DECISION

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

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99084

FILE: B-182979 DATE: April 9, 1976

MATTER OF: Corbetta Construction Company of Illinois, Inc.

DIGEST:

1. On reconsideration, GAO decision--which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract--is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed.

2. Contentions made by contracting agency--to effect that turnkey housing RFP did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of ASPR § 3-805 (1974 ed.), and, generally, that all offerors were fairly treated--do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. § 2304(g) (1970) and ASPR § 3-805 (1974 ed.).

3. Contracting agency's position that late price increase submitted by successful offeror upon extending its proposal did not involve late modification to proposal or any unequal treatment to other offerors is without merit. Decision is affirmed that late price increase was late modification within meaning of RFP late proposals clause, and that agency's acceptance amounted to conduct of irregular discussions with successful offeror, since no discussions were held with other offerors within competitive range.

4. GAO recommendation made to Navy in prior decision sustaining protest--which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience--is withdrawn upon reconsideration. Information presented by agency and contractor concerning value

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of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim.

5. GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision upholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration--which is function of contracting agency, not GAO. Also, performance defects alleged by protester do not necessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action.

6. Though recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents--including individual technical evaluators' numerical scoring of proposals--are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements.

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The Naval Facilities Engineering Command (NAVFAC), Towne Realty, Inc., Woerfel Corporation and Miller, Waltz, Diedrich, Architect & Associates, Inc., a joint venture (Towne), and Corbetta Construction Company of Illinois, Inc., and Joseph Legat Architects (Corbetta) have each requested reconsideration of our decision in the matter of Corbetta Construction Company of Illinois, Inc., B-182979, September 12, 1975, 55 Comp. Gen. ____, 75-2 CPD 144.

The September 12, 1975, decision sustained Corbetta's protest against NAVFAC's award of a contract to Towne for the design and construction of 210 family housing units at the Naval Training Center, Great Lakes, Illinois. The decision recommended certain corrective actions to the Navy involving reinstatement and amendment of the request for proposals; renewed competition with the offerors through written or oral discussions; and the award of a new contract under this procedure with termination for convenience of Towne's contract (or modification of Towne's contract pursuant to its final proposal in the event that it remained the successful offeror).

Upon reconsideration, it is our conclusion that the September 12, 1975, decision must be modified in part. The "Recommendation" contained in that decision is now withdrawn. In all other respects that decision is affirmed. Also, today's decision makes further recommendations to the Secretary of the Navy, which are described infra.

Towne's request for reconsideration is directed essentially at the recommendation in our prior decision. Towne's October 8, 1975, submission to our Office contends that the extent of construction already accomplished, plus the additional construction work which would be ongoing while our decision's recommendation is being implemented, renders the recommended remedy impracticable--because it would not be economically feasible for the Navy to terminate the Towne contract should this be necessary at the close of the recompetition. Towne supports its request with extensive evidence documenting the progress of construction. Towne requests, in short, that we withdraw the recommendation in our prior decision.

NAVFAC's request for reconsideration takes the same position as Towne in regard to our recommendation. NAVFAC has stated that construction work already in place as of September 16, 1975, amounted to at least $1.5 million, and that termination for convenience of the Towne contract, if required, would likely cost $4 million. Like

Towne, NAVFAC has submitted a substantial amount of documentary evidence detailing the progress of the construction.

In addition, NAVFAC's request goes beyond our decision's recommendation and challenges the correctness of our decision on the merits. The principal points raised are that the offerors were in fact properly treated in the procurement, and that our decision's holding concerning a late modification to Towne's proposal was incorrect.

In contrast to Towne's and NAVFAC's requests, which essentially allege that our decision was in error on various points, Corbetta's request departs to some extent from issues strictly related to a request for reconsideration, and instead attempts to relitigate issues which were presented and resolved in our earlier decision. This observation is also true, to some extent, as to NAVFAC's submission responding to Corbetta's allegations.

The objective of our Office in considering requests that one of our decisions be reconsidered is not to conduct a de novo review of the issues which were involved in the original controversy. Rather, it is to determine whether and to what extent our decision was erroneous. See B-168673, October 26, 1970, where we stated:

> "While this Office will reconsider its decisions when it is alleged that they are based upon error of fact or law, such allegations must be supported by evidence, in the form of documentation or citations to controlling administrative or judicial precedent, which will convincingly illustrate how and why our conclusions are wrong."

This is the standard to be applied in this matter, and we will consider the parties' contentions accordingly. Also, as in our prior decision, we intend to concentrate upon those issues which we believe to be dispositive of the matter.

RECONSIDERATION OF TECHNICAL EVALUATION OF TOWNE PROPOSAL--REQUIREMENT TO CONDUCT DISCUSSIONS

Our earlier decision held essentially that NAVFAC's acceptance of Towne's proposal was improper because NAVFAC failed to meet the obligation to conduct written or oral discussions with all of the

offerors within the competitive range. Because Towne's proposal varied substantially from certain specific RFP requirements, NAVFAC's acceptance of it waived those requirements for the purposes of the competition among Towne, Corbetta, and the other offerors. This action violated ASPR § 3-805.4 (1974 ed.). Also, we held that the existence of substantial technical uncertainties in initial proposals precluded any award on the basis of the initial proposals under 10 U.S.C. § 2304(g) (1970).

NAVFAC's request for reconsideration raises several points which bear upon these issues. One of the principal contentions is that the deficiencies in the Towne proposal which were discussed in our decision, as well as additional deficiencies cited by the protester, were in fact corrected after award of the contract during the process of final design review.

This, we believe, is not in point. As our earlier decision explained, the pertinent issue is not whether Towne conforms to the requirements during contract performance, but whether the requirements of competitive negotiation procedures were complied with in the procurement prior to award. Conformance with the requirements after award--whether fortuitous, or the result of efficient contract administration by NAVFAC--is irrelevant to the issue raised in Corbetta's protest and decided in our decision.

NAVFAC's request also raises additional points involving the nature of requirements stated in the RFP specifications, the responses to these requirements made in the proposals, and the effect in terms of evaluation of the proposals and the requirement to conduct written or oral discussions. For example, NAVFAC maintains that matters such as off-street parking, ponding, water system sectional control valves, absences of lights and hose bibs, etc., are considered by expert technical evaluators to be minor, insignificant details. NAVFAC contends that Towne's blanket offer of compliance with the RFP requirements should cover such items.

In this regard, the difficulty with a blanket offer of compliance is that there is no certainty what it is intended to cover. A blanket offer might be submitted by an offeror which has carefully examined all of the RFP requirements and fully intends to comply with them, but a blanket offer could also be submitted by an offeror which has misunderstood, overlooked or ignored RFP requirements and thus has no intent to comply with them. The effect, in terms of the statutory and regulatory requirements, on competition among the offerors, as well as the deleterious consequences to the Government which may ensue from improvident acceptance of a blanket offer without discussions,

is adequately described in our earlier decision. We see nothing in NAVFAC's contentions to cause us to modify our holding on this point.

As for NAVFAC's assertion that some of the omissions in the Towne proposal are merely minor details, we believe our earlier decision sufficiently explained why the cumulative effect of a large number of relatively minor items could amount to a substantial impact on the proposal. NAVFAC's contentions do not demonstrate errors of fact or law on this point.

NAVFAC again points out that turnkey proposals are not expected to contain complete plans and specifications, and that to insist on proposals showing satisfaction of every detailed requirement would discourage offerors from submitting proposals due to the cost and time involved in proposal preparation. NAVFAC also invites our attention to the RFP clause which cautions offerors not to submit unnecessarily elaborate proposals. NAVFAC has indicated, generally, its belief that our decision will vitiate the effectiveness and feasibility of negotiated turnkey housing procurement.

We believe these allegations indicate that NAVFAC has misinterpreted our earlier decision. The thrust of our decision was not that in all future turnkey procurements, initial proposals must respond to every detail of the requirements or else be rejected as unacceptable. Rather, it was that when initial proposals fail to so respond, to a "substantial" degree, an award on the basis of the initial proposals is legally precluded; and that when the RFP establishes detailed requirements, but the contracting agency accepts an initial proposal which does not meet a substantial number of the requirements, these requirements are waived, with the result that other offerors have been deprived of an equal opportunity to compete. Our earlier decision did not hold, nor do we hold now, that the cure for this problem is to insist that offerors' initial proposals respond to every detailed requirement. Instead, the solution is to undertake the legally required written or oral discussions with offerors within the competitive range to the extent necessary.

Negotiated turnkey housing procurement is no different in this regard than many other negotiated procurements for supplies or services where offerors are expected to propose their own individual "approach" to meeting the Government's needs and at the same time to satisfy many specific, detailed requirements set forth in the RFP. In such situations, we have not countenanced the idea that a substantial number of the "details," which were not addressed in the most favorable initial proposal, can properly be left for resolution

after award in a process of "final design review." We do not see a legal basis under the statute and ASPR to support this concept, and NAVFAC called none to our attention in its reports on the protest.

In its request for reconsideration, NAVFAC cites a recent court decision--Lincoln Services, Ltd. v. Middendorf, Civil Action No. 75-90-N (U.S.D.C., E.D. Va.), October 24, 1975. NAVFAC contends that this decision, which involved a Navy turnkey housing procurement, recognized that the RFP did not require or expect elaborate detailed proposals, that details could be resolved after award during the final design review, and that omission of some details did not render the successful proposal nonconforming.

A review of this decision indicates that the court specifically found the omissions in the successful proposal to be "minor" and not of such character as to make the proposal nonconforming. The decision mentions only two omissions--relating to fire ratings of exterior walls and tie-ins for hurricane resistance. Lincoln Services, then, is clearly distinguishable on its facts from Corbetta and affords no basis for our Office to modify our earlier decision in this matter.

NAVFAC's November 4, 1975, submission asserts that Towne's proposal met the requirements of request for proposals (RFP) section 1C.13 (this provision, discussed in our earlier decision, required offerors to submit detailed information covering specifications, drawings, and an equipment schedule. The provision cautioned that failure to submit all data might be cause for determining a proposal "nonresponsive"). NAVFAC suggests that detailed requirements set forth elsewhere in the RFP--for example, those relating to streets and sidewalks--did not have to be addressed under section 1C.13. As a specific example, NAVFAC points to the requirement of RFP section 2A.4B(4) that "Sidewalks on both sides of the street shall be included in basic scope of proposals." The protester cited, and our decision discussed, the failure to provide for sidewalks on both sides of the street in a number of locations as one of the omissions in Towne's proposal.

NAVFAC states that the clear intention of this RFP provision was that proposals were to be "* * * submitted on the basis that both sidewalks must be provided. Nowhere does it state that the proposals as submitted must show sidewalks on both sides of the streets."

We believe that the distinction which NAVFAC attempts to draw is without merit. We note that RFP section 1C.13(b)(2) specifically called for offerors to furnish with their proposals site plan drawings showing, among other things, "sidewalks." Reading RFP sections 2A.4B(4) and 1C.13(b)(2) together, the most reasonable interpretation is that offerors were required to submit drawings showing sidewalks on both sides of the street. The drawings submitted with Towne's proposal fail to show sidewalks on both sides of the street in a number of locations.

NAVFAC's request also raises the suggestion that discussions were not needed because the contracting officer believed a reasonable price within the provisions of ASPR § 3-805 (1974 ed.) was obtained in making an award to Towne without discussions. NAVFAC's September 25, 1975, submission states:

> "Under this ASPR 3-805 requirement, it is discretionary with the contracting officer whether, in his professional opinion, the offered prices are reasonable or whether conducting complete discussions of the details of each offer could be expected to result in significant reductions. Note that the longer discussions are prolonged, the greater the risk that offerors will learn the details of other offers. While the GAO may disagree with the Contracting Officer's decision on this, ASPR clearly states it is his decision to make. We submit that in the absence of gross error, the decision of a contracting officer should not be overruled. In this case, gross error was not present, and therefore GAO should not direct the setting aside of the awarded contract on the basis of a supposition that if further discussions had been held with Corbetta, a lower price would have been received."

We believe that NAVFAC's analysis reflects, at best, an incomplete assessment of the applicable law. As explained in our prior decision, 10 U.S.C. § 2304(g) (1970), as implemented by ASPR § 3-805.1 (1974 ed.), establishes a general requirement to conduct written or oral discussions with all offerors within the competitive range, price and other factors considered, in a negotiated procurement. The statute and regulations provide only five specifically delimited exceptions to this requirement. The only one of these exceptions which conceivably could be applicable in the present case is set forth in ASPR § 3-805.1(a)(v), i.e., a situation where it can be clearly demonstrated from the existence

of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a "fair and reasonable" price. ASPR § 3-807.1(b)(1)a (1974 ed.) further provides that "offers responsive to the expressed requirements of the solicitation" is one of the several criteria necessary to have "adequate price competition."

We note that there is no indication in the voluminous record developed in the protest and requests for reconsideration that the contracting officer made any determination that the criteria necessary to have adequate price competition were satisfied in this case. Moreover, as we stated in our earlier decision, the facts concerning omissions, deficiencies and uncertainties in Towne's and the other proposals were sufficient to create doubt whether there were at least two proposals responsive to the expressed requirements of the solicitation. We found that, in any event, a reasonable application of 10 U.S.C. § 2304(g) (1970) requires that where the most favorable initial proposal is substantially at variance with the RFP requirements, no award on the basis of the initial proposals is legally permissible. The requirement to conduct discussions in this situation does not relate primarily, as NAVFAC suggests, to supposition whether a lower price might be received from another offeror. It relates primarily to the need to clarify what the offerors' "firm fixed prices" actually are. If the most favorable initial proposal's price relates to a technical proposal which substantially varies from the solicitation's requirements, there can be no reasonable assurance that acceptance of this proposal will actually be most advantageous to the Government. To use NAVFAC's terminology, acceptance of such a proposal without discussions is "gross error."

Also, NAVFAC's observation that prolongation of discussions creates auction risks seems inapposite in view of the fact that no technical or price discussions were conducted with the offerors in the present procurement, with the exception of NAVFAC's improper acceptance of a late modification to the Towne proposal, discussed infra. Further, such risks cannot stand in the way of a legal requirement to conduct written or oral discussions. We believe that efficient conduct of negotiations in accordance with ASPR will minimize auction risks. Even where such risks are high, we have expressed the view that accepting them is less detrimental to the Government than the alternative of making an improper award. Cf. Bristol Electronics, Inc., et al., 54 Comp. Gen. 16, 21-22 (1974), 74-2 CPD 23.

In its November 4, 1975, submission to our Office, which comments on Corbetta's request for reconsideration, NAVFAC furnished additional information covering the individual technical evaluators' point-by-point numerical scoring of the various proposals, and at the same time released this information to Corbetta.

We note for the record that along with its reports submitted during the course of the protest (dated April 18 and May 30, 1975), NAVFAC had furnished certain information relating to the technical evaluation of proposals, such as the evaluators' narrative assessments of the proposals and the overall numerical point totals. Corbetta was furnished with pertinent portions of these materials during the protest proceedings and commented upon them. However, at no time during the protest proceedings did NAVFAC furnish the detailed record of point-by-point numerical scoring of the technical proposals. NAVFAC's November 4, 1975, submission to our Office was the first time this material was furnished either to our Office or to Corbetta. See, in this regard, further discussion of this point infra.

NAVFAC's November 4, 1975, submission uses the detailed record of the numerical point scoring to construct an assessment of the impact on the actual technical scoring of what it now terms the "alleged" discrepancies in the Towne proposal which were cited by Corbetta during the protest. The gist of this argument is that even accepting the existence of the 26 omissions in the Towne proposal which were discussed in our prior decision, their impact on the overall point scoring of the Towne proposal would be no more than 57 points. (Towne recieved 647 total points in the technical evaluation out of a maximum of 1,000.) NAVFAC also points out that the Corbetta proposal also evidenced discrepancies in a number of the same areas as to which Corbetta contended the Towne proposal was deficient.

NAVFAC has also remarked in connection with the technical point scoring that our Office "* * * has consistently refused to substitute its determination on technical matters for the determinations of experienced persons charged with responsibility for making such determinations * * *" and submits that we should not now depart from that practice.

We note, initially, that the above statement is not entirely accurate. It is true that in protest cases we do not conduct de novo technical evaluations of proposals simply because a protest against the agency's evaluation has been filed (Julie Research Laboratories, Inc., B-183288, October 14, 1975, 55 Comp. Gen. ____,

75-2 CPD 232), nor do we ordinarily become involved in substituting our judgment as to the precise numerical scores which should have been assigned to the proposals. (PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35). However, our Office does review the record of the technical evaluation, including the details of the numerical point scoring, in order to determine whether the agency's actions are shown to be without any reasonable basis (Julie Research Laboratories, Inc., supra). The detailed record of the numerical point scoring is clearly relevant evidence which must be considered in protests which challenge the technical evaluation. For our Office to substitute its judgment for the agency's on a purely technical matter is relatively rare, but in appropriate cases we have done so (see, for example, Globe Air Inc., B-180969, June 4, 1974, 74-1 CPD 301).

In addition, we fail to see the point of NAVFAC's contention concerning substitution of technical judgment. Our September 12, 1975, decision was not premised upon the substitution of our technical judgment for the technical judgments of NAVFAC's evaluators. We did not conclude in our decision that one or another of the proposals should have received a greater or lesser number of technical points than was accorded to it by NAVFAC. Rather, our decision was premised upon the existence of various omissions, uncertainties, deficiencies, and ambiguities both in Towne's proposal and in the other competing proposals, as documented both in the protester's submissions and in NAVFAC's own report documents. These facts and the applicable law led to the conclusion that the award to Towne was improper.

In addition, NAVFAC's remark that the protester failed in any of its protest correspondence to "* * * set forth any specific instance of misevaluation * * *" (apparently with reference to the point-by-point numerical scoring) seems to overlook the fact that NAVFAC failed to provide Corbetta with the detailed technical evaluation documents upon which Corbetta would base any showing of misevaluation. As for the 57-point effect on the Towne proposal cited by NAVFAC, we have no difficulty in regarding this as involving a "substantial" impact. Concerning the deficiencies in the Corbetta proposal alleged by NAVFAC, this merely provides another reason why written or oral discussions should have been conducted with all offerors in the competitive range. See the discussion of this point in our earlier decision. In short, we do not believe that NAVFAC's contentions in regard to the additional technical evidence

which has been presented furnish any cause for our Office to modify our prior decision in this matter.

Lastly, NAVFAC contends that our Office should not have sustained Corbetta's protest because the applicable statutory cost limitation precluded an award to the protester. NAVFAC's November 4, 1975, submission states:

> "The statutory limit for family housing is not an absolute dollar amount, but rather an average cost per unit. This permits the armed forces to construct housing in geographic areas where construction is expensive, by offsetting the savings possible in other geographic areas. There is always the possibility that during a program year, earlier projects may be awarded at prices below the statutory average, and DOD may allocate the additional amounts thereby made available to the Navy for use on a particular project. However, it is DOD policy that the statutory average cost must be honored on each housing award and particularly true in a situation such as this, where we have the first award under a newly raised legislative limit where no average cost other than the statutory limit has been established. In law, the statutory average does constitute an absolute bar to an award greater than a particular allocated share of such average. Accordingly, because of the limit on available funds, at no time during the period at issue in this case, could award ever have been legally made to Corbetta.
>
> "The Corbetta proposal was within a competitive range, as defined by ASPR 3-805.2. If for some reason an award could not be made to Towne, and if as stated above a more liberal average cost had been made possible (through other housing awards being made below the average), then an award to Corbetta might have been possible. Therefore, it would have been premature, at any time prior to actually make an award to Towne, to have rejected the Corbetta proposal. * * *" (Emphasis in original.)

It is unnecessary at this time to become involved in consideration of the nature of the statutory cost limitation, nor need we consider the question of the appropriate point in time in a negotiated

procurement at which proposals which exceed the limitation should be rejected pursuant to ASPR § 18-110(c) (1974 ed.). Our earlier decision held that if discussions had been held with Corbetta as required by law, Corbetta may have been able to reduce its price so as to come within the applicable statutory limitation. We see nothing in NAVFAC's contentions which shows this conclusion to be erroneous.

In view of the foregoing, the holding of our prior decision on these issues is affirmed.

RECONSIDERATION OF LATE MODIFICATION TO TOWNE PROPOSAL

Our earlier decision concluded that NAVFAC erred in accepting a late price increase which was submitted by Towne upon extending its initial proposal. We held that this action constituted discussions with Towne, and that NAVFAC failed to meet the obligation to conduct discussions with the other offerors in the competitive range. NAVFAC disagrees with this holding.

NAVFAC contends that a bid or proposal remains legally open for acceptance until its expiration date, that it may not be revoked unilaterally by the offeror prior to such date, and that it may not be unilaterally extended by the offeree beyond such date, citing Corbin on Contracts § 273 (1963) and Waterman v. Banks, 144 U.S. 394 (1892). NAVFAC argues that because an offeror is not legally obligated to extend its offer, it follows that it may condition any extension on such terms as it desires, as, for example, an increase in price. Basler v. Warren, 159 F.2d 41 (10th Cir., 1947).

NAVFAC concludes that Towne clearly had the right to increase its price as a condition of extending its offer, and that Corbetta and other offerors could have done likewise. NAVFAC points out that while its message to the offerors asked for extensions of their original proposals (so as not to encourage offerors to raise their prices), the offerors as experienced contractors were capable of knowing their legal rights in this situation and exercising them.

NAVFAC also disagrees with our decision's holding that Towne's price increase was a late modification to its proposal. NAVFAC states that the late proposals and modifications clause included in the RFP ("LATE PROPOSALS, MODIFICATION OF PROPOSALS OR WITHDRAWAL OF PROPOSALS (1973 SEP)") had no application to the price increase. The reason given is that under the terms of the RFP, all offers were to expire on October 20, 1974, and that the request for extensions was an admission that the Government had no legal right to demand that the offers be extended. NAVFAC states: "Since in response Towne extended the period of the offer, only upon acceptance by the Government of an increase in price, it seems clear that there can be no application of the 'Late Modifications' clause since along with all other terms of the RFP, its effectiveness concluded as of 20 October 1974."

Concerning the question of discussions with the offerors, NAVFAC believes that a request to extend the offers does not constitute an opening of discussions and points out that no discussions as to the technical aspects of the proposals were sought or engaged in. NAVFAC believes that to the extent that the request to extend the offers constituted holding discussions, then discussions were in fact held with all offerors, since each offeror had the same opportunity to adjust its price in connection with extending its offer. Thus, all offerors were treated equally. NAVFAC refers, in this regard, to ASPR § 3-507.2(b) (1974 ed.).

NAVFAC also considers it noteworthy that the Lincoln Services decision, discussed supra, "recognized" a price increase which was submitted when the time for acceptance of a proposal was extended by one of the offerors.

NAVFAC's observation that offerors had the legal right to condition extensions of their proposals on whatever terms they deemed desirable is correct, but only in a limited sense. Towne and the other offerors had the right to revise their proposals upon extending them in that they could legally attempt to do so. This, however, is not the issue. The issue is the legal effect of the offerors' attempts, and the Navy's response to those attempts, within the framework of the statutory requirement to conduct written or oral discussions with all offerors within the competitive range and the requirements of the late proposals clause included in the RFP. If an offeror attempts to make material revisions in its proposal upon extending it, and the revised proposal is accepted by the contracting agency in contravention of the requirement to conduct discussions or the requirements of the late proposal clause, there can be no question that such action is improper, notwithstanding the fact that the offeror had a "legal right" to attempt to make the revisions. Since these considerations did not apply in the circumstances involved in the Basler decision, supra, it is not in point.

NAVFAC's assertion that the late proposals clause, along with all other terms of the RFP, "effectively concluded" on October 20, 1974--the date proposals expired--is wholly without merit. There is no provision in the RFP whereby its effectiveness terminates as of a certain date. Rather, it is the proposals which expire at the end of a stated time, unless withdrawn earlier. Any extensions or modifications of the proposals are made with reference to the terms of the RFP and are either in material conformance with those terms or a departure from them. The RFP continues in existence even after a contract is awarded, as recognized by decisions of our Office which

have held that the solicitation can be reinstated under appropriate circumstances. See our decision of September 12, 1975, in this matter; Cf. Federal Leasing, Inc., et al., 54 Comp. Gen. 872, 883 (1975), 75-1 CPD 236.

As our earlier decision held, the RFP late proposals clause cannot justify the NAVFAC's acceptance of the revised Towne proposal. The clause provides in pertinent part:

> "(b) Any modification of a proposal, except a modification resulting from the Contracting Officer's request for 'best and final' offer, is subject to the * * * [provisions calling for rejection of late proposals].
>
> "(c) A modification resulting from the Contracting Officer's request for 'best and final' offer received after the time and date specified in the request will not be considered unless received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation.
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> * * * * *
>
> "(e) Notwithstanding the above, a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

Towne's revision to its proposal was clearly a "modification"; it did not result from a request for "best and final" offers; it was not a late modification which made the terms of the proposal more favorable to the Government; and there is no other provision in the clause which would allow acceptance of the late modification.

We note that ASPR § 3-506(d) (1974 ed.) provides that the normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late modifications to proposals. This provision cannot justify acceptance of the revised Towne proposal because the revision was not a normal one made during the usual conduct of negotiations, i.e., discussions with all offerors within the competitive range. Compare the circumstances discussed in Data General Corporation, B-182965, May 20, 1975, 75-1 CPD 304.

The question of whether "written or oral discussions" have been conducted turns upon whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. 51 Comp. Gen. 479, 481 (1972). We agree with NAVFAC that its request to offerors to extend their original proposals did not in itself constitute the opening of "discussions." In some instances, a mere request from the contracting agency to the offerors can in itself constitute discussions--for example, a request for best and final offers. Dyneteria, Inc., B-181707, February 7, 1975, 75-1 CPD 86. The situation here is different. It was not NAVFAC's request for extensions of the original proposals which constituted the opportunity to revise proposals, but the offeror's submission of a material revision to its proposal and NAVFAC's acceptance of the same. These actions constituted the holding of discussions with Towne alone and not with the other offerors in the competitive range. NAVFAC's citation of ASPR § 3-507.2(b), supra, in this connection does not appear to be in point, since this provision deals with disclosure of information to prospective contractors concerning a potential procurement.

Finally, NAVFAC's reliance on the Lincoln Services decision is misplaced. In that case it was the plaintiff which conditioned the extension of its proposal on a late price increase. The court found the plaintiff's contentions of unfair treatment in the procurement to be without merit under the circumstances of the case. It is apparent that the court was never faced with the issue of a late price modification submitted by a successful offeror which operated to the detriment of other offerors in the competitive range.

In view of the foregoing, the holding of our earlier decision on the late modifications issue is affirmed.

RECONSIDERATION OF RECOMMENDATION

The recommendation in our prior decision, as noted supra, contemplated a renewal of competition among the offerors, with the possible result that Towne's contract be terminated for the convenience of the Government. A number of reasons have been advanced why the recommendation is not in the Goverment's best interests, as, for example, NAVFAC's allegations that construction had advanced to the point by September 1975 that a new contractor would not be able tc build over the work already in place without removal of that work, and that the renewal of competition would result in an auction due

to the amount of information concerning the offerors' proposals which was disclosed to the parties during the protest proceedings. It is unnecessary to discuss these in detail. For the reasons which follow, the recommendation is now withdrawn.

Our recommendation was made with the knowledge that construction had been underway for some time, and that the Government would obviously incur costs in carrying out the renewal of competition. Information received by this Office in early September 1975 indicated that the value of preconstruction mobilization costs, actual work in place and materials on the jobsite was between $300,000-$400,000.

Several pertinent points have been brought out by NAVFAC and Towne. NAVFAC's figures estimate that the actual value of work in place as of September 11, 1975--the day before our decision was issued--was about $1.1 million. Moreover, Towne was in the process of awarding numerous subcontracts for materials, the cost of which would impact on any termination for convenience settlement. NAVFAC's documents indicate that the contracting agency itself was not fully aware of the extent of the subcontracts being awarded at that time, presumably because the subcontract process is a continuing one and the contractor merely advises the agency from time to time of the status of the subcontracting and progress of the work.

In this light, it appears that even if the contract had been terminated for convenience immediately after issuance of our decision--which we did not recommend--the costs may well have been so great that such action would not be in the Government's best interests. (We did not recommend immediate termination because of the possibility that competition might not be effectively renewed among the parties. For example, all of the offerors in the competitive range might have declined to participate in the recompetition. NAVFAC would have been left with no contract for housing and would have had to conduct an entirely new procurement.) It follows that any termination subsequent to the renewal of competition--a process which would take at least several weeks--would result in even greater costs to the Government. We are inclined to agree with Towne's observation that it is probably impracticable to recommend any termination remedy after construction has begun in a contract of this type. It may well be that a remedy such as the one recommended could be practicable and effective only if made during the design stage, prior to the beginning of actual construction.

This leaves the question of what other action our Office could take in these circumstances. We could have recommended to the Secretary of the Navy that he investigate the feasibility of a renewal of competition and possible termination for convenience of the Towne contract. For the reasons already discussed, this would not have resulted in any effective remedy for Corbetta. We are unaware of any other recommendation in connection with this protest which would have been legally appropriate. See, in this regard, the discussion of Corbetta's request for reconsideration infra. Any possible relief for Corbetta, therefore, would result from its claim for proposal preparation costs, discussed infra, either in this Office or the Court of Claims.

Corbetta's request for reconsideration contends that the manner of Towne's performance of the contract requires a termination for default, and that this would be the preferred remedy for protection of the Government's interests. In support of this, Corbetta has submitted affidavits prepared by several of its employees who have inspected the worksite subsequent to September 12, 1975. It is alleged that these affidavits demonstrate in detail numerous failures by Towne to comply with the contract requirements, local building codes, professional society requirements and good construction practice.

Towne denies the existence of the performance defects cited by Corbetta. Moreover, Towne and NAVFAC have pointed out that under the applicable termination for default provisions (see ASPR § 7-602.5 (1974 ed.)), a contractor may be terminated for default for refusing or failing to diligently prosecute the contract work. Also, even if it were assumed that there are defects in Towne's performance, they would not necessarily be the basis for a default termination, since the contractor may be given an opportunity to explain the causes of delay and the time for performance may under appropriate circumstances be extended by the contracting officer. NAVFAC states that the contracting officer has caused the work to be examined, and that he has no cause to believe that Towne is refusing or failing to prosecute the work with such diligence as will insure its completion. NAVFAC states that, accordingly, no termination for default will be directed.

We do not believe that this Office should become involved in considering whether to recommend terminations for default in situations

of this kind. As pointed out in our September 12, 1975, decision in this matter, and in many other decisions of our Office, questions raised in a protest as to the adequacy of a contractor's performance are matters of contract administration, which is the function of the contracting agency, not this Office. The only relevance of a termination for default to this matter is, as we stated in our earlier decision, that recommendations for corrective action such as those in the decision should not preclude the contracting agency from terminating the contract for default if the circumstances warrant. In view of NAVFAC's statements, supra, we take it that no termination for default is in the offing and, therefore, it is unnecessary to give further consideration to this point.

Corbetta has also suggested a number of remedies contingent upon Towne's contract being terminated for default, such as "assignment" of the contract to it with Towne performing as its subcontractor. In view of the discussion supra, it is unnecessary to consider these in detail. Another possibility raised by Corbetta is that it be reimbursed for certain costs in accordance with section 1B.14 of the RFP. This provision, however, is by its terms applicable only to recovery of costs pursuant to termination of the contract awarded under the RFP.

Corbetta's submission in regard to the reconsideration further contends that it should recover damages--principally proposal preparation costs--because of the Navy's "wanton and capricious action." In our earlier decision we noted that Corbetta had made a similar claim in connection with its protest. Our decision stated that in view of the recommended remedy, it was unnecessary to give further consideration to Corbetta's claim at that time.

Prior to issuance of today's decision, we advised the parties that any consideration of Corbetta's claim which might be necessary would be undertaken not in this decision but at a future time, because while protests and request for reconsideration of protest decisions should be decided in a reasonably speedy manner, the need for a rapid decision is not as pressing in the case of claims. Since today's decision withdraws the remedy recommended in our September 12, 1974, decision, Corbetta may now renew its claim for whatever costs to which it believes it is entitled.

Corbetta's request brings up several factors which it believed created delay in the protest proceedings or otherwise adversely affected its opportunity to obtain a remedy. Corbetta, specifically, contends that it was prejudiced by NAVFAC's delay in furnishing the agency reports responding to the protest, because our Office's decision on the protest was thereby delayed. NAVFAC has replied that

Corbetta itself was responsible for the delay in the protest proceedings, because it spent about 2 months after filing its protest in deciding whether it wanted to withdraw the protest and an additional month in clarifying its grounds for protest. We think this factor is basically irrelevant to the recommendation contained in our earlier decision. The only pertinent questions are whether Corbetta filed a timely protest (it did) and whether NAVFAC took an unreasonable amount of time to furnish its reports (we cannot say that it did, in view of the reasons cited by NAVFAC, supra).

Corbetta also contends that it filed its protest (January 7, 1975) prior to the time an award to Towne was actually consummated. Corbetta believes that the notice of award issued to Towne, January 6, 1975, did not consummate the contract, because the certain formal contractual documents were not executed until later. It is argued that section 20.4 of our Interim Bid Protest Procedures and Standards (4 C.F.R. § 20.4 (1974)) and ASPR § 2-407.8 (1974 ed.) required NAVFAC to withhold the actual award until the protest was decided.

We find it unnecessary to decide when the award to Towne was consummated. The preamble to our Interim Bid Protest Procedures and Standards (see 36 Fed. Reg. 24791 (1971)) specifically notes that our Office has no authority to regulate the withholding of awards by contracting agencies. Where a before-award protest has been filed, the ASPR provisions do require the agency to make a determination, before proceeding with an award, that the items to be procured are urgently required; that performance will be unduly delayed by failure to make a prompt award; or that a prompt award will otherwise be advantageous to the Government. In the present case, even if it were assumed, arguendo, that Corbetta's protest was filed before award, we believe that NAVFAC's failure to make an appropriate determination under ASPR § 2-407.8, supra, would, at most, render the award to Towne voidable and not plainly or palpably illegal under the standards of 52 Comp. Gen. 215 (1972). Towne's contract was found to be voidable in our earlier decision, and at this late stage in the proceedings Corbetta's allegation that its protest was before award has become academic.

Another point to be considered is Corbetta's allegation that NAVFAC should have suspended performance under the contract while its protest was under consideration. NAVFAC has replied that, in its view, there was "no valid reason" to suspend performance and points out that such action could have given rise to disputes between itself and the contractor.

Our Office has taken the position that while suspension of performance during a protest is a desirable step, the question of whether this action should be taken is for the contracting agency to decide. The agency bears the responsibility of assuring that satisfaction of the Government's needs is not unreasonably delayed by suspension of work and must judge any risks inherent in such action. Legal authority to compel the agency to suspend the work rests with the Federal courts, and it is up to the protester to pursue this course of action if it so desires. In the present case, Corbetta did not do so.

CONCLUSION

In view of the foregoing, the recommendation made in our prior decision is withdrawn and the decision is otherwise affirmed.

Two final points must be discussed. The first concerns NAVFAC's recent disclosure, as noted supra, of documents containing its evaluators' detailed point-by-point scoring breakdown of the technical proposals. At the conference on the requests for reconsideration, October 10, 1975, Corbetta's representatives raised the question as to why they had been unable to obtain this information during the protest. NAVFAC's November 4, 1975, letter to our Office responded as follows:

> "At our meeting of 10 October 1975 we indicated to your representatives that the individual evaluations by the members of the evaluation team are in the Northern Division files and that in keeping with our policy these had not been made available to the protestor, the contractor, or anyone else. Indeed, the Navy policy remains firmly against release of these documents, for any other position would be to invite protest from unsuccessful proposers who would then seek to have the GAO or the courts, or both, review the subjective evaluations by each member of the evaluation team. Nevertheless, because the decision of your office dated September 12th tends to infer that the Navy has not acted in accordance with the governing regulations in effecting this procurement, we are attaching to this report * * * copies of the individual ratings prepared by the members of the evaluation team. * * *"

This statement leaves unanswered the question of why the record of the individual technical evaluations was not routinely furnished to our Office with NAVFAC's reports on the protest in April and May

1975. As noted supra, our Office received this information for the first time with NAVFAC's November 4, 1975, submission--10 months after the protest was filed.

In this regard, we note that where, as here, records which the contracting agency believes should not be disclosed are relevant to the issues raised in a protest, the proper course of action is to furnish these records to our Office with the report on the protest, along with an indication that they are believed to be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552 (1970)) and should not be disclosed to the parties. Our Office will not disclose the records to the protester and interested parties under these circumstances. Rather, it is up to the protester and interested parties to pursue their disclosure remedies under the Freedom of Information Act if they choose to do so. See Unicare Health Services, Inc., B-180262, B-180305, April 5, 1974, 74-1 CPD 175; Dynalectron Corporation et al., 54 Comp. Gen. 1009 (1975), 75-1 CPD 341.

NAVFAC did not follow this procedure in the present case, but rather withheld these records from both the parties involved in the protest and our Office. We view this action as a departure from the protest procedures contained in ASPR § 2-407.8(a) (1974 ed.), which provide that agency protest reports should include, in addition to various other items, any agency documents which are relevant to the protest. Also, our Office has stated that it is imperative that agency reports responding to protests contain a full accounting of the relevant facts and circumstances. 45 Comp. Gen. 417, 418 (1966). By letter of today, we are calling this matter to the attention of the Secretary of the Navy with a recommendation that the procedure followed by NAVFAC in this case be fully reviewed and revised so as to prevent a recurrence of these circumstances in the future.

The second concluding point concerns our recommendations to the Secretary of the Navy for corrective action in our prior decision, made pursuant to the Legislative Reorganization Act of 1970, Public Law 91-510, and furnished to the congressional committees named in 31 U.S.C. § 1172 (1970). Pursuant to such recommendations, the Secretary is obligated to respond to the congressional committees named in the statute within a stated time as to the actions which are taken in response to the recommendations. See 31 U.S.C. § 1176 (1970). As noted supra, the recommended remedy in this case has now been withdrawn. However, since the actions taken by NAVFAC in this procurement led to an improper award, it is necessary that the Secretary cause a review of NAVFAC's actions in this procurement to be undertaken to

ensure conformance with the requirements of applicable law and regulations in future negotiated turnkey housing procurements. Accordingly, in today's letter to the Secretary we are recommending this action.

R.F.Keller

Acting Comptroller General
of the United States