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DECISION



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

FILE: B-191218

DATE: May 25, 1978

MATTER OF: Sam L. Huddleston & Associates, Inc.

DIGEST:

1. Discussions required to be conducted by agency with three of most qualified firms in course of procurement of professional A-E services are part of statutory and regulatory procedures prescribing competitive selection process. It is fundamental to competitive A-E selection process that firms be afforded opportunity to compete on equal basis.
2. Where one of three competing A-E firms had possession and knowledge of Master Plan containing basic design concepts for development of cemetery to which agency intended selected A-E firm's design to conform, failure of agency to inform other two firms of existence of Master Plan prior to discussions resulted in unfair competitive advantage to firm possessing Master Plan.

Sam L. Huddleston & Associates, Inc. (Huddleston), protests the proposed award by the Office of Construction, Veterans Administration (VA), of an architectural and engineering (A-E) contract to the joint venture of Gerald F. Kessler & Associates, Inc. and Arthur H. Bush & Associates, Architects (Kessler), for project No. 789-888007 and project No. 789-888008, Fort Logan National Cemetery, Fort Logan, Colorado.

The procedure for the Government's procurement of A-E services is prescribed by the Brooks Bill, 40 U.S.C. § 541 et seq. (Supp. V, 1975). Section 542 of that act states as follows:

"The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

Section 543 provides, in part:

"The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required."

In accordance with this statutory framework, Federal Procurement Regulations (FPR) § 1-4.1004-1 (2d ed. June 1975) requires each agency to establish one or more permanent or ad hoc architect-engineer evaluation boards to be composed of members having experience in architecture, engineering, construction and related procurement matters. Further, FPR §§ 1-4.1004-2(b) and (c) provide, in part, as follows:

"(b) When procurement of architect-engineer services is proposed, the board shall review the current data files on eligible firms, including files established * * * in response to the public notice of a particular contract. * * * After making this review and technical evaluation, the board shall hold discussions with not less

than three of the most highly qualified firms regarding anticipated concepts and relative utility of alternative methods of approach for furnishing the required services.

"(c) [The board shall] [p]repare a report for submission to the agency head or his authorized representative recommending, in the order of preference, no less than three firms that are considered most highly qualified to perform the required services. This report shall include in sufficient detail the extent of the evaluation and review and the considerations upon which the recommendations were based."

After action by the agency head or his authorized representative on the board's recommendations, negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with that firm as to a fair and reasonable price are negotiations terminated and the second ranked firm considered.

In the instant case, notice of intention to contract for A-E services was published in the Commerce Business Daily (CBD) on July 28, 1977. The present cemetery at Fort Logan consists of approximately 41 acres with 96 acres remaining for future expansion needs. The selected A-E firm, under project No. 789-888007, is to be responsible for the development and preparation of final design plans, contract or "working" drawings, and specifications for the construction of a national cemetery administration building, entrance drive and gate. Project No. 789-888008 also requires the preparation of final design plans, contract drawings, and specifications as well as construction period services for the development of 35 acres of the cemetery.

Various firms responded to the CBD synopsis by submitting, if not already on file at the VA, updated statements of their qualifications, Standard Form (SF) 254, "Architect-Engineer and Related Services Questionnaire." The firms were also required to supplement SF 254 by submitting Standard Form (SF) 255, "Architect-Engineer and Related Services for Specific Project," see FPR §§ 1-4.1004-2 and 1-16.803. Following evaluation

of these forms, the VA A-E Evaluation Board (Board) selected Huddleston, Kessler and the joint venture of Nelson, Haley, Patterson and Quirk, Inc., and Harley Ellington Pierce Yee Associates, and Donald H. Godi and Associates, Inc. (Nelson), for further consideration since they were felt to be the best qualified for the projects.

Kessler had previously prepared for the VA an approved Master Development Plan (Master Plan) for the entire Fort Logan National Cemetery. The Master Plan had been prepared in two phases, including a detailed conceptual design for the development of the cemetery, two volumes of specifications and approximately 40 drawings. Kessler had also previously designed in the Master Plan a national cemetery administration building and entrance drive and gate for the cemetery. The VA apparently intended the selected A-E firm's final design approach for the instant projects, including the design plans, construction drawings and specifications, to be consistent with the design approach contained in the Master Plan. Huddleston states that it was not aware of the existence of the Master Plan when it responded to the CBL synopsis.

Each firm was subsequently interviewed by the Board on October 25 and 26, 1977. During these interviews, each firm was given weighted numerical scores by the Board in ten categories, six of which were as follows:

"I-TEAM PROPOSED FOR THIS PROJECT

A. Background of the personnel

1. Project Manager
2. Other key personnel
3. Consultant(s)

II-PROPOSED MANAGEMENT PLAN

A. Team Organization

1. Design phase
2. Construction phase

III--PREVIOUS EXPERIENCE OF TEAM PROPOSED
FOR THIS PROJECT

A. Describe projects

* * * * *

V--PROJECT CONTROL

A. Schedule

1. What techniques are planned to assure that schedule will be met?
2. Who will be responsible to assure that schedule will be met?

B. Cost

1. What control techniques are planned?
2. Review recent projects to demonstrate ability to meet project cost target.
3. Who will be responsible for cost control?

VI--PRESENT PROPOSED DESIGN APPROACH FOR THIS PROJECT

- A. Describe proposed design philosophy
- B. What problems do you anticipate and how do you propose to solve them?
- C. Describe possible energy applications.
- D. Describe innovative approaches in production and design.

VII--PRESENT EXAMPLES OF RECENTLY ACCOMPLISHED SIMILAR PROJECTS

A. Describe the projects to demonstrate:

1. Schedule control
2. Cost control
3. Construction problems and means taken to solve them.
4. Any additional construction costs caused by design deficiencies; not program changes."

The Evaluation Criteria and Scoring Sheet (VA Form 08-3375) used by the Board during the interviews also provided for the award of 5 bonus points to a firm for its "preparation for interview."

During the actual interview with Huddleston, the VA, for the first time, orally apprised Huddleston of the existence of the Master Plan. The Chief, Technical Support Division, a member of the Board, asked Huddleston during the interview as follows:

"Regarding the question that I asked of the two (2) firms other than Kessler during the interviews, i.e., if selected could they generally live with the approved design concept of the approved Master Plan, I thought the question was of substantial importance. This was because the general concepts of the Master Plan had been approved and substantial deviation from the Master Plan would result in a great loss of time, funds, advance planning, and possibly adverse publicity because the Master Plan brochures have been furnished to numerous individuals, organizations, federal and probably state agencies, and to various offices and individuals in the House and Senate." [Emphasis added.]

After conclusion of the interviews, the November 8, 1977 memorandum concerning final rankings of the A-E firms, prepared by the Chairman of the Board, recommended as follows:

"The Board after a thorough review of all available information recommends the joint venture firm of Gerald F. Kessler and Associates, Inc., and Arthur A. Bush and Associates of Denver, Colorado, as being the best qualified to provide the services on these two projects. This joint venture previously furnished the Master Plan for overall development of Fort Logan National Cemetery and presented a straightforward approach to the final design phase through the continued effort of this design team.

The Veterans Administration Exterior Elevation Committee has previously approved the architectural concept for the Administration Building by Arthur A. Bush Associates.

"Sam L. Huddleston, and Associates, Inc., was ranked second by the Board. Although well founded in each respective aspect of architecture for the building design as well as the landscape design for the 35 acre development, this firm failed to highlight as effective an overall approach to these projects as the recommended firm." [Emphasis added.]

The Chief, Technical Support Division, in a memorandum dated December 13, 1977, also wrote as follows:

"My decision to vote for the selection of Kessler was based strictly on the three (3) interviews. I felt that while Huddleston, if selected could have done a good job, Kessler could do a superior job and to vote other than for Kessler would have deprived the cemetery and ultimately the Veterans Administration of the highest quality design and design philosophy, and construction. The interviews, and questions, I and the other members asked during the interviews, clearly convinced me that Kessler's joint venture firm should be selected. This decision was based on team organization, experience, design philosophy, solar energy and environmental concerns, and the prudent use and conservation of a limited water supply." [Emphasis added.]

The basis of Huddleston's protest is that it was placed in an unfair competitive disadvantage during the interviews constituting the selection process by the VA's failure to inform and furnish it with a copy of the Master Plan prior to its interview. Counsel for Huddleston argues as follows:

"[C]ontained in the [VA's November 8, 1977 memorandum] is the statement that the Huddleston firm 'failed to highlight as effective an overall approach to these projects as the recommended firm.' Without benefit of the Master Plan how on earth could a firm without benefit of a working knowledge of the Master Plan be expected to even approach the concept as developed by the firm with total working knowledge of the Master Plan?

* * * * *

If in fact the Master Plan was so important and obviously it was, then all firms presenting their plans should have had the opportunity to work from the Master Plan when preparing their presentation to the evaluation board. * * * The Master Plan was briefly explained to the Huddleston firm once the interview began. This was the first time that the Huddleston firm even was aware of the plan and of course could do nothing at that late date to respond to the Plan. Furthermore, the time spent by the board to review the Master Plan took time away from the presentation made by the Huddleston firm. It is argued that because the Kessler firm had the Master Plan that it could devote additional time to its presentation, not having to spend time on a review of a plan already in its possession. * * * It is submitted that the Master Plan was most critical and to deprive a firm vying for the job was tantamount to denying that firm with information that it needed to properly prepare its plans and presentation. * * * The Kessler firm obviously was aware of the limited water supply as it had prepared the Master Plan and was knowledgeable with this aspect of the project. With such information it of course could, and did prepare its presentation to favorably take this matter into consideration. On the other hand, the Huddleston firm had no such knowledge and could not properly prepare itself for

this aspect of the plan. At no time did the interview team even mention the limited water supply to the Huddleston firm."

We agree with the protester. The discussions required to be conducted by the Board with three of the most qualified firms are part of the statutory and regulatory procedures contemplating a competitive selection process of A-E services, not unlike the procedures for competitive negotiations. It is a fundamental rule of competitive negotiations that offerors be afforded the opportunity to compete on an equal basis. We believe that this rule is equally applicable to the competitive selection process governing the procurement of A-E services by the Government. While we have recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances, such competitive advantage may not be enjoyed by a particular firm if it is the "result of preference or unfair action by the Government." ENSEC Service Corp., B-184803, B-184804, B-184805, January 19, 1976, 76-1 CPD 34; B-175834, December 19, 1972. The VA's failure to furnish Huddleston with the Master Plan prior to the interviews placed the protester in a competitive disadvantage since it appears that only Kessler possessed and knew of the existence and contents of the Master Plan design concepts, drawings, and documents to which the VA intended the selected A-E firm to conform. Such action by the VA was clearly unfair to Huddleston and contrary to the required equality of treatment by the Government of competing firms during the selection process.

The VA, however, argues as follows:

"The factors considered in the interview dealt with the firm's method and potential, not an actual and complete understanding of the proposed project. Therefore, each firm was placed on an equal footing with regard to the board's consideration of the Master Plan. * * * The only one of the ten factors to be evaluated on which knowledge of the Master Plan might bear was Factor VI-Present Proposed Design Approach for this Project. Out of a possible 10 points, the

protesting firm was rated as good, 9 points. Therefore, it is not apparent that the protesting firm, Huddleston, was at any disadvantage in light of this high score. Despite the protester's allegations, the decision to select Kessler was based on team organization, experience, design philosophy, solar energy and environmental concerns, and the prudent use and conservation of a limited water supply. Pre-interview possession of the Master Plan could have no bearing on the above-mentioned bases for selection and therefore the allegations of advantage and/or disadvantage are without merit."

In reply, counsel for Huddleston argues as follows:

"The VA has submitted that it was unimportant to provide the Huddleston firm with a copy of the Master Plan, and that only one of ten factors to be evaluated would relate to the Master Plan. It is submitted that this attitude on the part of the VA is * * * without merit. The Kessler firm, possessing the Master Plan, had an opportunity to key their presentation to the criteria graded * * * it should be carefully noted that in the Point Adjustment section of the scoring sheet, paragraph C provides 5 bonus points for 'Preparation for Interview.' The Kessler firm received the 5 bonus points for its interview preparation while the Huddleston firm did not receive any points for its preparation. Certainly Kessler's ability to know the scheme of the Master Plan allowed it to better prepare for the interview. Furthermore, the interviewing party being familiar with the Master Plan, and seeing and hearing the Kessler presentation could not help but be more impressed with a presentation which obviously related more to the ideas contained in the Master Plan, than did the Huddleston presentation. * * * Without a doubt having the use and benefit of the Master Plan permitted Kessler to address itself to the design philosophy, environmental concerns, and the prudent use and conservation of the existing limited water supply present in the subject

project. As we have already noted the philosophy of the Master Plan had already been approved prior to the interviews, with knowledge of the environmental concerns, and the limited water supply the Kessler firm also had an advantage to address itself to these aspects of the project. The Huddleston firm did not have this information. Certainly fairness in the competitive market place requires the bidding firms to have all information relative to a project. Knowing that the Kessler firm prepared the Master Plan, it was incumbent upon the VA to provide all bidding firms with the Plan." [Emphasis added.]

Without knowledge of the Master Plan, Huddleston and Nelson were admittedly placed in a competitive disadvantage as to Factor VI, "Present Proposed Design Approach for this Project," especially in view of the fact that the VA intended the selected A-E firm to design in conformance with the Master Plan. Factor VI is also of importance from the point of view of an A-E firm trying to impress its interviewers and relate to them its particular qualifications and competence for the specific project.


We do not agree with the VA, however, that this was the only evaluation factor affected by the failure of the VA to furnish the other firms a copy of the Master Plan. Kessler, possessing the Master Plan, had an opportunity to prepare and deliver its entire presentation with detailed knowledge of the requirements of the specific projects. Undoubtedly, a firm's presentation during the interview, where it has the only competitive opportunity to impress the Board with its qualifications and credentials, can be substantially enhanced by a detailed knowledge of the basic and fundamental design concepts, two volumes of specifications and 4' drawings contained in the Master Plan. For example, the December 13, 1977 memorandum of the Chief, Technical Support Division, expressly states that his decision to vote for the selection of Kessler was based, among other things, on Kessler's presentation regarding environmental concerns and the prudent use of a limited water supply at the cemetery. As stated

by the protester, it had no such information during the interview for a presentation concerning these matters.

The VA argues, however, that Huddleston had, as a member of its team, a consulting engineering firm that had previously worked on the Master Plan with Kessler, and thus knew or should have known of the environmental concerns and the limited water supply at the cemetery. For the reasons that follow, we believe this argument to be without merit since we find that the duty to furnish this information rested with the agency. Section 543 of the Brooks Bill requires each agency to publish (furnish to each competing A-E firm with which discussions are conducted) the criteria upon which selection shall be based. We believe, by necessary implication, that the agency must also furnish the competing A-E firms the basic information underlying the selection criteria necessary for the firms to compete on an equal basis, where, as here, only one firm has possession and knowledge of such information. Into this category of basic information underlying the selection criteria and known to only one firm fall the environmental concerns and the limited water supply at the cemetery. It is wholly insufficient for the agency to argue post facto that the A-E firm not furnished the information by the agency may have acquired the underlying information from some other source. It is solely the agency's duty and responsibility to furnish a competing firm the basic information underlying the selection criteria and necessary for the firm to compete on an equal basis with the other firms. We conclude that Huddleston was placed in a competitive disadvantage, permeating the interview selection process, due to the failure of the VA to furnish it with the Master Plan.

Accordingly, we recommend that the Master Plan be furnished to all three A-E firms, that the discussions be reopened, and that all three firms be reevaluated so that the firms can be afforded the opportunity of competing on an equal basis.

The protest is sustained.


Deputy Comptroller General
of the United States