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DECISION



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

FILE: B-200754

DATE: March 30, 1981

MATTER OF: JGMA Development Corporation

DIGEST:

1. Review of record establishes that procuring agency took reasonable steps to assure that site visits were conducted in consistent and fair manner through development of written plan for evaluators which was followed with respect to all offerors.
2. Procuring agency has presented evidence, although disputed by protester, which establishes reasonable basis for exclusion of protester from competitive range for weaknesses in technical proposal.

JGMA Development Corporation (JGMA) has protested the rejection of its proposal as technically unacceptable. The proposal was submitted in response to request for proposals (RFP) No. SA-RSD-80-0201 issued by the Department of Commerce.

The RFP was for the Ocean Thermal Energy Conversion Cold Water Pipe At-Sea Test Program and was issued on December 14, 1979. Six firms submitted proposals by the closing date of February 19, 1980. Following an initial technical evaluation, site visits to the offerors' fabrication plants, written and oral responses to clarification questions, and further evaluations, the contracting officer determined that four firms would be

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requested to submit best and final offers. JGMA and one other offeror were advised their proposals had been found technically unacceptable and outside the competitive range.

Initially, JGMA argues that it was prejudiced by the manner in which the site visits were conducted. JGMA contends that it received informal notice of the site visit only 1 week before it occurred and its facility was only viewed by two consultants retained to assist in the proposal evaluation and not by any members of the Source Evaluation Board (SEB). Further, the same persons did not visit all offerors' facilities, which led to inconsistent reports. The site inspection only lasted 3 hours whereas JGMA contends at least 1 full day was necessary to completely review the facility. Moreover, the visit was only to the fabrication site for the pipe, one aspect of the complex proposal, and other offerors with more centrally located facilities may have been subjected to a complete site review which could have caused a judgment bias unfavorable to JGMA. Because of these problems, JGMA believes the SEB may not have obtained a full appreciation of the unique process utilized by JGMA.

Contrary to the allegations by JGMA, Commerce states that steps were taken to assure that all site visits were conducted fairly and in the same manner for all offerors. All offerors were notified of the site visits telephonically on March 21, 1980, the date JGMA was notified, and this information was confirmed by a follow-up letter. All site visits were conducted prior to April 4, 1980. One of the two consultants visited each offeror's facility to insure consistency in the treatment of all offerors. The SEB had approved a written site visit plan which Commerce contends was followed by the consultants at each site visit and JGMA has offered no evidence that the visits were of different durations.

Based upon our review of the record, we find the SEB took all reasonable steps to insure the site visits were conducted in a similar manner and we fail to see

that JGMA was prejudiced thereby. In fact, a review of the memoranda of the two investigators shows that both favorably reported on the site visit at the JGMA facility.

JGMA further points out that the timing of events surrounding the procurement reveal the confusion the SEB had in evaluating the proposals. The contracting officer's report on the protest states that the SEB's report of April 4 recommended site visits be conducted, at which time the JGMA site visit had been concluded. The same SEB report recommended that clarification questions be sent to offerors, when JGMA's questions were sent on March 27, 1980. Further, JGMA argues that the decision to reject JGMA's proposal was made on August 1, 1980, but JGMA was not notified until September 22, 1980.

The contracting officer has responded that the April 4, 1980, date on the SEB report constituted the written confirmation of earlier verbal contacts and that all site visits were completed prior to April 4, 1980. Regarding the SEB report of August 1, 1980, which recommended the exclusion of JGMA from the competitive range, the contracting officer states that the time between August 1 and September 22, 1980, was consumed with either higher priority matters at the end of the fiscal year or in deciding whether to accept the SEB's recommendations.

We believe the contracting officer has adequately explained the time differences and fail to see any prejudice to JGMA.

Next, JGMA contends that none of the weaknesses alleged by the SEB to exist in its proposal were unworkable technical problems and most indicate a lack of familiarity by the SEB with the contents of JGMA's proposal. JGMA states that when it left the oral clarification discussions it was confident it was a serious contender for the award and that if major problems arose with its technical proposal, they could have been handled in subsequent discussions and negotiations.

With regard to JGMA's contentions that its proposal should have been included in the competitive range and its various disputes with the SEB's finding of technical unacceptability in certain areas, we note at the outset that it is neither our function nor practice to make an independent determination of the acceptability or relative merits of technical proposals. Our review is limited to examining whether the agency's evaluation was fair and reasonable. We will question contracting officials' assessments of the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of the procurement statutes or regulations. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192, and INTASA, B-191877, November 15, 1978, 78-2 CPD 347. Moreover, the determination of the competitive range is primarily a matter of administrative discretion which we will not disturb absent a clear showing that the determination is unreasonable. A. T. Kearney, Inc., B-196499, April 23, 1980, 80-1 CPD 289.

The SEB listed twelve areas of weaknesses in the JGMA proposal which led to its conclusion that JGMA should be excluded from the competitive range. While we question the reasonableness of the determination that one of these areas was a weakness, we believe that overall the evaluation of proposals was fair and there was nothing improper or unreasonable in excluding JGMA from further consideration.

The one area of the evaluation we question concerns the downgrading of JGMA's proposal because of the SEB's questioning of the availability and scalability of its proposed platform, the SEACON, owned by the United States Navy. Because of the design and configuration of the SEACON, the SEB was concerned with its seakeeping characteristics in beam seas which could create roll angles in excess of 20 degrees in 8-foot seas and, therefore, cause problems in obtaining the data required in performance of the contract.

While the difficulties noted by the SEB may be possible, the SEACON was listed as a potential platform in a technical report prepared under a prior Commerce

contract and referenced in the solicitation for the purpose of selecting possible platforms. Since the SEACON was unacceptable to the SEB, offerors could have been misled by the reference to the technical report and we believe offerors were entitled to have the matter cleared up through discussions.

Regarding the availability of the SEACON, the SEB found fault with JGMA for not having a firm letter of commitment as to the availability of the SEACON for use on the contract. The SEACON would have been Government-furnished equipment and if available from the Navy for one offeror, it would have been available for any offeror. In view of the delay in evaluating the proposals, the value of any letter of commitment for the platform is doubtful.

While we disagree with the finding of the SEB in the above area, we find the other reasons advanced sufficient to justify the rejection of JGMA's proposal from the competitive range.

The SEB found that JGMA's management plan would not produce the required output because the plan included a large number of high level managers with a relatively low number of worker level staff to develop the program. Further, the SEB downgraded the management plan because many of the personnel were working on the project on a part-time basis rather than being fully dedicated.

JGMA argues that it was improper for the SEB to evaluate the management plan during the technical evaluation; however, we note that the management plan was one of the seven evaluation factors listed in the RFP and, therefore, proper for consideration.

One area of the JGMA proposal which the SEB had serious concerns with was JGMA's plan to tow the 1,000-foot long pipe 1,200 miles to the test site in open ocean. The SEB decided this was undesirable from a technical risk standpoint because of the probability of damage to the pipe or instrumentation during the tow. While JGMA contends that such a tow is feasible, the contracting officer states that in

two other at-sea projects, which involved towing equipment less than 5 miles, equipment was damaged and the pipe instrumentation lost because of lack of control in unpredicted weather.

JGMA's alternate plan was to assemble the pipe at the test site but the SEB noted that such plan would result in a pipe which did not meet the required standards of pipe construction uniformity and field assembly is subject to availability of a staging area, logistics of equipment and quality control problems, which involve high-risk/high-cost factors.

While JGMA disagrees with the SEB's assessment of the technical risk involved with its tow plan, we cannot say the SEB's findings lacked a reasonable basis.

The SEB also downgraded JGMA's proposal in the area of its approach to validation of analytical models because it indicated a lack of understanding of the major issues involved in the validation effort. JGMA's proposed subcontractor for this portion of the contract was found by the SEB to have most of its experience in theoretical analysis and code development rather than code validation. Also, the proposal relied on certain literature which was termed "extensive validation efforts," when, according to the SEB, other literature would have shown this was, at best, preliminary validation efforts.

JGMA responds that its subcontractor has extensive experience in this area and that the problems which the SEB had with the proposal were caused by deficiencies in the National Oceanic and Atmospheric Administration, Department of Energy (NOAA/DOE), cold water pipe analytic code which was to be validated. Moreover, JGMA alleges that, in its proposal, it identified additional parameters necessary to ensure the completeness and accuracy of the data collected and that some of these parameters were identified in the newly published NOAA/DOE code.

Commerce contends that it was aware of the shortcomings in the code and that the improvements

now present in the code are not attributable to JGMA's proposal but to work done by another firm under a contract negotiated in the spring of 1979 and delivered in the spring of 1980, prior to the evaluation of JGMA's proposal.

We find JGMA has not shown the SEB finding as to the acceptability of the validation methods proposed by JGMA to have lacked a rational basis.

The above-listed shortcomings were the most serious according to the SEB and were a sufficient basis to exclude JGMA from the competitive range. However, the SEB also found JGMA's proposal deficient in the areas of:

Vortex Shedding Suppression Design
Strain Gage Implant Plan and Location
Calibration System
Availability of Data Acquisition System

While JGMA disagrees with the findings of the SEB in these technical areas, it has presented no evidence to show that the SEB acted unreasonably and, therefore, we see no need to individually discuss each area.

Based upon our review of the entire record, including the evaluation of all the submitted proposals, we conclude the evaluation was conducted in a fair and reasonable manner and we find no basis to upset Commerce's decision to exclude JGMA from the competitive range.

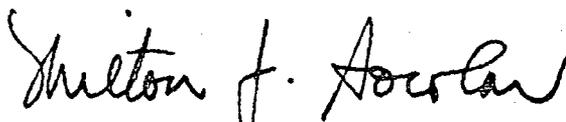
Finally, JGMA has expressed concern that it was not furnished for its consideration all of the documents relative to the procurement which were furnished our Office in Commerce's response to the protest. These documents included memoranda of the SEB deliberations, evaluation narratives and other material related to the technical evaluation of the proposals. Commerce excluded these because they constitute procurement information under 41 C.F.R. § 1-3.805-1(b) and no award has been made.

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It has been our consistent position to honor agency-imposed restrictions on documents since the documents are those of the agency, not GAO. Nevertheless, we do not consider the honoring of these restrictions to be a denial of procedural fairness. See Systems Research Laboratories, Inc., B-186842, May 5, 1978, 78-1 CPD 341. Also, those documents were fully reviewed by our Office in reaching the above decision.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States