

support



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Jones & Company

File: B-224914

Date: February 24, 1987

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## DIGEST

An agency acts improperly by not conducting technical discussions and by requesting best and final price proposals where omissions and weaknesses noted in the initial technical proposals were suitable for correction through discussion, since, as a general rule, contracting agencies must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range.

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## DECISION

Jones & Company protests the award of a contract to Stetson Engineers Inc. under request for proposals No. BIA-M00-86-27, issued by the Bureau of Indian Affairs, Department of the Interior. Jones contends that several aspects of the procurement were improper, including the agency's decision not to conduct technical discussions and its evaluation of the protester's and the awardee's proposals.

We sustain the protest.

The solicitation, issued June 27, 1986, sought offers to prepare a comprehensive water development plan for the Rio San Jose watershed on the Acoma and Laguna Indian Reservations in New Mexico. The RFP was set aside for Indian-owned firms and other qualified small businesses. It included the following "SPECIAL NOTICE TO OFFERORS":

"Consideration for award shall be given, first to qualified 100 percent Indian-owned and controlled firms and technical merit, secondly to all other small business concerns and technical merit."

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BIA listed 13 technical evaluation factors and possible points for each in the RFP, and it stated that technical matters would be more important than price in selection for award.

By the closing date, August 15, four Indian-owned firms and one non-Indian firm, Stetson Engineers, submitted proposals. Stetson's technical score was well above those of the other offerors: 27, 32, 77.3 (Jones), 77.8, and 91 (Stetson). Stetson's initial price, \$358,453, was substantially below those of the two nearest-ranked offerors, which were slightly more than \$600,000. In light of Stetson's technical score and proposed price, BIA decided to consider the firm on the same basis as Indian-owned firms and to include it in the competitive range along with two other firms. The contracting officer requested best and final cost proposals; both Indian-owned firms reduced their proposed prices to about \$500,000, while Stetson's final offer was \$342,211.

On September 30, the contracting officer awarded a contract to Stetson. Following Jones' October 7 protest to our Office, he decided to continue performance on grounds that it would "serve to meet the mission of the BIA in fulfilling its trust responsibilities to the Pueblos of Acoma and Laguna." The water development plan is to be used in a water rights case that may be tried in early 1988, and the contracting officer believed that delay might leave insufficient time to complete the plan and integrate the plan into the litigation strategy.<sup>1/</sup>

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<sup>1/</sup> The contracting officer's written determination to continue performance did not refer to the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(d)(2) (Supp. III 1985), which establishes the exclusive grounds for legally proceeding with performance of contracts that have been protested within 10 days after award. In the absence of a specific finding that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General," 31 U.S.C. § 3551(d)(2)(A)(ii), we consider BIA's determination to be, in effect, that "performance of the contract is in the best interests of the United States." 31 U.S.C. § 3551(d)(2)(A)(i).

The protester raises several issues regarding the conduct of the procurement that we find either without merit or untimely. For example, Jones contends that the technical evaluation criteria should have addressed the adequacy of the offerors' technical approaches and understanding of the work. According to Jones, since the criteria relate solely to previous experience, they are slanted toward long-established firms like the awardee. Protests based upon apparent improprieties in a solicitation must be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1986). Since the evaluation criteria were listed in the RFP and, therefore, were apparent before the closing date, this ground of protest is untimely.

The protester also alleges that the proposals were not fairly evaluated, and it provides a detailed comparison of its proposal and Stetson's with regard to key elements of the statement of work. The primary distinction emphasized is that, with regard to each area of the requirement to prepare a water development plan, Jones was more specific concerning the nature of the Rio San Jose watershed, its history and the current environment, and what information is currently available to the contractor. The evaluation criteria, however, concern only knowledge and experience generally, not the Rio San Jose watershed specifically. For example, offerors could receive up to five points for "knowledge and experience in actual design of recreational water development projects," with no requirement of knowledge about recreational uses of water in the particular area in question.

We have reviewed the proposals and the technical evaluation record, and we conclude that BIA's relative rating of the two proposals was not unreasonable. On the other hand, as discussed below, we find that BIA improperly failed to conduct meaningful discussions with firms in the competitive range.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(2) (Supp. III 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, and, in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach to another or in technical leveling. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd on reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. Once discussions are opened with an offeror, the agency must point out all deficiencies in that offeror's proposal and not merely selected ones. Id.

BIA's request for best and final cost proposals constituted discussions, and the failure to discuss technical matters was proper only if the initial technical proposals contained no uncertainties or weaknesses. Sperry Corp., 65 Comp. Gen. 195 (1986), 86-1 CPD ¶ 28. This was not the case. In its report dated September 23, the technical evaluation committee recommended that the firms in the competitive range and their subcontractors be interviewed and given the opportunity for further presentation of their responses to the RFP. The committee apparently did not prepare a summary of its evaluation, but the evaluation sheets of committee members demonstrate many areas in which additional information from Jones would have improved its rating, such as resumes from additional staff members and clarification as to types of surface water studies to be performed. We conclude that the omissions and weaknesses noted by the evaluators were, in large part, suitable for correction, thus requiring that BIA conduct technical discussions. See Sperry Corp., supra.

BIA states that it had insufficient time to conduct technical discussions before the end of the fiscal year, at which time funds appropriated for fiscal year 1986 would no longer be available for the contract. We recognize that even with sound advance planning this problem cannot always be avoided, but there is no exception to the statutory obligation to conduct meaningful discussions based upon the possible lapse of appropriated funds.

We are recommending that BIA reinstate the request for proposals, conduct additional discussions with the three firms in the competitive range, and request additional best and final offers. If Stetson is not the successful offeror, its contract should be terminated for the convenience of the government.

We sustain the protest.

*Milton F. Jordan*  
for Comptroller General  
of the United States