



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** J. A. Jones/IBC Joint Venture; Black Construction Company

**File:** B-285627; B-285627.2

**Date:** September 18, 2000

---

Douglas L. Patin, Esq., Robert J. Symon, Esq., and Claire E. Kresse, Esq., Spriggs & Hollingsworth, for J. A. Jones/IBC Joint Venture; and Gary Y. Shigemura, Esq., and Koji Kato, Esq., Shigemura and Harakal, for Black Construction Company, the protesters.

Richard Welsh, Esq., and Damon Martin, Esq., Naval Facilities Engineering Command, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Protests that agency unreasonably determined that protesters' proposals for design/construction contract were unacceptable but susceptible to being made acceptable and impermissibly awarded contract on the basis of initial proposals are denied, where record shows that protesters' proposals did not meet several of the solicitation's design requirements and contained informational deficiencies, and award to the offeror of the only technically acceptable proposal without discussions was consistent with the solicitation.

---

### DECISION

J. A. Jones/IBC Joint Venture (Jones/IBC) and Black Construction Company (Black) protest the Navy's award of contract to Dick Pacific Construction Co., Ltd. (Dick) pursuant to request for proposals (RFP) No. N62766-99-R-0200 for design and construction of an Army Reserve Center in Guam. Both protesters contend that the Navy miscalculated their proposals and, therefore, the selection of Dick was improper.

We deny the protests.

## BACKGROUND

Issued by the Naval Facilities Engineering Command on February 14, 2000, the RFP solicited fixed-price offers for the design and construction of an Army Reserve Center including five buildings (administration, training, maintenance, storage, and unheated storage), utility connections (sewer, water, telephone, electrical, cable television, and other local area network), and other related work. The RFP included a large number of mandatory design requirements that offers were required to meet.

The RFP stated that the contract would be awarded to the offeror whose proposal represented the best value, after evaluation of price and technical factors. The technical evaluation factors were building design; proposer experience/past performance; designer qualifications, experience and past performance; management plan; construction company's safety record; and small business subcontracting effort. Price proposals would be evaluated to determine that prices were balanced, fair, and reasonable. The RFP stated that the agency intended to award a contract without conducting discussions and, therefore, advised that initial proposals should contain the offeror's best terms. The RFP also advised that proposals should set forth full, accurate and complete information, and that the government would rely on the information contained in the proposal in awarding the contract.

Four offers were received and evaluated by the technical evaluation board (TEB). Three of the four proposals, including those of Jones and Black, were given overall technical ratings of "unacceptable but susceptible to becoming acceptable." Dick's proposal was given an overall rating of "highly acceptable" and ranked first on technical merit.<sup>1</sup> The Jones proposal (total price of [deleted]) was the [deleted] Black's proposal (total price of [deleted]) was the second [deleted] and Dick's proposal (total price of \$15,248,982) was the highest-priced.<sup>2</sup>

The TEB recommended to the source selection board (SEB) that discussions be conducted and prepared questions to be asked of each offeror. The SSB agreed with the overall technical ratings given by the TEB, but decided that enough information was available to determine the best value and to award the contract without discussions. After comparing the costs of the perceived technical benefits of Dick's highest rated proposal with those of Black's [deleted] rated proposal and determining that Dick's price compared favorably with the government estimate and other proposals, the SSB recommended that the contract be awarded to Dick.

---

<sup>1</sup> Black's proposal was ranked [deleted] on technical merit, while the Jones proposal was ranked [deleted].

<sup>2</sup> All four proposals were less than the government estimate of [deleted].

After reviewing the TEB and SEB reports, the source selection authority (SSA) noted that Dick's proposal was the only acceptable proposal received. The SSA also noted that the Jones proposal did not meet all RFP requirements, would require significant redesign to achieve conformance, and therefore was not eligible for award. While recognizing that Black's technically unacceptable proposal would not require extensive redesign to make it acceptable, the SSA concurred with the TEB's assessment that the proposal contained several minor design weaknesses that would have to be corrected before the proposal could be considered acceptable for award. After noting that Dick's proposal contained numerous design features that exceeded the RFP requirements, and comparing Dick's price with the lower price proposed in Black's technically unacceptable proposal, the SSA determined that the additional design features proposed by Dick merited paying Dick's higher price. Thus, the SSA concurred with the SEB's recommendation that the contract should be awarded to Dick without discussions. The contract was awarded to Dick on May 24. Jones and Black filed these protests shortly thereafter.

#### THE JONES PROTEST

Jones contends that its proposal should have been rated as "acceptable" rather than "unacceptable but susceptible to becoming acceptable," and that the Navy should have informed it of the perceived weaknesses in its proposal and allowed it to clarify the proposal with regard to the Navy's concerns. Jones also contends that the Navy did not consider the cost savings represented by its proposal and therefore the Navy's best value determination was not supportable.

Our Office will question an agency's evaluation and selection decisions only where they violate a procurement statute or regulation, lack a reasonable basis, or are inconsistent with the stated evaluation and selection scheme. See B. Diaz Sanitation, Inc., B-283827, B-283828, Dec. 27, 1999, 2000 CPD ¶ 4 at 6.

The Jones proposal received "acceptable" ratings on three evaluation factors (proposer experience/past performance, management plan, and small business subcontracting effort). The proposal also received ratings of "unacceptable but susceptible to becoming acceptable" on three evaluation factors (building design; designer qualifications, experience and past performance; and safety record). Based upon deficiencies in the areas of building design; designer qualifications, experience, and past performance; and safety record, the TEB rated the Jones proposal overall as "unacceptable but susceptible to becoming acceptable." From our review of the record, we conclude that the Navy reasonably rated the Jones proposal as unacceptable but susceptible to being made acceptable. We discuss below some of the deficiencies that the Navy found in the Jones proposal that caused the Navy to reasonably determine that it was unacceptable as submitted.

In evaluating building design, the most important technical evaluation factor, the TEB determined the Jones proposal to be unacceptable but susceptible to becoming

acceptable because it did not meet the RFP's minimum requirements in three different areas.

The first deficiency concerned the RFP requirement that the contractor plant a minimum of 25 royal palm trees in front of the administration building. RFP part 2 (Technical Requirements), at 2B-23. The Jones proposal offered to plant [deleted] instead. The agency explains that it required royal palms because they are larger in circumference and therefore better able to withstand the destructive power of seasonal typhoons. In addition, the agency states that it desired to avoid the introduction of [deleted]. Agency Report (Jones Protest) at 4, 8.

The second deficiency concerned the RFP requirements that the contractor provide main sewer lines that are a minimum of 200 millimeters (mm) in diameter and lateral sewer lines that are a minimum of 150 mm in diameter. RFP part 2 (Technical Requirements), at 2B-14. Jones proposed main lines that were [deleted] mm in diameter and lateral lines that were [deleted] mm in diameter instead. The agency explains that these were serious deficiencies because insufficient sewage drainage increases the risk of blockage and backflow, which can have serious health and safety implications. The agency also states that the [deleted] sewage infrastructure proposed by Jones would frustrate the Navy's ability to expand the system. Agency Report (Jones Protest) at 4, 8.

The third deficiency concerned water runoff. The TEB noted that the Jones proposal was deficient because it did not ensure that water runoff would be diverted [deleted] as required by the RFP. RFP part 2 (Technical Requirements), at 2B-7; Agency Report (Jones Protest) at 4. The RFP explained that this requirement was to prevent the runoff from entering adjacent property.

Additionally, in evaluating the Jones proposal as unacceptable but susceptible to becoming acceptable on designer qualifications, experience, and past performance, the TEB noted that Jones did not provide the [deleted] required by the RFP for evaluation, [deleted], and that Jones did not [deleted].

Jones concedes that it offered [deleted] trees, that its sewer pipes were [deleted] and that because of a "clerical mistake" it did not provide the qualifications of its design team. Jones Protest at 9. Moreover, Jones has not refuted the agency's assertion that the proposal was deficient with regard to diverting water runoff. Under these circumstances, and based on the record, we think the agency reasonably concluded that the Jones proposal was unacceptable. Jones nonetheless argues that these deficiencies could have been easily corrected if the Navy had informed it of the agency's concerns and allowed it to "clarify" its proposal. Jones also argues that, if awarded the contract, it can change any part of its design that does not meet the RFP's minimum requirements under RFP provisions that require submission and approval of the contractor's final design documents by the government.

Where award will be made without discussions, agencies may have limited exchanges with an offeror for the purpose of clarifying certain aspects of its proposal or to resolve minor or clerical errors. Such limited exchanges do not constitute discussions. Federal Acquisition Regulation (FAR) § 15-306(a)(2). Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Joint Threat Servs., B-278168, B-278168.2, Jan. 5, 1998, 98-1 CPD ¶ 18 at 12.

Here, the information Jones says it would have given to the agency, if it had been allowed to do so, would not have been clarifications, as Jones suggests. Rather, Jones would have provided additional information (for example, the qualifications of its design team) or revised its design specifications (for example, [deleted] of its sewer pipes to meet the RFP's minimum requirements) in order to make its proposal technically acceptable. Allowing Jones to revise its proposal or provide additional information to make its proposal acceptable would have constituted discussions and required the agency to hold discussions with the other offerors. FAR § 15.306(d); Kahn Instruments, Inc., B-277973, Dec. 15, 1997, 98-1 CPD ¶ 11 at 8 n.5. The Navy could not properly have held discussions with Jones alone under the guise of obtaining clarifications.

There generally is no requirement that an agency hold discussion where, as here, the RFP advises that the agency intends to make award without discussions. Since the RFP notified offerors of the agency's intention to make award without discussions, Jones could not presume that it would be given a chance to improve its proposal through discussions. The burden was on Jones to submit an initial proposal containing sufficient information to demonstrate its technical merits and to show that all of the RFP's required design specifications were met. Jones ran the risk that its proposal would be rejected when it failed to do so. Given the solicitation language and our conclusion that the Navy reasonably found that the Jones proposal was unacceptable, the agency was not required to hold discussions here. Id.

There is also no merit to the protester's suggestion that the agency could have awarded it the contract and then allowed it to modify its design specifications as necessary. The RFP specifically stated, in a provision entitled "Enforceability of Proposal," that the proposal must set forth full, accurate, and complete information as required under the RFP; that the government would rely such information in awarding the contract; and that all items proposed would be utilized for the duration of the contract. RFP § 5B.4. Thus, the agency would not have been able to enforce all of the RFP's mandatory requirements on Jones if it awarded a contract to the firm based upon its nonconforming proposal. While the RFP included provisions that allow government-approved changes to specifications after award, see RFP section 01110, at 2-3, we think it is clear that the purpose of those provisions is to allow the government an opportunity to review all design documents and to approve any necessary changes before construction begins; we do not believe that such

provisions are intended as a means for the contractor to revise its unacceptable proposal after award to make it acceptable.

## **BLACK'S PROTEST**

Black contends that the Navy incorrectly evaluated its proposal in a number of areas and that none of the weaknesses the agency perceived in Black's proposal would prevent Black from completing the project in accord with the RFP. Black Protest at 2-7.

The Black proposal received an "unacceptable but susceptible to becoming acceptable" on building design, the most important evaluation factor. The proposal received "highly acceptable" ratings on three factors (proposer experience/past performance; management plan; and small business subcontracting effort). The proposal also received "acceptable" ratings on two evaluation factors (designer qualifications, experience and past performance; and safety record). Based upon deficiencies in the building design area, the TEB rated Black's proposal as "unacceptable but susceptible to becoming acceptable." From our review of the record, we conclude that the Navy reasonably rated Black's proposal as unacceptable but susceptible of becoming acceptable. We discuss below some of the deficiencies that the Navy found in Black's proposal that caused the Navy to reasonably determine that the proposal was unacceptable as submitted.

The first deficiency concerns the RFP requirement, noted above, that the contractor plant a minimum of 25 royal palm trees in front of the administration building. Black's proposal offered to plant [deleted] royal palms instead. Black admits that it offered fewer royal palm trees than were required, but states that it did so to make the plans symmetrical; Black also states that it will plant [deleted] additional trees if the Navy requires them. The Navy points out that 25 trees can be placed symmetrically in front of the administration building as long as one is placed on the centerline and that Black could have offered to plant [deleted] trees, meeting the RFP minimum requirement, and still have offered an even number of trees. Agency Legal Analysis (Black) at 6-7. Black's proposal in this regard did not meet the agency requirement.

Another deficiency found in Black's proposal concerned the RFP's requirement that the contractor provide a C1-type ceiling (suspended, humidity-resistant, acoustical-tile ceiling) in the classroom/break room of the maintenance building). RFP part 2 (Technical Requirements), app. I, at 6, 11. Black's proposal included a maintenance building drawing that showed that Black was proposing to install [deleted] ceiling [deleted] in the classroom/ breakroom. The Navy explains that it required a C1-type suspended ceiling with acoustical tiles in order to control noise in the classroom and for its humidity resistance characteristic. Agency Legal Analysis (Black) at 7. The Navy further explains that the type of ceiling offered by Black, unlike the ceiling required by the RFP, would be unpainted, would allow ventilation ducts to be seen,

and would allow direct exposure and would not be resistant to humidity. Agency Additional Statement (Black) at 3.

Black concedes that the required suspended ceiling was not shown on the plans submitted as its proposal. Black's Protest at 5. However, Black attached a document entitled "Room Finish Schedule" to its protest, which purports to show that it will provide the required suspended ceiling. Black's Protest, exh. H, at 2. From our review of Black's proposal's drawings, it appears, as the agency found, that Black offered an exposed, unpainted ceiling rather than the required type of suspended ceiling. Moreover, it is not clear from the room finish schedule attached to Black's protest that the required suspended ceiling will be installed in the classroom/breakroom. In any event, the agency points out, and Black has not refuted, that the room finish schedule was not part of Black's proposal. A proposal can only be evaluated on the basis of the information included in it; where, as here, the RFP contained a specific requirement for a particular type of ceiling, Black disregarded that requirement at its peril and ran the risk, as in this case, that its proposal would be rejected as unacceptable. See *Allenhurst Indus., Inc.*, B-256836, B-256836.2, July 8, 1994, 94-2 CPD ¶ 14 at 3-4.

A further deficiency in Black's proposal concerned [deleted] drinking fountains in the storage building, which contained the physical fitness room and both the men's and women's locker rooms. The RFP required drinking fountains to be "strategically located" in the corridor, in both the men's and women's locker rooms, and in the physical fitness room. RFP § 2C.3.d. The TEB considered Black's proposal to be unacceptable because it [deleted]. The Navy explains that this was [deleted] because Army Reservists finishing physical training require readily available drinking water to avoid negative health consequences. Agency Legal Analysis (Black) at 8. Black concedes that the water fountains were not shown on its architectural plans for the storage building, but states that its electrical plans included fountains. Black Protest at 4, exh. F. However, as the Navy correctly asserts, the electrical plans only show that electrical lines for fountains would be provided, not that the fountains themselves would be provided. Agency Legal Analysis (Black) at 8. Since Black's proposal [deleted] at best, only showed electricity for the fountains, the TEB reasonably considered the proposal unacceptable with regard to this requirement.<sup>3</sup>

## SUMMARY

---

<sup>3</sup> Black also complains that the RFP did not indicate the relative weight of cost versus the combined technical factors in the evaluation and selection process. Black's Protest at 5. Under our Bid Protest Regulations, this protest issue, alleging an impropriety in the RFP, should have been filed before the time set for receipt of initial proposals. 4 C.F.R. §21.2(a)(1) (2000). As the protest was filed after the closing date, the issue is dismissed as untimely.

Based upon the deficiencies, discussed above, and others, we conclude that the Navy reasonably determined that both the Jones and Black proposals were “unacceptable but susceptible to becoming acceptable.” Since Dick’s initial proposal was technically acceptable (in fact, Dick’s proposal was rated as “highly acceptable” overall), we conclude that the Navy reasonably awarded the contract to Dick on the basis of initial proposals, consistent with the RFP.<sup>4</sup>

The protests are denied.

Anthony H. Gamboa  
Acting General Counsel

---

<sup>4</sup> Jones and Black also object to the Navy’s selection of Dick’s higher-priced offer because it was not the best value. In view of our finding that the Navy reasonably determined the Jones and Black proposals to be technically unacceptable, neither proposal could form the basis for award, notwithstanding its lower price. TEAM Support Servs., Inc., B-279379.2, June 22, 1998, 98-1 CPD ¶ 167 at 9. Because Dick’s proposal was the only technically acceptable proposal, and since the RFP warned offerors that the agency intended to award on the basis of initial proposals, the agency was not required to consider Jones’s or Black’s lower price in making its award decision. See Exploration Prods., B-279251.2, B-279251.3, June 1, 1998, 98-2 CPD ¶ 15 at 11-12. Here, in any event, we note that, in deciding to award to Dick, the SSA compared Dick’s price to both the government estimate and the prices proposed by the other offerors and determined that the additional design features proposed by Dick merited paying Dick’s higher price, so that discussions (which could have led the offerors to improve their proposals to an acceptable level) were not appropriate. Agency Reports, Tabs 18 and 19. In our view, the Navy’s determination that Dick’s proposal represented the best value and the award to Dick on the basis of its having submitted the only technically acceptable initial proposal were consistent with the RFP’s stated selection scheme.