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DECISION

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

FILE: B-218137 **DATE:** May 6, 1985

MATTER OF: JL Associates, Inc.

DIGEST:

1. Where a solicitation issued as part of a cost comparison to determine whether installation support service functions should be contracted includes detailed performance requirements, firm acted unreasonably in pricing its offer to include support functions inherently governmental in nature simply because they were not expressly excluded from the statement of work.

2. GAO finds that the protester has failed to prove its assertion that the agency should have discussed areas of staffing in its proposal that were for non-solicitation functions because the protester has presented no evidence to show that the agency reasonably should have known that the offer included non-covered work.

3. Protest that award of a contract would have created an improper personal services contract is dismissed as academic where the government properly determined to continue the function in-house.

JL Associates, Inc. protests the Department of the Army's decision to cancel solicitation No. DABT43-83-R-0017, which sought proposals to perform installation support functions at Carlisle Barracks, Pennsylvania for 6 months, with four 1-year option periods. The Army conducted this negotiated procurement to determine whether it sould continue performing the work in-house with government personnel or have it performed by a commercial firm. Based on a comparison of the government cost estimate with the low offered price of JL Associates, the

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Army determined that it would be less costly to retain the work in-house.

JL Associates contends that the Army improperly exempted from the its in-house cost estimate the cost of a residual government workforce that would perform those installation support functions that could not be contracted out if a contract were to be awarded to a commercial firm. JL Associates also contends that if certain support functions should have been excluded from performance by a contractor, the Army failed to conduct meaningful discussions with the company regarding JL Associates' allegedly evident staffing of functions not covered by the solicitation. Finally, JL Associates contends that the Army's retention of a residual workforce when the support services are contracted violates the Federal Acquisition Regulation (FAR), 48 C.F.R. § 37.1 (1984), by creating a personal services contract with contractor personnel working directly for the government.

We deny the protest in part and dismiss it in part.

Background

The solicitation requested offerors to provide proposals outlining the extent of their commitment to specified base support services, general management, offeror experience in contract support services, phase-in/phase-out plan, and contract pricing data. The solicitation provided that all proposals would be evaluated in these areas, and that the proposal with the best overall value to the government would be selected for a cost comparison evaluation with the government's in-house cost estimate. Following the submission of initial and revised proposals by the offerors, two rounds of best and final offers were held. JL Associates was then selected as having the best overall proposal.

In comparing JL Associates' proposed cost to the government's estimate, the Army found that contracting the base support at Carlisle Barracks would cost $2,693,649 more than continuing to perform with government personnel. Upon notification of the Army's decision to continue performance in-house, JL Associates filed an appeal with the Army's Cost Comparison Review Board. JL Associates protested to our Office after receiving the Board's denial of its appeal.

Residual Government Workforce

JL Associates contends that the government's in-house cost estimate and JL Associates' price offer were not based on the same scope of work. JL Associates asserts that while the Army determined that the total base support function at Carlisle Barracks could be performed using 96 full-time personnel plus the equivalent of 12 part-time personnel, the agency at the same time exempted more than 35 of the personnel from consideration in the in-house cost estimate because these individuals allegedly constituted a residual "governmental-in-nature" (GIN) workforce needed to continue the performance of inherently governmental functions that could not be contracted. GIN functions include those of the organizational head, the contracting office, and the supply branch. According to JL Associates, however, the offer it submitted based on the requirements in the solicitation to manage, operate, and administer the support services at Carlisle Barracks included the functions the Army considered inherently governmental; JL Associates states that, as a consequence, it offered a price based on the use of 85 full-time personnel to perform the required base support services. JL Associates argues that if the Army had properly compared its estimated personnel costs to JL Associates' personnel costs using the full 108 personnel, it is unlikely that the Army would have decided to continue the work in-house.

The Army responds that it solicited for certain specific base support services, and points out that the solicitation delineated the precise scope of work; the Army argues that a proper solicitation need only describe the work to be performed in sufficient detail for a fair competition, and need not list work that is not desired. The Army also points out that the solicitation referenced Army Regulation 420-10, "Facilities Engineering: General Provisions, Organization, Functions and Personnel" (1981), which sets forth, among other things, a general organizational structure for government personnel under a commercial contract operation. The regulation also identifies residual non-contractable governmental functions under such an operation. The Army further notes that the solicitation informed offerors that the successful contractor was to provide the personnel,

management, equipment, supplies, and transportation to perform the contract, "except as may be provided by the government." Thus, the Army takes the position that there is no support for JL Associates' belief that the solicitation included base support requirements the government intended to continue performing through a GIN staff.

Our Office will review protests concerning agency decisions to continue performing services in-house instead of contracting for them to determine if an agency followed the solicitation guidelines for ascertaining whether a contract would or would not be awarded. See Schonstedt Instrument Co., B-215531, Aug. 1, 1984, 84-2 CPD ¶ 141. Such review is undertaken because we believe it would be detrimental to the procurement system if, after the submission of offers, an agency were permitted to alter the procedures it had established and upon which the offerors had relied. Jets, Inc., 59 Comp. Gen. 263 (1980), 80-1 CPD ¶ 152. However, to succeed in its protest, a protester has the burden of showing that the agency failed to follow the solicitation's cost comparison guidelines and that this failure could have materially affected the outcome of the cost comparison. Serv-Air, Inc; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317.

We find no legal merit to the protest on this issue. We do not understand how JL Associates, based essentially on inference from the general solicitation requirement to perform installation functions at Carlisle Barracks, reasonably could assume that the government would assign the performance of GIN functions to a contractor. Indeed, as the Army points out, the solicitation expressly advised offerors that there were functions outside the contract's scope of work for which the government would remain responsible.

To the extent JL Associates' assertion that its price offer included staffing costs for GIN work is based on the fact the solicitation did not delineate the specific areas of work that were non-contractable, we see no reason for the solicitation to specify, in addition to base support work that would be contracted, the work that would not be. Moreover, JL Associates makes few arguments that any

of the detailed performance specifications in the solicitation's statement of work were so broadly worded as to include base services that otherwise would be performed by a GIN staff. Instead, JL Associates appears to ignore the specific solicitation work requirements by asserting that there was no limit placed on the base support services to be performed by the successful contractor. We think, however, that it is incumbent on an offeror to bid against specifications and requirements stated in a solicitation, not on unstated ones.

JL Associates does claim that there were some instances where a GIN staff would participate in the performance of functions required by the contractor under the terms of the solicitation. In particular, JL Associates alleges that the functions of a GIN staff budget assistant overlap with the solicitation requirement for the successful contractor to maintain a cost accounting and financial report system. JL Associates also alleges that GIN staff functions of a supply officer and three supply clerks overlap with the required contractor functions of receiving, storing, and shipping supplies. While recognizing that these are only two alleged instances where a GIN staff would "augment" a contractor's personnel, JL Associates asserts that it is apparent that a contractor's workforce cannot accomplish "the totality of the advertised functions without the direct assistance of the GIN staff."

Even assuming that JL Associates is correct with regard to the cited examples where the contractor would be performing some GIN staff functions, we find that the company has failed to establish that this would have materially affected the outcome of the cost comparison. The record shows that the estimated cost of the entire GIN staff was approximately $2,762,298, some $68,000 more than the $2,693,649 estimated extra cost to the government of contracting out. We cannot conclude on the basis of the two examples cited by JL Associates that every member of the 35 person GIN staff will be performing the same base support functions as required by the contractor under the terms of the solicitation.

Finally, we note that JL Associates believes that the make-up and functions of the Army's GIN staff were not

reviewed by an independent agency in violation of regulatory guidelines. However, the record reveals that the Army's in-house cost estimate for Carlisle Barracks was reviewed by the Army Audit Agency to determine if the data in the estimate was reasonable and prepared in accordance with the applicable guidelines of the Department of Defense and the Office of Management and Budget. While the Army Audit Agency did not specifically review the reasonableness of the composition of the 35 person GIN staff, it did find that the in-house cost estimate was prepared in accordance with applicable guidelines and was reasonably accurate. Further, as the Army points out, the Office of Management and Budget's cost comparison guidelines do not require an independent review of the composition of the government's residual workforce.

Discussions

JL Associates argues that if we should find that the cost comparison is proper on its face, we also should find that the Army failed to conduct meaningful discussions with the firm. The protester contends that the Army should have recognized the company's proposal was staffed for functions the government intended to continue itself, and should have so advised JL Associates to ensure that the firm was not proposing an overstaffed operation. JL Associates alleges that the Army in fact negotiated higher, rather than lower, staffing levels with it.

The Army states that at no time in reviewing the company's offer did it find any staffing for functions not covered by the solicitation. As to the noted negotiation point, the Army explains that following the evaluation of JL Associates' original offer, it requested that JL Associates provide further clarification regarding the company's staffing in several areas, and informed JL Associates that staffing was deficient for transportation movements. The Army further states that the staffing deficiency in transportation movements did not require JL Associates to increase its staffing. The Army notes that while JL did increase its overall staffing by three spaces in its revised proposal, none of the three spaces was for transportation movements. The Army also states that no additional personnel were added in JL Associates' first and second best and final offers.

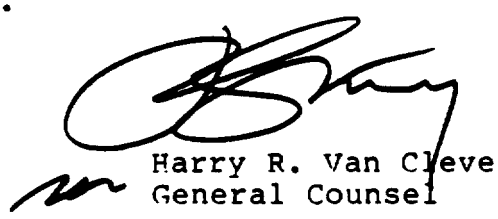
Basically, it is the Army's position that given the structure of the solicitation and the character of GIN functions, it had no reason to believe that any offeror would have done as JL Associates claims it did. The burden is on the protester to present evidence that affirmatively establishes its case. C.L. Systems, Inc., B-197123, June 30, 1980, 80-1 CPD ¶ 448. JL Associates, however, has presented us with no evidence to support its argument that there were areas in its proposed staffing that the Army should have identified as being staffed for non-solicitation functions. Under the circumstances, JL Associates has not met its burden of proving that the Army did not conduct meaningful discussions regarding the company's proposed staffing.

Alleged Personal Services Contract

JL Associates contends that the Army's retention of a residual GIN staff would have improperly created a personal services contract, with contractor personnel working directly for the government. JL Associates alleges that this is because the retention of a residual GIN staff would have resulted in some base support functions being done by a combination of in-house and contractor personnel. According to JL Associates, it is highly improbable, given what the firm now knows about the GIN staff's size and composition, that the Army would not have had to have exercised relatively continuous supervision and control over contractor personnel to accomplish its base support service mission.

Since we have found that the Army properly decided to retain the function in-house, the issue of what might have been the case had a contract been awarded is academic. This aspect of the protest therefore is dismissed.

JL Associates' protest is denied in part and dismissed in part.



Harry R. Van Cleve
General Counsel