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DECISION

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

FILE: B-202357 DATE: August 28, 1981

MATTER OF: JVAN, Inc.

DIGEST:

1. Contracting agency did not violate appendix "G" of the Defense Acquistion Regulation, "Avoidance of Organizational Conflicts of Interest," since there is no indication that successful contractor had been awarded earlier contract containing any restrictive provision relating to organizational conflicts of interest and present solicitation is not for a production contract. Moreover, any protest against the failure of the present solicitation to contain a conflict of interest provision is untimely since it was not raised prior to the closing date for the receipt of initial proposals.

2. No violation of the Services Contract Act has occurred since the applicable Department of Labor wage determination has been incorporated into the contract so that the successful contractor is legally bound to pay the minimum wages and fringe benefits. Moreover, GAO cannot conclude that the agency's cost realism determination as to the successful contractor's cost proposal is without a reasonable basis and, therefore, has no grounds to question that determination.

3. When read as a whole, two provisions in RFP's Statement of Work clearly establish the manning requirements for the different classes of equipment which the contractor has to operate and maintain. Thus, contrary to the protester's assertion, no ambiguity exists regarding the manning requirements and the offerors, therefore, did not compete on an unequal basis.

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4. Successful contractor's use of personnel from a wholly owned subsidiary to help perform the contract does not violate the Assignment of Claims Act since subsidiary is the agent rather than the assignee of the contractor.

5. Whether contracting agency improperly held discussions with unsuccessful offeror after requesting best and final offers need not be determined since this action made no difference in the selection of the successful offeror; no offeror was prejudiced and issue is therefore academic.

JVAN, Inc. (JVAN), protests the award of a contract to Ford Aerospace and Communications Corporation (Ford) under request for proposals (RFP) No. F26600-80-R-0059, issued by the Tactical Fighter Weapons Center, Nellis Air Force Base (Air Force), Nevada.

The RFP solicited offers for the operation and maintenance of electronic warfare ranges located at Nellis Air Force Base for the period of April 1 through September 30, 1981, with five 1-year options. Nine proposals were received, and after negotiation and receipt of best and final offers, the Air Force awarded the contract to Ford on February 7, 1981. JVAN initially filed a protest with the contracting agency, but this was denied and JVAN then filed a protest with our Office. Through several submissions, JVAN has raised five issues for our consideration which can be summarized as follows:

1. An organizational conflict of interest, exists since Ford equipment will be tested on ranges operated by Ford employees;

2. Ford's price proposal does not comply with the Service Contract Act of 1965;

3. An ambiguity exists between paragraph 3.1 of the Statement of Work and annex 8 regarding the manning levels for the range equipment and, in view of the

lower manning levels the Air Force has allowed Ford to use, all offerors did not compete on an equal basis;

4. The Air Force and Ford have improperly agreed to substitute the Aeronutronic Services Corporation (ASC), a Ford subsidiary, for Ford in the performance of this contract since Ford, not ASC, qualified for the award; and

5. The Air Force improperly held discussions with the Federal Electric Corporation after requesting best and final offers.

We find the protest to be without merit.

Conflict of Interest

JVAN argues that the award to Ford creates an organizational conflict of interest, and it cites appendix "G" of the Defense Acquisition Regulation (DAR) (1976 ed.) in support of this argument. However, we have held that the provisions of appendix "G," "Avoidance of Organizatonal Conflicts of Interest," are not self-executing and thus cannot be applied against a contractor unless a provision relating to possible conflict of interest restrictions for future procurements had been included in a prior contract. Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362. Moreover, the intent of the appendix "G" provisions is to prohibit the successful contractor in the research and development effort, which has gained an unavoidable advantage, from participating in competition for a production contract. VAST, Inc., B-182844, January 31, 1975, 75-1 CPD 71.

Here, there is no indication in the record that Ford was awarded a prior contract containing a restrictive provision, nor does the present procurement involve a production contract. Therefore, this is not the type of situation to which appendix "G" is directed, and it is therefore not applicable.

We further note that if a contracting agency believes it is necessary to exclude production contractors from a contract involving technical support services, the agency can and should include a conflict

of interest provision in the solicitation. See, e.g., Gould, Inc., Advanced Technology Group, B-181448, October 15, 1974, 74-2 CPD 205. The Air Force, however, did not believe such a provision was required here. If JVAN intends to argue that the RFP should have contained some type of conflict of interest provision and that the absence of such a provision renders the solicitation defective, this basis of protest would involve an alleged impropriety in the solicitation apparent prior to the closing date for the receipt of intitial proposals. Under our Bid Protest Procedures, any such alleged impropriety must be protested prior to the closing date for the receipt of initial proposals. 4 C.F.R. § 21.1(b)(1) (1981). Therefore, since JVAN did not raise the issue of conflict of interest until after the contract had been awarded, any protest now against the failure of the RFP to contain a conflict of interest provision is untimely.

Services Contract Act

JVAN also argues that Ford's total contract price is so low that Ford cannot possibly pay the wages and fringe benefits required by the applicable Department of Labor (DOL) wage determination. In light of this, JVAN believes that the Air Force is allowing Ford to violate the Services Contract Act of 1965, 41 U.S.C. §§ 351 et seq. (1976) (SCA).

We have held that the administration and enforcement of the SCA rests with DOL and not with our Office. Massa Flooring Co., Inc., B-187974, January 19, 1977, 77-1 CPD 40. However, we will review a question of whether the contracting agency properly evaluated a solicitation's SCA provision since this involves the issue of whether all offerors were competing on an equal basis. Education Service District of Washington County, B-198726, B-198792, November 19, 1980, 80-2 CPD 379.

The record here indicates that the RFP included the then current DOL wage determination and that this wage determination was used in the evaluation of each offeror's labor costs. Moreover, this wage determination is also included in Ford's contract. In light of this, we find that Ford is legally bound to pay the minimum wages and fringe benefits required by the DOL

wage determination and, consequently, find no unequal treatment of the offerors as JVAN implies. Cf. Logistical Support, Inc., B-197488, November 24, 1980, 80-2 CPD 391. We also note that it is the contracting agency which is charged with monitoring the contract to insure compliance with the contract's labor standards provisions. Super Building Maintenance, B-182164, February 6, 1975, 75-1 CPD 84.

As part of its SCA argument, JVAN also speculates that Ford was able to offer lower labor rates in its proposal because it planned to perform the contract with employees of a wholly owned subsidiary, ASC, who would not qualify for the Ford Pension Plan. JVAN argues that this is a violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. (1976), as amended.

However, the enforcement of this act rests with the Secretaries of Labor and Treasury, not with our Office. See 29 U.S.C. § 1202. Accordingly, we will not consider whether Ford has violated the act, but will only note once again that Ford is legally bound to comply with the contract's labor standards provisions.

JVAN further argues that the contracting officer's cost analysis of the Ford proposal was defective since, if Ford's cost had been properly analyzed, the contracting officer would have discovered that Ford could not pay the SCA wages and fringe benefits and still be able to perform the contract. In other words, JVAN believes that Ford's costs are unrealistic and that Ford will either have to perform the contract at loss or not pay the required wages and fringe benefits in violation of the SCA.

DAR § 3-807.2(a) provides that generally some form of price or cost analysis should be made in connection with every negotiated procurement action. The method and degree of analysis, however, is dependent on the facts surrounding the particular procurement and pricing situation.

Our Office has recognized that a low-cost estimate by an offeror should not be accepted at face value and that an agency should make an independent cost projection of the estimated costs reflected in the cost

proposal. This is to ensure that costs are examined in terms of their realism since the Government will be obligated under a cost-reimbursement type contract (as here) to reimburse the contractor its allowable costs. However, we have also held that conducting a cost realism evaluation is a function of the contracting agency whose determinations will not be disturbed by our Office unless they clearly lack a reasonable basis. See University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50, and cases cited.

The record presented clearly indicates that the Air Force conducted an independent cost analysis of Ford's proposed costs as required by DAR § 3-807.2(a). The Air Force had the use of a Defense Contract Audit Agency (DCAA) audit report which recommended applicable rates and commented on the allowability of proposed costs. It also employed a cost evaluation team for the analysis as specified by Air Force regulations. The same procedures were used for JVAN and all the other offerors. In its analysis of the Ford cost proposal, the Air Force compared Ford's proposed costs with the information furnished by the DCAA audit report, as well as with its own independent cost estimate, and found Ford's costs to be realistic. Under the circumstances, we cannot conclude that this Air Force determination lacks a reasonable basis.

Ambiguity

JVAN claims that a latent ambiguity exists between paragraph 3.1 of the Statement of Work (SOW) and Annex 8 of the SOW. Because of this alleged ambiguity, JVAN believes that the offerors did not compete on an equal basis. We do not find that any ambiguity exists.

Paragraph 3.1 provides in pertinent part:

> "The contractor shall normally provide eight hours of operating time (mission capable) per day per piece of equipment exclusive of any start up or shut down time.

Annex 8 provides in pertinent part:

"There are four classes of systems on the Nellis Ranges.

* * * * *

"Class 1 Equipment shall be normally operated eight hours per day excluding Saturdays, Sundays, and government holidays. Minimum acceptable operation rate shall be 75% of total threat simulators operating during this eight-hour period.

* * * * *

"Class 2 Equipment shall normally be operated eight hours per day excluding Saturdays, Sundays, and government holidays. Minimum acceptable operation rate shall be 99% for each required system during this eight-hour period.

"Class 3 Equipment operation rates shall be such as to support the operation rates required for Class 1 and 2 systems as specified above.

"Class 4 Equipment is that equipment required to support the EARTS system located in the RCC; will be normally operated 24 hours per day, 6 days per week. Minimum acceptable operation rate shall be 99% for each required system."

We have recognized that the mere allegation that something is ambiguous does not make it so. Some factor in a writing may be somewhat confusing without constituting an ambiguity, provided that an application of reason would serve to remove the doubt. Thus, an ambiguity exists only if two or more reasonable interpretations are possible. 48 Comp. Gen. 757 (1969).

We have also held that solicitations must be interpreted by reading them as a whole and construing them in a reasonable manner and, whenever possible,

effect must be given to each word, clause, or sentence. Panuzio/Rees Associates, B-197516, November 26, 1980, 80-2 CPD 395.

JVAN argues that the word "normally" as used in paragraph 3.1 means that all equipment will be manned "as close as possible to 100% at all times." This, according to JVAN, was its understanding of paragraph 3.1 during negotiations, but that it has since found out that other offerors structured their proposals on the basis that Class 1 equipment need only be manned 75 percent of the time and that the Air Force accepted this. JVAN also points out that this manning level has been incorporated into Ford's contract. JVAN notes that this 75-percent manning requirement appears in Annex 8 of the SOW, but seems to believe that this does not affect its interpretation of paragrah 3.1 and that the Air Force's decision to allow Ford and other offeror's to use a 75-percent manning level created a latent ambiguity and caused the offerors to compete on an unequal basis.

We believe that paragraph 3.1 of the SOW and Annex 8 must be read as a whole. Panuzio/Rees Associates, supra. JVAN's claim of ambiguity only has merit if paragraph 3.1 is read in isolation. However, when that provision is read in connection with Annex 8, it is clear that there is only one reasonable interpretation of the equipment manning requirement. That is, paragraph 3.1 speaks in general terms indicating that the equipment, as a whole, will be manned close to 100 percent of the time during the average 8-hour work day. But in order to find out the specific manning requirement for the different classes of equipment, reference must be made to Annex 8. There, the offeror learns that Class 1 equipment has a minimum manning level of 75 percent while Classes 2 and 4 equipment must be manned 99 percent of the time.

In light of this interpretation of the RFP which treats paragraph 3.1 and Annex 8 as a whole, we conclude that no ambiguity exists and that offerors could properly propose a manning level of 75 percent for Class 1 equipment and, moreover, that such a manning level is properly a part of Ford's contract.

Substitution of ASC for Ford

JVAN contends that it is improper for Ford to qualify for the award and then, after receiving the contract, have its subsidiary, ASC, do the actual performance. JVAN sees this as a novation (the substitution of another party for one of the original parties to a contract with the consent of the remaining party) which is a violation of the Assignment of Claims Act of 1940, 31 U.S.C. § 203 (1976) and 41 U.S.C. § 15 (1976).

The Air Force, on the other hand, argues that, in its initial proposal, Ford indicated that the contract would be performed by a combination of Ford and ASC personnel. In addition, the Air Force denies any intention of entering into a novation which would substitute ASC for Ford as the prime contractor, but insists that Ford is fully responsible for contract performance.

We have held that no violation of the Assignment of Claims Act occurs when, after entering into the contract, the successful contractor forms a corporation or subsidiary to perform the contract, but continues to personally supervise the work. In such a case, the newly formed corporation is regarded as the agent rather the assignee of the contractor. Continental Cablevision of New Hampshire, Inc.--Reconsideration, B-178542, October 17, 1975, 75-2 CPD 236.

Here, the subsidiary existed before the contract was awarded. The successful contractor not only retains overall control of the work, but some of its personnel will be involved in the actual day-to-day performance of the contract. Lastly, the agency has stated that it intends to hold the parent corporation fully responsible for contract performance.

Under the circumstances, we find no violation of the Assignment of Claims Act. If a contractor can form a subsidiary after the contract award and have that subsidiary perform the contract, it can certainly use a subsidiary in existence prior to the award to do the same thing so long as it retains personal supervision of the work. Ford has done

just this and informed the Air Force of its plan from the start. There is no evidence that either Ford or the Air Force intend ASC to become legally obligated to perform the contract in question. ASC is merely Ford's agent, and Ford continues to bear all legal obligations under the contract. This ground for protest, therefore, is without merit.

Improper Discussions

JVAN argues that the Air Force held improper discussions with the Federal Electric Corporation (FEC). The record indicates that upon receipt of FEC's best and final offer on January 2, 1981, the contracting officer discovered that FEC had omitted all the costs for the engineering and integration effort subline items. The deadline for best and final offers was 4 p.m. on January 2, so at 2:35 p.m. the contracting officer telephoned the FEC representative and asked him if he had meant to leave the subline items blank. The FEC representative reviewed the proposal and by 3:30 p.m. provided the contracting officer with the information necessary to complete the omitted items. The Air Force maintains that the contracting officer's actions did not constitute discussions, but only a clarification which was proper under the circumstances.

In negotiated procurements, meaningful discussions must be held with all offerors whose initial proposals are acceptable or are capable of being made acceptable. DAR §§ 3-805.1 and 2. Discussions should be concluded with a common cutoff date for the submission of best and final offers. DAR § 3-805.3(d). If discussions are reopened with one offeror after the receipt of best and final offers, they must be reopened with all offerors in the competitive range and those offerors must be given an opportunity to submit revised proposals. University of New Orleans, B-184194, September 19, 1977, 77-2 CPD 201. However, inquiries to an offeror for the sole purpose of eliminating minor uncertainties or irregularities in a proposal constitute clarifications rather than discussions and do not require reopening of discussions with all offerors.

Whether discussions have been held is a matter to be determined on the basis of the actions of the parties. New Hampshire-Vermont Health Services,

57 Comp. Gen. 347 (1978), 78-1 CPD 202. We have held that discussions occur if an offeror is afforded an opportunity to revise or modify its proposal. 51 Comp. Gen. 479 (1972).

Whether the Air Force held discussions with FEC or whether FEC was afforded the opportunity to revise its proposal need not be determined. In view of the subsequent award to Ford, we find that neither JVAN nor any of the other offerors was prejudiced by this Air Force action. We have recognized that a contracting agency's technically improper action becomes academic where it made no difference in the selection of the successful offeror. See, e.g., Data Products New England, Inc.; Honeywell Inc.; Tracor Aerospace, B-199024, January 9, 1981, 81-1 CPD 16.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States