

PL-1

9429



DECISION

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

FILE: B-193124

DATE: March 14, 1979

— CN 601764

MATTER OF: John M. Cockerham & Associates, Inc.;
Decision Planning Corporation

— ? DL 6-22408
01179

DIGEST:

1. Protest against alleged improprieties in solicitation not filed with contracting agency or GAO prior to closing date for receipt of proposals is untimely and not for consideration on merits.
2. Protest is untimely and not for consideration on merits when basis for protest, amount of time taken to evaluate proposals and alleged inconsistency in application of evaluation criteria, was known or should have been known more than 10 days prior to filing protest.
3. Contract awarded on basis of initial proposal without discussion is proper where agency has reason to believe that completion of study was urgently required.
4. Where record indicates that evaluation of proposals was in accordance with established criteria and was based on reasoned judgment of evaluators, protest based on offeror's disagreement with evaluation is denied because determination of relative merits of proposals is responsibility of procuring agency and will not be disturbed unless shown to be arbitrary or contrary to statutes or regulations.
5. GAO will not substitute its judgment by making independent determination, except in circumstances not applicable here, for that of procuring agency with respect to whether or not offeror can carry out study in "objective" manner since determination calls for subtle and complex technical judgments.
6. GAO will consider and give full weight to entire record, even though some portions of it have not been released to protesters.

004080

7. GAO has no authority under Freedom of Information Act (FOIA) to determine what information must be disclosed by other Government agencies. Therefore, there is no basis for GAO to review Navy's FOIA decisions or to furnish requested documents to protester.

Request for proposals (RFP) No. N00039-78-R-0407(Q), issued by the Department of the Navy, Naval Electronics Systems Command (Navy), on September 13, 1978, solicited proposals to provide a report that would set forth findings, conclusions and recommendations of the effectiveness in the performance measurement, or Cost/Schedule Control Systems Criteria (C/SCSC), in the selective acquisition process. The closing date for receipt of proposals was September 25, 1978. A contract (No. N00039-78-C-0535) was awarded on September 29, 1978, to Advanced Management Systems, Inc. (AMS). AGC 00445
DLG OMSO
01180

On October 5, 1978, John M. Cockerham & Associates, Inc. (JMCA), protested to our Office. JMCA contends that the instant contract was hurriedly awarded to enable the Navy to utilize fiscal year 1978 funds. In JMCA's opinion, such action caused "good competitive judgment [to be] sacrificed in lieu of expediency." Furthermore, JMCA argues, based on the debriefing, that its proposal was comparatively better in the technical and cost areas. It is JMCA's belief that its type of experience with C/SCSC combined with its objectivity which results from such experience was one of the "stronger appeals" of JMCA's proposal. Consequently, JMCA takes exception to the Navy's determination to reject JMCA's proposal because of an alleged lack of objectivity which is based on the Navy's position that "knowledge of a subject infers a bias of the subject." Moreover, JMCA appears to posit the contention that the Navy's conclusions with respect to the technical considerations did not have any basis whatsoever. In other words, technical inferiority does not result solely because a proposal set forth an analysis that was not anticipated by an agency. JMCA has expressed concern that since it has not been given access to AMS's proposal, JMCA has been compelled to present its protest with "little or no information." Also, JMCA questions the Navy's failure to negotiate or hold discussions with JMCA which JMCA contends would have been beneficial to this procurement. In addition, JMCA requests that our Office in its review of the

instant protest compare JMCA's technical proposal with that of the winning proposal.

On October 23, 1978, Decision Planning Corporation (DPC) protested, by letter dated October 19, 1978, to our Office. DPC advises that the basis of its protest is as follows:

- (1) There was insufficient time to effectively respond to and evaluate the RFP,
- (2) The time taken for evaluation of the proposals and subsequent award of contract was inadequate to effectively evaluate each proposal, and
- (3) "The order of priorities for the six evaluation criteria is not consistent with the products the solicitation calls for, and will not yield for the U. S. Government that which they are seeking. The selection committee has attempted to separate objectivity and technical competence in the evaluation process and place a heavier emphasis on the objectivity of the proposers. * * *"

A conference was held at our Office on January 15, 1979, during which the grounds for protest were clarified by each protester and set forth as stated above. Also, our Office requested that DPC include in its comments to this conference a response answering the Navy's allegation that DPC's protest was untimely.

DPC submitted its comments by letter, dated January 24, 1979. With respect to the timeliness issue, DPC's letter provided in pertinent part:

"On October 2, 1978, Decision Planning Corporation was informed by telephone that the solicitation in question had been awarded to Advanced Management Systems, in the amount of \$59,876.

* * * * *

"Decision Planning Corporation became aware of the inconsistency between the evaluation criteria and its use by the Source Selection Board during the week of October 2, 1978. Our protest is based upon the realization that the Navy's Source Selection Board did not objectively use the evaluation criteria and made their selection based upon something less than the qualifications of Decision Planning Corporation as stated in the proposal. This realization became apparent to Decision Planning Corporation in an informal briefing by the Source Selection Board to Decision Planning Corporation on October 6, 1978. The Decision Planning Protest occurred on October 18, 1978, within the ten working day threshold for timely protest. Therefore, Decision Planning Corporation does not accept the contention by the Naval Electronics Systems Command that our protest in the matter of criteria evaluation is untimely."

Our Bid Protest Procedures (Procedures), 4 C.F.R. § 20.2(a) and (b)(1) (1978), require that protests based on alleged improprieties in a solicitation which are apparent, as here, prior to the closing date for receipt of proposals shall be filed with the agency or our Office prior to the closing date. Consequently, with respect to argument number (1), above, the amount of time permitted to respond to the RFP, since DPC's protest was not filed with the Navy or our Office prior to the closing date, this issue is untimely and not for consideration on the merits.

Concerning the remaining issues of DPC's protest, our Procedures, 4 C.F.R. § 20.2(b)(2) (1978), require that "bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier." The term "filed" as used in section 20.2(b)(2) means receipt in the contracting agency or in our Office as the case may be. See 4 C.F.R. § 20.3 (1978). In this regard, DPC has stated that on October 2 it was informed of the award to AMS and by October 6 became aware of an alleged inconsistency in the

application of the evaluation criteria. Our Office received DPC's protest on October 23, 1978, 15 working days after October 2 and 11 working days after October 6. The basis of protest regarding issue number (2), the amount of time taken to evaluate the proposals, should have been known on October 2 and the basis for issue number (3), the inconsistency between the evaluation criteria and the Navy's utilization of the criteria, should have been known, at the latest, on October 6. Therefore, these issues are also untimely and not for consideration on the merits. Accordingly, DPC's protest is dismissed and the balance of our decision will concern the issues raised by JMCA's protest.

JMCA, as noted above, protests the time allowed for proposal preparation. Since we discussed this issue as it pertained to DPC, see, supra, and our analysis would be the same for JMCA, we need not repeat such at this time. Pursuant to our Procedures, 4 C.F.R. § 20.2(a) and (b) (1978), this issue of JMCA's protest is untimely and will not be considered on the merits. With respect to the remaining issues of JMCA's protest, they will be considered.

The RFP provided, with respect to whether or not the Navy would conduct negotiations, the following:

"Section C - SOLICITATION INSTRUCTIONS
AND CONDITIONS

* * * * *

"10. Award of Contract

* * * * *

"(g) The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

* * * * *

"(16) AWARD OF CONTRACT (E-73 JUL)

"Offerors should note that the Government reserves the right to award a contract, based upon initial offers received, without discussion of such offers. Accordingly, each offer should be submitted on the most favorable terms from both a cost and technical standpoint. See paragraph ten (10) of Solicitation Instructions and Conditions."

In addition, the RFP disclosed that the following criteria, with the most important listed first, would be used in evaluating the proposals:

- "A. Objectivity toward the policy and process of Performance Measurement of Selected Acquisitions required by DODI 7000.2.
- "B. Background showing the ability to perform studies and analyses and to gain the input of executive level decision-makers who are in a position to be objective regarding the CSCSC process.
- "C. Experience with analysis of cost performance reports data and other government reports.
- "D. Ability to gain data and interface with DOD program management offices and understanding of the scope of the work and the nature of personnel resources required for successful performance.
- "E. Cost Realism.
- "F. Brevity, clarity and completeness of offeror's technical proposal."

In response to the questioning that the contract was hurriedly awarded to utilize 1978 fiscal year funds, the Navy, in its report, stated, in pertinent part:

"On 2-4 May 1979, the Federal Acquisition Institute and the Department of Defense will cosponsor the 8th Annual Defense Acquisition Research Symposium at the Defense Systems Management College, Fort Belvoir, Virginia. A key topic at this Symposium will be the efficacy of C/SCSC as a management tool. Expected to participate in the Symposium are the highest level acquisition officials, both military and civilian, in the DOD and the military departments, including the Deputy Under Secretary of Defense Acquisition Policy, the Deputy Under Secretary for Acquisition from each military department and the Commanding Officers from the Naval Material Command, the Air Force Systems and Logistics Commands, and the Army Materiel Development & Readiness Command. Without the report resulting from this procurement, a valuable opportunity would have been lost to have these senior acquisition officials, who rarely are together at the same place at the same time, concentrate their considerable experience and expertise on this key topic.

"The cognizant personnel at the Defense Systems Management College, the requiring activity, determined that it would take approximately 6-1/2 months for a contractor to perform the required investigation, to prepare the draft report and submit it to the Government, to incorporate all Government comments into the draft report, and to deliver a final report in time to be available to the Symposium. There is nothing in the record which would indicate that this determination is not reasonable. Accordingly, it was necessary to commence the contractual effort on or before 1 October 1978."

Then, the Navy, in its comments to the January 15 conference, added:

"* * * Because Fiscal Year 1978 funding has been made available for contract award, obligation of these funds was required by 30 September 1978."

- DLG 176

- I.D.W.T.

- DLG 01181

It is apparent that the primary concern for the Navy was the completion of the study for the aforementioned symposium rather than the 1978 fiscal year funds, although we do recognize that such was an element in the Navy's handling of the instant procurement. On the record before us we see no reason to question the urgency perceived by the Navy at the time it issued the RFP or awarded the contract.

In this connection, we note that JMCA objected to the Navy's failure to hold discussions. The Navy states that it determined not to negotiate based on the urgency of the study and the results of the Contract Award Review Panel's (CARP) technical evaluation. The RFP, see section "C," *supra*, specifically advised all proposers that award could be made on the initial offers. In addition, the Defense Acquisition Regulation (DAR), formerly the Armed Services Procurement Regulation, § 3-805.1(a) (1976 ed.), in part, provides:

"(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 procurments:

* * * * *

"(iii) in which date of delivery will not permit discussion."

In these circumstances, we cannot say that the Navy's decision not to negotiate was unreasonable. See GTCO Corporation, B-189737, December 21, 1977, 77-2 CPD 488.

The main thrust of JMCA's concern is not with the use of 1978 fiscal year funds but with the short time allowed for the evaluation of the technical proposals and the technical evaluation itself, both of which JMCA believes were detrimental to the procurement. In resolving cases in which a protester, as here, challenges the validity of a technical evaluation, it is not the function of our Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the procuring agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation.

Accordingly, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. Airport Management Systems, Inc., B-190296, May 25, 1978, 78-1 CPD 395.

Moreover, with respect to the objectivity standard, we will not substitute our judgment for that of the procuring agency by making an independent determination. Such determination, in our view, calls for subtle and complex technical judgments and will be questioned by our Office only upon a clear showing of unreasonableness, favoritism, or a violation of the procurement statutes and regulations. See Emventions Inc., B-183216, June 16, 1975, 75-1 CPD 368; affirmed Emventions Inc., B-183216, November 28, 1975, 75-2 CPD 354. In this regard, we do not believe the Navy's determination that JMCA, in this procurement, may lack objectivity should be taken to mean that JMCA does not use good evaluation methods generally or does not have a good professional staff. It merely means that after Navy's evaluation of the areas of JMCA's prior experience and present commitments, the Navy, given the need for a fresh overview assessing the effectiveness of the C/SCSC program, concluded that there was some doubt as to JMCA's complete objectivity when compared to other offerors.

The Navy has documented the considerations upon which the challenged evaluation is based. We have reviewed this record in light of JMCA's allegations and see nothing in the record which indicates that the evaluation of AMS's proposal or that of JMCA was improper or arbitrary. To the contrary, it appears that the CARP rated both proposals on the basis of the reasoned judgment of its members and in accordance with the established evaluation criteria. The fact that JMCA disagrees with that judgment does not invalidate it. See Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87.

With respect to JMCA's expression of concern that it has not been given access to AMS's proposal and, therefore, has been compelled to present its protest with "little or no information," we note that it is our policy to consider and give full weight to the entire record, even though some portions of it have not been released to the protesters.

See S.J. Groves & Sons Company, B-189544, October 25, 1977, 77-2 CPD 324. The record before us includes copies of the JMCA, DPC and AMS proposals and the CARP recommendations, which include, for the most part, the scores and narratives of the submitted proposals, furnished us by the Navy.

Finally, JMCA has advised our Office that the Navy has refused to furnish JMCA a copy of AMS's proposal. In response, the Navy states:

"Insofar as the nondisclosure of technical proposals is concerned, and as was explained to the protestors at the conference, the technical proposal of the successful offeror falls within the parameters of exemption (b) (4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1976), which prohibits disclosure of information of the type involved herein and, additionally, falls within the scope of 18 U.S.C. § 1905 (1976), which declares illegal the disclosure of confidential information by federal officers or agencies. Since the protestors and the successful offeror, Advanced Management Systems, Inc., are competitors, disclosure of the successful offeror's proposal either to JMCA or DPC, as they requested, would harm the competitive position of Advanced Management."

Essentially, JMCA requests that our Office review Navy's decision and furnish JMCA with AMS's proposal, the evaluation criteria and actual scoring, and all enclosures to the administrative report. However, we have no authority under the Freedom of Information Act (FOIA) to determine what information must be disclosed by Government agencies to the public, DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47, and thus there is no basis for us to review Navy's FOIA decision or to furnish the requested documents to JMCA.

Based on the foregoing, JMCA's protest is denied.


Deputy Comptroller General
of the United States