



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

B-178445

40019  
October 4, 1973

Advanced Management Systems, Inc.  
4140 Southwest Freeway  
Houston, Texas 77027

Attention: Mr. Edwin L. Lowary  
President

Gentlemen:

We refer to your letter of July 6, 1973, and prior correspondence, protesting the award of a contract for logistics and warehouse support services to anyone other than Advanced Management Systems, Inc. (AMS), under request for proposals No. 9-BB43-56-3-6P, issued at the National Aeronautics and Space Administration (NASA) Johnson Space Center, Houston.

Your protest is founded on several bases. You contend, first, that although cost was not listed in the request for proposals as a major factor to be considered in making award, cost did, in fact, constitute the decisive factor in making the award to the low cost offeror, Metro Contract Services, Inc. (MCS). Further, you believe that the low price offered by MCS is unrealistic, and you note in this context that during negotiations when you indicated a desire to reduce your labor costs through certain efficiencies in labor utilization and manpower reductions you were instead encouraged to add another employee to your work force. You also contest the NASA determination that MCS has "more relevant company experience" than AMS inasmuch as AMS has been in business for five years and MCS was formed only in 1972 and at that time had only three employees, all attorneys. You note further the possibility that MCS was considered to have the necessary experience because during negotiations it offered to employ your project manager. You believe this offer to have been a gross misrepresentation, since the services of that person were committed exclusively to AMS. Finally, you contest the MCS representation that it is a small business, the procurement being a 100-percent small business set-aside.

On the basis of the facts presented our Office, we must deny your protest for the following reasons.

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The original scoring of the technical proposals by the source evaluation board resulted in an AMS score of 636 points out of the possible 1000 and an MCS score of 615. Of the total 1000 points, 150 were allotted for company experience. Of the three companies which were requested to execute contracts prior to the final determination of award, AMS received 15 points and the other two offerors received none. While no definitive reevaluation and score tabulation was made after negotiations, the report of the source evaluation board and the negotiation records show that after the scoring, both AMS and MCS were found to have company experience in certain areas which had not previously been indicated. It was also noted that MCS had strengthened its proposal by offering to employ the incumbent project manager in the event that it received award--a fact not shown in the original scoring for key personnel. However, from a study of these records, we cannot say that any of these newly added experience factors truly altered the competitive positions of either offeror in any material way.

Indeed, even should the most detrimental assumption be made as regards MCS, that the MCS score was not increased in those areas during negotiations, it would still be necessary to find the award to MCS proper. We note that offerors' costs were to form a part of the evaluation, although they were not to be scored as were the technical criteria. We have previously held that estimated costs and proposed fees may become the controlling factor in determination of award if all other factors are substantially equal. 50 Comp. Gen. 320, 407 (1970). We believe this rule to be clearly applicable in the instant case where the technical scoring of the AMS and MCS proposals resulted in scores of substantial equality and where a difference of approximately \$114,000 existed between the AMS proposed cost and the \$743,111 offer of MCS.

Relative to your contention that the price of MCS is unrealistic, we note that the following prices were offered by the three offerors considered for award.

|                      |           |
|----------------------|-----------|
| MCS                  | \$743,111 |
| Optron Systems, Inc. | 760,620   |
| AMS                  | 857,209   |

Considering the range of these prices and the proximity of the Optron price to that of MCS, we cannot find that the low offer is unrealistic. You have presented no persuasive reason why AMS' price should be accepted as the standard of realism. Further, our Office has noted that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals

are realistic concerning the proposed costs and the technical approach involved. We believe that such judgments must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. See 50 Comp. Gen. supra, at 410.

Concerning your allegations that HCS is not a small business, we note that a decision as to the status of this firm was requested of the Small Business Administration (SBA), albeit after award. HCS was found by the SBA to be a small business as regards this procurement. Such determinations by the SBA are binding on Government procurement officials and will not be questioned by our Office. 47 Comp. Gen. 462, 467 (1968). In this regard we are pleased to observe that NASA Procurement Regulations (1.703(h)(1)) now comport with the Armed Services Procurement Regulation and SBA's Regulations, so as to allow any possible appeal of the size status of the apparent successful small business offeror to be made prior to the award of a contract.

You state that although an attempt was made during negotiations to reduce AIS' labor costs, the procurement officials instead prevailed upon AIS to add one man-year to its project management office. As regards the addition to your project management office, the administrative report states that such addition was encouraged so as to create a stronger management arrangement and that this had the effect of strengthening the AIS proposal with a very minimal cost impact. Further, the negotiation records indicate that attempts to have AIS reduce its direct labor wage rates to a more competitive level were unsuccessful. When questioned as to why its wages for supervisory personnel and the LP&A Staff were significantly higher than those of other offerors, AIS found this to be necessary and unalterable. We note also that the contract level of effort as cited in the request for proposals was 170,000 man-hours of direct labor. These levels of effort could not be reduced, of course, by an offeror during negotiations, and therefore we fail to see how the negotiating team kept AIS from reducing its cost offer. It would appear, to the contrary, that requests to decrease costs in certain areas in order to become cost-competitive were rejected by AIS.

You also protest two further ancillary matters. First, you protest the gross misrepresentation and fraud perpetrated by HCS in offering to employ the incumbent project manager, who was exclusively committed to you, should it receive the contract. The Inspection Division of NASA conducted an investigation into this matter. It was concluded that the

allegations of fraud were not substantiated and that, therefore, the matter would not be referred to the Department of Justice. It would appear that while the incumbent project manager was exclusively committed to AMS until after the award of the contract and did not give MCS permission to use his name during negotiations as a future employee of MCS, he did state that he would consider working for MCS if it received award instead of AMS. In any event, the effect of any statement by MCS during negotiations concerning his employment by it had no apparent effect upon the decision to make award to MCS and, therefore, in our opinion would not affect the legality of such award.

Lastly, you contend that delays in the procurement action prevented AMS from bidding on other work while it held itself ready to perform for NASA under the expected contract and that when AMS was not awarded that contract it was, in retrospect, financially injured. This is one of the risks any firm knowingly and willingly accepts in competing for a contract, be it with the Government or with the private sector of the economy.

Sincerely yours,

Paul A. Doubling

For the      Controller General  
                 of the United States