comp. Gen. 202 (1970).

See, also, B-171015(1),(2), July 13, 1971, a case involving a Navy turnkey housing procurement where the successful offeror was allowed to increase its price by \$90,000 but other offerors were given no opportunity to revise their prices. Our decision did not object to the limitation on negotiations under the special circumstances of that case, which involved the presence of certain auction risks due to the unauthorized and premature public disclosure of prices. It follows a fortiori that negotiations would be required with all offerors in the competitive range absent such special circumstances.

As for B-161513, supra, and 49 Comp. Gen. 625, in the former decision it was held that a late price modification was properly

rejected, and in the latter that the agency improperly accepted a late price modification. We do not believe that either decision provides support for the acceptance of Towne's late modification.

In view of the foregoing, the Navy's acceptance of the Towne price increase was not proper under the circumstances, because discussions were thereby conducted with Towne without meeting the obligation to conduct discussions with other offerors within the competitive range. In view of this conclusion, the Navy's comment concerning possible economic duress suffered by offerors in extending their offers is of no consequence. In this connection, it is pertinent to note that while Corbetta's late price reductions were properly rejected, they could have been considered for the purpose of deciding whether to enter into discussions with the offerors. A late price reduction, though unacceptable per se, may be an indication that opening negotiations, rather than making an award on the basis of the initial proposals, would prove highly advantageous to the Government. See 53 Comp. Gen. 5. In short, Corbetta's substantial price reduction was an indication that discussions might be in the Government's best interests. In addition, since the Navy could not proceed with any award until the enactment by Congress of the new statutory cost limitation, it would appear that ample time was available between October and December 1974 for thorough discussions. Also, while Towne's initial proposal was the only one whose price was within the expected future statutory limitation, discussions with the offerors might have resulted in Corbetta and other offerors reducing their prices so as to come within the limitation.

#### RECOMMENDATION

In considering possible remedies, we must note that it would be difficult to find that a termination for convenience is in the Government's best interest where the present contractor is providing the Government's actual minimum needs for which there has been adequate competition initially. See Data Test Corporation, B-181199, March 7, 1975, 54 Comp. Gen. \_\_\_\_\_, and decisions cited therein.

In the present case, we note that Towne was required under the contract to submit final design drawings within 60 days after award (March 7, 1975), which were required to be approved by the Navy before construction could proceed. At the conference on the protest on May 29, 1975, which was attended by the Navy and Towne, the Navy representative advised that Towne's final design drawings were

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under review at that time and that no construction had begun. We understand that construction commenced on or about July 28, 1975.

We do not have first-hand knowledge of the manner in which contract performance is proceeding. This matter is the function and responsibility of the Navy in the course of its administration of the contract. However, the foregoing facts raise some doubts as to whether the work is proceeding in the manner required and whether it will be completed on schedule (540 calendar days after notice of award).

Moreover, as noted supra, we are of the view that there was no adequate competition initially for the Government's actual minimum needs. Under the circumstances, we recommend that competition based on the actual requirements be renewed in order to determine whether a termination for convenience of the current contract is called for.

We recommend that the Navy immediately reinstate the RFP and open negotiations with all offerors within the competitive range. Upon reinstating the RFP and before opening negotiations, the Navy should issue an amendment to the RFP clarifying and revising the work requirements to the extent necessary to make them consistent with its actual minimum needs. Further, an amendment should be issued making clear to offerors the relative importance of price as an evaluation factor. The terms of this amendment should be consistent with the views of our Office on this subject as expressed in TGI Construction Corporation et al., B-181287, March 20, 1975, 54 Comp. Gen. \_\_\_\_.

After the negotiations, the present contract should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than Towne. If Towne remains successful, the existing contract should be modified in accordance with its final proposal. As in other cases where our Office recommends corrective actions of the type discussed above, e.g., Data Test Corporation, supra, nothing in our recommendations should take precedence over any possible termination for default of the existing contract should such action be deemed appropriate and necessary by the contracting agency.

By letter of today, we are advising the Secretary of the Navy of these recommendations.

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In view of the recommended remedy, we see no basis on the present record to consider further Corbetta's claim for proposal preparation costs.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. § 1172 (1970).

*R. J. Kellman*  
Acting Comptroller General  
of the United States