



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: JL Associates, Inc.

File: B-239790

Date: October 1, 1990

David R. Gleason, Esq., for the protester.
Michael Trovarelli, Esq., and Kevin Burke, Defense Logistics Agency, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency disclosure of incumbent contractor's option unit prices for freezer storage services in a solicitation to determine whether it is most advantageous to the government to exercise an option was not improper even though these prices were submitted in a restricted cost proposal since the prices, incorporated in the contract, were not shown to be confidential, proprietary data.

DECISION

JL Associates, Inc. (JLA) protests the disclosure of its allegedly confidential and proprietary data under request for proposals (RFP) No. DLA13H-90-R-6507, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency, for cold storage services. The RFP contained unit prices for an option in JLA's incumbent contract for these services. JLA contends that its option unit prices were proprietary, confidential data and DPSC's actions have prejudiced it and provided its competitors with an unfair competitive advantage.

We deny the protest.

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In April 1989, DPSC awarded JLA a contract to supply cold storage services for an initial term from April 1 to September 30, 1989, and two 1-year option terms. The contract included various unit rates (e.g., per hundred pounds, per package) for different types of cold storage (e.g., freezer, cooler) and various accessorial and handling charges for frozen foods, fresh fruit and vegetables, and other items. The contract currently is within the first option term.

DPSC issued this RFP on April 30, 1990, in order to determine the feasibility of exercising the final option term under JLA's incumbent contract for these services. Under paragraph L13, Notice of Option Availability, the RFP advised offerors that the government had an option available under the current (JLA) contract and cautioned offerors to consider the option in determining their prices, since the government reserved the right to exercise the option.^{1/} Also set forth in the paragraph were the unit prices contained in JLA's final option term for each individual cost item under the contract.

The government may only exercise an option in an existing contract if its exercise is the most advantageous method of fulfilling government's needs, price and other factors considered. Federal Acquisition Regulations (FAR) § 17.207(c)(3) (FAC 84-49). In appropriate circumstances, the government may issue a new solicitation to determine whether it is most advantageous to the government to exercise an option in an existing contract. See FAR § 17.207(d)(1); General Elec. Medical Sys., B-231342, Aug. 26, 1988, 88-2 CPD ¶ 185. The sole limitation in the FAR on using a solicitation to test the market is that this approach should not be used "if it is anticipated that the best price available is the option price or that it is the more advantageous offer." Id. There is no evidence in the record that indicates that JLA's option is necessarily the most advantageous method of meeting the government's needs.

DPSC states that for the past 12 years it has disclosed option prices in solicitations issued to determine whether to exercise options in order to ensure competition is on an equal basis known to the offerors or bidders. See General Elec. Medical Sys., B-231342, supra; Milwaukee Valve Co., Inc., B-206249, Feb. 16, 1982, 82-1 CPD ¶ 135.

^{1/} As the RFP placed technical quality over cost, this paragraph advised that a higher priced proposal would not automatically result in exercise of the option.

JLA states that decisions in which our Office has not objected to the disclosure of option prices in solicitations involved data that was in the public domain or otherwise releasable, e.g., option prices in bids on formally advertised procurements. JLA contends that the option unit prices disclosed by DPSC were proprietary, confidential data because the prices were offered to DPSC under a restricted legend in its proposal on the current contract work. JLA further contends that revealing its individual pricing for each item in the RFP is prejudicial to JLA and places it at a competitive disadvantage. This results, according to the protester, because the option prices show JLA's pricing strategy and its decision-making process regarding the relative cost of services to be performed under the contract. JLA argues that DPSC is prohibited from releasing information which was received from it in confidence. See FAR § 5.401(b)(2) (FAC 84-56). To rectify the alleged competitive harm, JLA requests that the solicitation be canceled and that it be permitted to complete the final option term of the current contract.

In appropriate circumstances, where it has been clearly established that the government's use of proprietary or confidential data or trade secrets in a solicitation violates a firm's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the protester or, if possible, cancel the solicitation and resolicit without using the protester's data. 49 Comp. Gen. 28 (1969); Zodiac of North Am., Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595.

Commercial or financial material, such as JLA's option unit prices, is confidential if the disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Since option prices, including unit prices, are often solicited by the government in solicitations for supplies or services, we perceive no possible impairment in the government's ability to obtain this information in the future, since offerors will supply this information in the hopes of receiving the award and options. See Racal-Milgo Gov't Sys. v. Small Business Administration, 559 F. Supp. 4, 6 (D.D.C. 1981).

JLA argues that the disclosure of its detailed unit option prices will cause it substantial competitive harm. In this case, the unit prices of JLA's second option were expressly incorporated into the contract, along with the basic

contract and first option prices. Contract prices are generally available under the Freedom of Information Act, 5 U.S.C. § 552 (1988), since the disclosure of prices charged the government is ordinarily a cost of doing business with the government.^{2/} See Racal-Milgo Gov't Sys., Inc. v. Small Business Administration, 559 F. Supp. at 6. Recent Freedom of Information Act cases have recognized that unit prices in contracts are not confidential and may be disclosed under the FOIA, where the disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, such that the possibility of competitive harm would be considered too speculative. See Acumenics Research & Technology, Inc., v. Dept. of Justice, 843 F.2d 800, 808 (4th Cir. 1988); Pacific Architects and Eng'rs Inc. v. Dept. of State, 906 F.2d 1345 (9th Cir. 1990). We have not found, and the protester does not cite, any precedent that indicates whether option prices, incorporated in a contract, are releasable under FOIA.

JLA does not contend that its unit prices necessarily disclose its overhead rates or profit margins; rather, the firm asserts this disclosure allows a competitor to view, in detail, JLA's pricing strategy and decision-making process as to services to be performed, which will give competitors an unfair advantage. However, the relative option unit prices for the various items of work of the second option do not significantly vary from the unit prices for these same items of work in the basic contract and first option period. JLA does not contend the basic contract unit prices are confidential or proprietary; indeed, under the guidelines set forth in Acumenics, we think these unit prices disclose no confidential data, but are information a contractor

^{2/} FAR § 15.1001(c)(iv) (FAC 84-58) expressly advises awardees that the unit prices of awards will generally be disclosed to unsuccessful offerors. See AT&T Info. Sys. v. General Services Administration, 627 F. Supp 1396, 1404 (D.D.C. 1986), rev'd on procedural grounds and remanded, 810 F.2d 1233 (D.C. Cir. 1987).

should expect to be released. Thus, JLA has not shown its option unit prices are confidential data. Under the circumstances, we do not object to their disclosure in the RFP.

Accordingly, the protest is denied.

Robert W. Murphy
for James F. Hinchman
General Counsel