



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Ralph Korte Construction Company, Inc.  
File: B-225734  
Date: June 17, 1987

### DIGEST

1. Agency properly clarified minor irregularity in awardee's price proposal when the more reasonable interpretation was that offeror made a clerical error in entering either or both of two component construction prices rather than a mistake in entering the subtotal, since if interpreted as a mistake in entering the subtotal the offer would exceed and be inconsistent with the construction cost limit of the RFP. Clarification of such a minor irregularity to correct this clerical mistake does not constitute discussions, requiring the opening of discussions with the other offerors in the competitive range.

2. Clarification conducted by agency with successful offeror to correct clerical error was not prejudicial to protester whose proposal contained substantial qualifications of and deviations from request for proposals, since in a negotiated procurement any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable, and may not form the basis for award.

### DECISION

Ralph Korte Construction Company, Inc., protests the award of a contract to J.S. Alberici Construction Company, Inc., under request for proposals (RFP) No. DACA27-87-R-0004, issued November 26, 1986, by the Louisville, Kentucky District, United States Army Corps of Engineers. The solicitation was for the design and construction of a new headquarters facility for the Air Force Communications Command at Scott Air Force Base, Illinois. Korte primarily alleges that award on the basis of initial proposals, without discussions with itself and other offerors, was improper. Alternatively, Korte alleges that if the agency intended to make an award on the basis of initial proposals, Korte was entitled to it as the highest-scored, lowest-priced offeror. We deny the protest.

039240

## BACKGROUND

The subject RFP provided for a "design-build" project in which design and construction would be completed by a single firm or a team of architects and engineers. It required offerors to submit separate management and cost proposals and stated that management was more important for evaluation purposes. The RFP contained the following management evaluation criteria listed in descending order of importance: (1) project organization and personnel (2) offeror experience and past performance, and (3) management control systems. Cost proposals, which are at issue here, were to consist of three line items: (1) basic design, for which the contractor would be reimbursed \$325,000; (2) option I, final design, for which the contractor would be reimbursed \$375,000; and (3) option II, for which offerors were to propose prices for (a) building construction, (b) site work, and (c) a communications system. Offerors were to submit separate prices for building construction and site work and to provide a subtotal for these two items. The RFP warned offerors that the funds available for these items were \$16,609,000 and that offers exceeding this "construction cost limit" might be rejected. Further, the solicitation notified offerors that award might be made on the basis of initial proposals, i.e., to the offeror "whose initial proposal was determined to be most advantageous to the government, price and other factors considered."

Five firms, including Korte and Alberici, submitted initial proposals by the amended closing date of January 23, 1987. The evaluation committee found all management proposals acceptable and, according to the contracting officer, included all five in the competitive range. Korte received the highest management score, 267 points out of a possible 300.<sup>1/</sup> The committee then reviewed cost proposals. Korte's total price, \$17,850,000, which included a construction

---

<sup>1/</sup> Point scores for management were as follows:

Ralph Korte Construction Company, Inc.	267
Mellon Stuart Co.	249
Tarlton Corp.	239
J.S. Alberici Construction Company, Inc.	234
C. Rallo Contracting Company, Inc.	218

subtotal of \$16,096,300, was the lowest.<sup>2/</sup> Korte's cost proposal, however was conditioned "per attached building description clarifications and qualifications" that consisted of a 2 1/2 page, 48-item list. Apparently it was not until the time of evaluation of cost proposals that the conditional nature of Korte's proposal became evident to the Corps, although Korte's management proposal stated its belief that "the project as defined in the RFP could not be constructed within the stated budget of \$16,609,000," and noted that the cost proposal defined areas where Korte "made exception" to the RFP. In any event, the evaluation committee subsequently determined that it did not have enough information to evaluate Korte's "clarifications and qualifications" without discussions. However, according to the committee price evaluation, it appeared that Korte's offer "could not come close to the [\$16,609,000 cost limit] without making major revisions to the specifications."

In contrast, the committee determined that Alberici's offer met all RFP requirements. After what the agency describes as a clarification of Alberici's price for the construction items, the evaluation committee determined that it was \$16,606,042, and therefore within the \$16,609,000 construction cost limitation. Since the remaining three proposals exceeded this amount for the items in question, the committee considered Alberici's to be the most advantageous to the government.

The agency awarded an \$18,160,743, fixed price contract to Alberici on February 4, 1987. Korte's protest followed on February 13, and the Corps issued a stop work order to Alberici on February 19, pending our decision on the matter.

#### KORTE'S PROTEST

Korte initially alleged that the Corps could not properly have made an award without discussions because, given its own lower price, the action did not result in the "lowest

2/ Proposed prices were as follows:

	Construction (Items 3(a) and 3(b))	Total
Korte	\$16,096,300	\$17,850,000
Alberici	16,606,042 (as corrected)	18,160,743
Mellon	17,100,000	18,550,000
Rallo	17,396,553	18,780,000
Tarlton	17,295,000	19,195,000

overall cost to the government at a fair and reasonable price," citing the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(a)(3) (1986). After receiving additional documents, Korte further protested that the Corps had improperly allowed Alberici to modify its price to bring it within the construction limitation. According to the protester, this constituted discussions, which should have been held with all offerors in the competitive range. In addition, Korte alleged that if the agency intended to make an award on the basis of initial proposals, Korte was entitled to it as the highest-scored, lowest-priced offeror. Korte concluded that evaluators had unfairly penalized it by not discussing its "clarifications and qualifications."

#### ANALYSIS

In our opinion, the correction of Alberici's proposed price for the construction portion of the project was clarification of a minor irregularity and not discussions requiring the opening of discussions with the other offerors in the competitive range. In any event, the correction works no competitive prejudice to Korte. Regardless of the agency's inclusion of Korte's offer in the competitive range, because of the number of qualifications, their substantial nature, and the recognized seriousness of them by the evaluation committee, Korte's proposal was in fact unacceptable as initially submitted. Accordingly, award to Korte on the basis of its qualified initial proposal would not have been proper.

The record indicates that Alberici's cost proposal, as submitted, included certain figures that had been crossed out and other figures that had been substituted and initialed by a representative of the firm. The original figures were as follows:

Basic Design Services	\$ 325,000
Option I	375,000
Option II	
a. Bldg.	16,022,408
b. Site	<u>653,634</u>
*Subtotal (3(a) and 3(b))	16,676,042
c. Communications system	784,701
Subtotal Option II	<u>17,460,743</u>

Total Project Cost \$18,160,743

\*Funds available for this item are \$16,609,000.

The subtotal for line items 3(a) and 3(b) and the price for item 3(c) had then been crossed out and new figures substituted as follows:

Basic Design Services	\$ 325,000
Option I	375,000
Option II	
a. Bldg.	16,022,408
b. Site	<u>653,634</u>
*Subtotal (3(a) and 3(b))	16,606,042
c. Communications system	854,701
Subtotal Option II	<u>17,460,743</u>
Total Project Cost	\$18,160,743

\*Funds available for this item are \$16,609,000.

In other words, \$70,000 had been subtracted from the total of items 3(a) and 3(b) and the same amount added to item 3(c). The original subtotal of items 3(a) and 3(b), \$16,676,042, is mathematically correct. The substituted subtotal is \$70,000 less than the sum of the component items.

The agency explains that after the evaluation committee selected Alberici's proposal as the best overall, the chairman called Alberici on January 30, 1987, to clarify the apparent \$70,000 mistake. According to the agency, Alberici advised it that \$70,000 should have been deleted from item 3(a), building construction, and its intended price for that item was \$15,952,408. As a result of the inquiry, a procurement clerk typed the corrected price on Alberici's offer with the notation "to conform with changes made before award, item 3(a) amount should read \$15,952,408." According to the agency, this merely corrected a clerical error in accord with applicable regulations. Therefore, according to the agency, award on the basis of initial proposals was proper.

Under appropriate circumstances, an award may be made on the basis of initial proposals following, if necessary,

discussions conducted for the purpose of minor clarification. 10 U.S.C. §§ 2305(b)(4)(A)(ii), 2305(b)(4)(C) (Supp. III 1985). The FAR states that clarification means communication with an offeror for the purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal. 48 C.F.R. § 15.607. If the resulting communication prejudices the interest of the other offerors or if the correction requires reference to documents, worksheets or other data outside the solicitation and/or the proposal, the mistake may only be corrected through discussions. Id., §§ 15.607(a), 15.607(c)(5); ALM, Inc., B-221230, et al., Mar. 11, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 CPD ¶ 240. If discussions are held with any offeror within the competitive range prior to award, meaningful discussions must be conducted with all offerors within the competitive range. 10 U.S.C. § 2305(b)(4)(B); Joint Action in Community Service, Inc., B-214564, Aug. 27, 1984, 84-2 CPD ¶ 228.

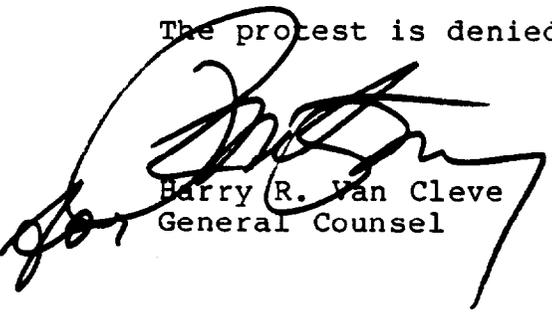
We agree with the Corps that the discrepancy in Alberici's construction pricing was a minor irregularity, within the meaning of the FAR. See Southern Systems, Inc., B-224533, Feb. 25, 1987, 87-1 CPD ¶ 214. What is involved here is a discrepancy between the correct mathematical subtotal of the two items comprising the construction price and the amount substituted by Alberici as the subtotal of those items. If interpreted as a mistake in entering the subtotal, Alberici's offer would exceed and thus be inconsistent with the \$16,609,000 construction cost limit. Given the limit, we believe the more reasonable interpretation of Alberici's offer was that the firm did not intend to exceed the limit, but rather made an error in either or both of the construction item prices, rather than a mistake in entering the subtotal. Clarification of such a minor irregularity to correct this clerical mistake does not constitute discussions. Therefore, the matter was properly clarified with Alberici, without the opening of discussions with the other offerors in the competitive range. 48 C.F.R. § 15.601.

Moreover, we are unconvinced that the correction was prejudicial to Korte. In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for award. South Central Bell Advanced Systems, B-216901, Aug. 19, 1985, 85-2 CPD ¶ 188. Regardless of the Corps' initial inclusion of Korte's proposal in the competitive range, the record indicates and the evaluation committee recognized that the deviations of Korte's proposal from RFP requirements were substantial, and therefore the proposal was unacceptable. The major example of a substantial deviation was Korte's substitution of a structural system consisting of a

composite steel deck with poured-in-place concrete over a structural steel frame in lieu of the poured-in-place reinforced concrete structural system presented in the RFP project documents. Also, Korte's offer deviated from the obligation to provide design services contained in the RFP by providing that the future contract could be canceled during the basic design services phase, presumably at the contractor's option. A further deviation of Korte's offer was its provision that any cost incurred through the design phase of option I would be reimbursable, while the RFP provided a fixed price for design services. Other deviations of Korte's offer from the RFP requirements included (1) omitting the required supports for concrete flat work, (2) proposing subgrade elevations to be 0.10 feet from the established grade rather than the required 0.05 feet, and (3) omitting the required stringers (floor supports) in all access flooring.

Korte clearly made an offer substantially different from what was called for by the RFP. While the solicitation provided for an incentive procedure for cost reduction and design alternatives submitted to and approved by the government after award, it was not acceptable to qualify one's proposal on the basis of alternate designs, as Korte did, as this would prevent competition on an equal basis. Further, Korte's highest-scored management proposal is irrelevant since the score did not reflect the deviations of Korte's proposal from the technical requirements of the RFP. Accordingly, we find the permitted correction of the subtotal unprejudicial to Korte.

The protest is denied.



Harry R. Van Cleve  
General Counsel