

DECISION



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

FILE: B-221230.3; B-221249  
B-221250

DATE: March 11, 1986

MATTER OF: ALM, Incorporated

DIGEST:

1. Awardees' teaming arrangements do not violate requirement in Competition in Contracting Act of 1984 for "full and open competitive procedures."
2. Where an agency communication with the offeror selected for award to correct alleged mistakes in its proposal results in the proposal price being increased in a significant amount, the communication constitutes discussion requiring discussions with all offerors within the competitive range.

ALM, Incorporated (ALM), protests the awards of contracts to VSE Corporation (VSE), RAIL Company (RAIL) and JWK International Corporation (JWK) under request for proposals Nos. N68520-85-R-9063, -9064, and -9065, respectively, by the Naval Aviation Logistics Center, Patuxent River, Maryland. Each of the three RFP's solicited services for the Weapons Systems Support Departments of various Naval Air Rework Facilities. Each RFP contemplated separate awards of three lots of services. The awards in question here were for Lot II of each RFP, logistics support services for different Naval Air Rework Facilities. The awards are indefinite quantity, time and materials contracts with the "time" portion being fixed unit prices of loaded labor rates for proposed personnel and the travel and material portions being cost reimbursement. The work is assigned the contractor by task order.

ALM's protests on the three RFP's are (1) that the RFP's evaluation criteria, which gave the greatest weight to technical merit, were not adhered to in making the award to lower priced offerors since ALM believed it was the highest ranked technically and (2) each awardee entered into teaming

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arrangements consisting of six or more firms which violated the requirement for "full and open competitive procedures" contained in the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-369, 98 Stat. 1175, 10 U.S.C.A. § 2301(a)(1) (West Supp. 1985). Additionally, ALM protests the JWK award under RFP -9065 because price discussions were improperly held with only JWK, but not the other offerors within the competitive range.

With regard to RFP's -9063 and -9064, we deny the ALM's protests in part and dismiss the remainder. We sustain in part ALM's protest under RFP -9065 and deny or dismiss the remainder.

The Navy argues that the protests should be dismissed since the protester has not sufficiently detailed any factual or legal bases for its protest, but only states generalities. We point out, however, that ALM has been provided no details as to the award selection bases. Documentation regarding the technical and cost evaluations and the award selection bases was first provided with the agency report to our Office, but was not provided ALM. (ALM is pursuing this information under the Freedom of Information Act.) Moreover, although ALM was debriefed by the Navy after it filed the protests and informed of some evaluated deficiencies in its proposal, ALM was not told at the debriefing that it was not the highest ranked offeror technically. ALM was only apprised of this fact in the agency report on the protest. Under the circumstances, we believe ALM has sufficiently detailed its protest bases.

With regard to ALM's first contention that it should receive the award as the highest ranked offeror, the record indicates that ALM received a lower technical ranking and proposed a higher cost than the awardees on each of the protested lots. Also, ALM has not protested the evaluated deficiencies in its proposal which were communicated to it at the debriefing. Therefore, this basis for protest is denied.

ALM contends that each of the awardees' teaming arrangements with six or more firms violates CICA's requirement for "full and open competition." In this case, the Navy and the awardees believe the specialized expertise of a number of firms was desirable to most effectively accomplish the contract requirements. Moreover, as stated by the Navy,

Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.601 (1984), specifically authorizes and encourages contractor team arrangements in appropriate circumstances. Nothing in CICA or its legislative history is inconsistent with this FAR provision. Furthermore, we are aware of no limitation in the FAR, or any other provision in law, on the number of firms that can be in a teaming arrangement. If it is believed that the arrangements may violate the anti-trust laws, this matter is appropriate for resolution by the Department of Justice and not under the bid protest function of this Office. See 10 U.S.C.A. § 2305(b)(5) (West Supp. 1985); The National Bank of Fort Sam Houston, B-212719, Feb. 14, 1984, 84-1 C.P.D. ¶ 91 at 7.

In any case, we believe "full and open competition" was achieved. Four offerors submitted proposals on Lot II of RFP -9063; five submitted proposals on Lot II of RFP -9064; and seven submitted proposals on Lot II of RFP -9065. Therefore, this protest basis is denied.

At the conference on the protest and the comments submitted thereafter, ALM supplemented its protest by alleging that discussions were required to be conducted under the RFP's by the Navy because (1) of the awardees' teaming arrangements; (2) the solicitation provision indicating that discussions were contemplated; and (3) the fact that this was not a sealed bidding procurement. However, we believe this contention was not within the scope of ALM's initial protest. Nor is this issue timely raised under our Bid Protest Regulations, since it was not protested within 10 working days of when ALM should have been aware of this possible protest basis. 4 C.F.R. § 21.2(a)(2) (1985). We cannot permit new protest bases to be raised in an untimely piecemeal manner because this would unreasonably disrupt the procurement system and protest process. T.V. Travel Inc., et al.--Request for Reconsideration, B-218198.6, et al., Dec. 10, 1985, 65 Comp. Gen. \_\_\_\_\_, 85-2 C.P.D. ¶ 640 at 9. Therefore, this protest basis is dismissed.

However, ALM timely contends that improper price discussions were held with JWK, but not other offerors within the competitive range. The Navy states that it did not conduct discussions with JWK, as alleged by ALM, although it did clarify with JWK some apparent mathematical errors in the extension of JWK's unit prices. The Navy claims that making such minor clarifications is authorized and does not require opening discussions with other offerors.

We obtained JWK's initial cost proposal, its revised proposal and the contract from the Navy. We have been unable to confirm the nature or the fact of the clerical or mathematical errors that account for the differences between JWK's revised proposal cost and JWK's initial proposal cost.

Also, there is no indication that the procuring activity made any cost or price analysis or verification of JWK's individual items of labor price or estimated material or travel costs prior to its selection and that all offerors' proposal costs were evaluated just as they were proposed.<sup>1/</sup> Some form of analysis was eventually done to JWK's proposal after award selection, because JWK was asked to submit a revised cost proposal.

Of more critical importance is the fact that this "clarification" resulted in JWK's proposal cost being increased by almost 19 percent,<sup>2/</sup> an undeniably significant amount. Our in camera review of the technical and cost evaluation reveals that JWK's initial proposed cost was the figure used in determining the awardee. In selecting the successful offeror, the contracting officer relied upon a precise formula integrating technical scores and cost that weighted technical factors 80 percent and cost 20 percent. See National Capital Medical Foundation, Inc., B-215303.5, June 4, 1985, 85-1 C.P.D. ¶ 637. Our review also reveals that if JWK's revised proposal, which JWK submitted after selection and prior to award, is used in the technical/cost evaluation formula, JWK no longer has the best score. This puts into question the award selection basis.

If discussions are held with any offeror within the competitive range prior to award, it is required that meaningful discussions be conducted with all offerors within

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<sup>1/</sup> Complex contracts of this nature, i.e., task order, time and material contracts resemble in many respects cost reimbursement contracts. Consequently, we have recognized that it is appropriate to have a more detailed cost or price analysis on this type of contract, instead of just relying upon the proposed unit costs, in evaluating proposals. OAO Corporation, B-211803, July 17, 1984, 84-2 C.P.D. ¶ 54; FAR, 48 C.F.R. § 15.805-1(b).

<sup>2/</sup> The Navy apparently has not disclosed to any offeror the proposed costs, technical scores or relative standing of the offerors. Since we recommend below that further discussions be conducted, we do not disclose the proposed costs, technical scores or the technical/cost evaluation in this decision, since this may adversely affect the competition. See Sperry Corporation, B-220521, Jan. 13, 1986, 65 Comp. Gen. \_\_\_\_, 86-1 C.P.D. ¶ \_\_\_\_.

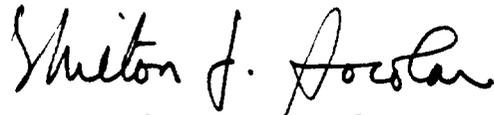
the competitive range. 10 U.S.C.A. § 2305(b)(4)(B) (West Supp. 1985); Joint Action in Community Service, Inc., B-214564, Aug. 27, 1984, 84-2 C.P.D. ¶ 228. It is true that under appropriate circumstances, awards can be made on the basis of initial proposals "as clarified in discussions conducted for the purpose of minor clarification." 10 U.S.C.A. §§ 2305(b)(4)(A)(ii); 2305(b)(4)(C) (West Supp. 1985). FAR, 48 C.F.R. § 15.601, states: "'Clarification,' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal." FAR, 48 C.F.R. § 15.607, permits the correction of mistakes without discussions being reopened in appropriate but limited circumstances. However, if the resulting communications correcting a mistake prejudices the interests of the other offerors or if the correction requires reference to documents, worksheets or other data outside the solicitation and the proposal to establish the existence of the mistake, the proposal intended, or both, an award without discussions is prohibited. FAR, 48 C.F.R. §§ 15.607(a), 15.607(c)(5); American Electronic Laboratories, Inc., B-219582, Nov. 13, 1985, 65 Comp. Gen. \_\_\_\_, 85-2 C.P.D. ¶ 545; Engineering and Professional Services, B-219657, B-219657.2, Dec. 3, 1985, 85-2 C.P.D. ¶ 621.

In this case, the communications with JWK resulted in its price being raised almost 19 percent over the amount used in the proposal evaluation. This is clearly not a minor "clarification" and is unquestionably prejudicial to the position of the offerors within the competitive range, even assuming the communications with JWK were only to correct clerical or mathematical errors--which we cannot confirm. Therefore, we believe the nature of the JWK communications must be considered discussions and that meaningful discussions were therefore required to be held with all offerors within the competitive range. See Sperry Corp., B-220521, 65 Comp. Gen. \_\_\_\_, supra; American Electronics Laboratories, Inc., B-219582, 65 Comp. Gen. \_\_\_\_, supra; Engineering and Professional Services, B-219657, B-219657.2, supra. From our review, ALM's proposal was apparently acceptable, and may be within the competitive range.

Therefore, ALM's protest of the JWK award under RFP -9065 is sustained. We recommend that discussions be reopened with all firms that were within the competitive range for the remaining contract work after an appropriate

cost or price analysis is performed on these proposals. After meaningful discussions, new best and final offers should be solicited. If JWK is not the highest rated offeror after the new best and final offers are received and evaluated, we recommend that JWK's contract be terminated for the convenience of the government and award made to the highest rated offeror.

As discussed above, the remainder of ALM's protest of RFP -9065 is denied or dismissed. ALM's protests of RFP -9063 and -9064 are denied in part and the remainder dismissed.



Acting Comptroller General  
of the United States