



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Sylvest Management Systems Corporation

File: B-275935; B-275935.2

Date: April 21, 1997

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William M. Rosen, Esq., and Robert J. Moss, Esq., Dickstein Shapiro Morin & Oshinsky, for BTG, Inc., an intervenor.

Michael L. Wills, Esq., Tennessee Valley Authority, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Tennessee Valley Authority (TVA) Act, 16 U.S.C. § § 831-831dd (1994), and "procurement code" adopted by TVA Board require, at a minimum, that TVA consider total price in evaluating proposals and making award decisions.
2. Protest is sustained where record shows that price evaluation improperly failed to include the cost of all required items in its evaluation of awardee's price for computer systems; some required hardware items were listed in the proposal as optional equipment and were priced separately from the systems prices, and a certification executed by the awardee in its best and final offer was not sufficient to include those optional items in the systems at no additional cost. Award therefore improperly was based on less than the actual price of the awardee's systems.

DECISION

Sylvest Management Services Corporation protests the award of a contract to BTG, Inc. under request for proposals (RFP) No. YD-142201, issued by the Tennessee Valley Authority (TVA) for the purchase of computer hardware and maintenance support services. Sylvest argues that the award to BTG is improper because its evaluated price did not, as TVA believed, include all required equipment.

We sustain the protest.

The RFP included three broad schedules of products and services. Schedule I was for the purchase of computer maintenance services, and Schedules II and III were for the purchase of various hardware and software upgrades to existing TVA

computers, as well as for the purchase of new hardware. The solicitation also permitted the award of multiple contracts, and the agency advised that it reserved the right to award one contract for Schedule I and another for Schedules II and III; this protest concerns only the new hardware requirements under Schedule III, and thus only the portion of BTG's contract covering that equipment. Under schedule III, firms were required to offer nine servers--three different-sized servers (small, medium, and large) from three different manufacturers. Offerors were required to run both industry standard and TVA needs-specific benchmark testing. The RFP required offerors to certify as follows:

"Regarding the benchmark requirements, whatever configuration you use to run the benchmark successfully shall be the same configuration you use in your pricing proposal."

The acquisition was conducted on a best value basis, with the RFP specifying that TVA would make award to the offeror whose proposal received the highest cumulative score for both technical and price evaluation factors. TVA received numerous offers in response to the RFP and, after evaluating the proposals, engaging in discussions and soliciting two rounds of best and final offers (BAFO), made award to BTG as the firm submitting the proposal deemed to offer the best overall value to the government.

SCOPE OF REVIEW

As an initial matter, TVA argues that this acquisition is not subject to generally applicable procurement statutes and regulations, including the Federal Property and Administrative Services Act of 1949 (FPASA) as amended, 41 U.S.C. §§ 253-266 (1994), and the Federal Acquisition Regulation (FAR), 48 C.F.R. chap. 1 (1996). In this regard, TVA notes that Congress, through the enactment of the Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, § 5101, 101 Stat. 679, 680 (1996), recently repealed the Brooks Act, 40 U.S.C. § 759 (1994); the Brooks Act was the authority under which TVA previously conducted its automatic data processing (ADP) acquisitions (such as the one here), and which required it to abide by the various statutes and regulations noted above in conducting ADP procurements. Telos Field Eng'g, B-257747, Nov. 3, 1994, 94-2 CPD ¶ 172, at 3, and authorities cited therein. According to TVA, this repeal, along with solicitation language stating that TVA "will be the sole judge of the suitability of products offered in response to the solicitation," effectively excepts this acquisition from procurement statutes and regulations, and precludes review of this protest by our Office. TVA maintains that it is bound solely by the requirements of the TVA Act, 16 U.S.C. §§ 831-831dd (1994), and the procurement procedures and policies promulgated by the TVA Board.

We do not agree that TVA's actions here are beyond review. First, it is well established that TVA falls under the definition of "federal agencies" subject to our

bid protest jurisdiction pursuant to the Competition in Contracting Act (CICA). 31 U.S.C. § 3551(3); see also 40 U.S.C. § 472 (1994). Our original decision to this effect, Monarch Water Sys., Inc., 64 Comp. Gen. 756, 759-762 (1985), 85-2 CPD ¶ 146 at 5-9, which was issued shortly after the 1984 passage of CICA and followed in subsequent cases,¹ has not been repealed by statute, nor are we aware that legislation has ever been proposed to do so.

Second, the TVA Act and TVA's implementing resolutions provide a basis for review. Section 9(b) of the TVA Act, 16 U.S.C. § 831h(b) (1994), requires TVA to conduct its procurements in accordance with procedures which the TVA Board has determined to be adequate to ensure prospective offerors notice of, and an opportunity to compete for, the agency's requirements. Pursuant to this authority, the TVA Board has passed a resolution, dated February 13, 1991, adopting a "revised procurement code" which outlines TVA's policies and procedures for conducting its acquisitions. Among other things, the procurement code requires TVA to "purchase personal property and services in a manner that ensures the best value to TVA in quality, delivery, reliability, and price," and allows consideration of both price and non-price factors. In addition, while the code permits TVA to accept an offer that does not comply with one or more solicitation terms, TVA may only do so where "acceptance of such an offer would not adversely affect competition for the requirement."

Thus, TVA, by virtue of its implementation of the TVA Act, is required to obtain the best value when conducting procurements unless doing otherwise would not adversely affect the competition. The solicitation language purporting to make TVA the sole determiner of product suitability does not negate that requirement. Accordingly, the issue to be resolved is whether TVA's actions in evaluating proposals resulted in a best value selection and, if they did not, whether the competition was adversely affected.

TIMELINESS

As another preliminary matter, TVA (and BTG) maintains that Sylvest's protest of the evaluation of BTG's pricing is untimely because it was not filed within 10 days after Sylvest obtained the information on which the allegation is based. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997). TVA asserts that Sylvest had all necessary information after receiving its debriefing, where it learned BTG's total price and the hardware vendors proposed by BTG. This argument is without merit. Sylvest's protest is based on the contents of BTG's BAFO and TVA's price evaluation materials; without this information, Sylvest could not have raised its contention. These documents were provided to Sylvest's counsel pursuant to a protective order issued by our Office during the pendency of the protest, and Sylvest raised its

¹Telos Field Eng'g, supra, at 3 n.1; Vertiflite, Inc., B-256366, May 12, 1994, 94-1 CPD ¶ 304, at 1 n.1.

allegation within 10 days after receiving the information. Therefore, the protest is timely.

TVA'S EVALUATION OF BTG'S PRICING

As indicated, Sylvest maintains that the agency erred in its evaluation of BTG's price proposal. Firms were required to run benchmark testing on their proposed equipment, and to certify that the equipment being proposed and priced was the same configuration as that used to successfully pass the benchmark testing. All parties agree that, in order to successfully run the TVA-specific benchmark tests, a significant amount of additional "hard disk memory" had to be added to the basic server configurations. (For example, the basic large IBM server originally required 4 gigabytes of hard disk memory. In order to pass the TVA-specific benchmark tests, an additional 64.3 gigabytes of hard disk memory were required.) Sylvest maintains that BTG's systems prices included only the basic server configurations, and not the additional hard disk memory, which was priced in the offer as an option, and that the agency improperly failed to include the cost of all required items in BTG's low evaluated price.

TVA does not dispute that BTG's proposal included the additional required hard disk memory as optional, separately priced items, but essentially argues that the certification in BTG's BAFO was sufficient to indicate that BTG was offering the optional additional memory as part of the base configurations, at no additional cost. TVA maintains that it reasonably relied on the certification in reaching this conclusion, since there was nothing in BTG's offer that brought the certification into question.

We find TVA's position untenable. First, it is clear from the face of BTG's BAFO (that is, before considering the certification) that the extended or aggregate pricing--the pricing relied on by the agency for evaluation purposes--does not include the required additional hard disk memory. Both of BTG's BAFOs are comprised of "updates" that specify pricing information relating to the nine server configurations. Each of these nine configurations is listed as a single contract line item (for example, the small server offered from manufacturer no. 1 is listed as line item 01AA, and the small server offered from manufacturer no. 2 is listed as line item 01AB). Each of the base line items includes a listing of salient features for each configuration. Underneath each base line item is a list of options designated as sub-line items (for small server manufacturer No. 1, for example, there are 17 sub-line items designated as line item No 01AA-opt. 1, line item No 01AA-opt. 2, etc.). These optional items include various hardware enhancements that can be added to the basic server configuration. The additional hard disk memory units are listed as separate, optional sub-line items that are priced separately from the basic server units. A careful examination of BTG's aggregate or extended pricing shows that it is based on the prices for the basic servers only and does not include the cost of the additional hard disk memory units.

The remaining question, then, is whether the certification operated to incorporate the required additional memory in the offered systems without additional cost. We find that it did not. As indicated above, offerors were required to certify that the configurations necessary to pass the benchmarks were the configurations used in the pricing proposal. BTG certified as follows:

"BTG, Inc. has updated its proposal to reflect the configuration used to run its benchmark successfully. Proposal change pages are provided in tab 5 and hardcopies and/or computer tapes of the required benchmarks have been provided as tab 4 of this best and final offer."

While this certification states that the proposal has been updated to reflect the benchmarked configurations, it does not state that all items included in the required configurations are included in the systems prices. This is problematic due to BTG's listing of hard disk memory (and other items) as separately priced options. In light of this separate pricing, and because the certification did not state that the required optional memory was included in the systems prices, BTG's proposal cannot reasonably be read as offering the optional memory at no additional cost. Rather, the total price for the configurations that passed the benchmarks consists of the systems prices plus the prices listed for the optional hard disk memory. Since TVA calculated BTG's evaluated total price by totaling only BTG's systems prices, without also adding the separate prices for the required additional hard disk memory, the evaluation did not provide TVA a basis for determining best value, and therefore was improper.²

The record contains insufficient information for our Office to determine precisely what hard disk memory--and the resultant added cost--will be necessary for each of the nine server configurations to run the benchmark tests properly. The record

² In contrast, Sylvest certified as follows:

"Sylvest is proposing the exact configuration from each vendor that was used to successfully complete the benchmarks. These configurations match with the RAM [random access memory], CPU [central processing units], and disk space to run . . . the . . . benchmarks with no reallocation of resources." (Emphasis supplied.)

Although this certification, like BTG's, did not specifically state that the offered systems prices included the additional memory necessary to pass the benchmarks, since Sylvest's offer included no optional, separately-priced items (for each server configuration, a single price is listed, and the server configuration, including the additional hard disk memory units, is specified under the single price given), there was no question that Sylvest's total systems prices included all required memory and other items.

only contains detailed information with respect to the amount of additional hard disk memory required to configure the servers from one of the three manufacturers proposed by BTG. It is clear from the record, however, that the additional hard disk memory cost would be substantial; Sylvest has submitted detailed, un rebutted calculations showing that, without its additional cost for the hard disk memory (a net present value of [deleted]), its proposal for the servers would have been the lowest-priced. This, in our view, demonstrates that there is a reasonable likelihood that, but for the agency's price evaluation error, Sylvest would have been in line for the Schedule III requirements. We therefore sustain Sylvest's protest.

By separate letter of today to the Chairman of TVA, we are recommending that TVA either reevaluate the BAFOs submitted in response to Schedule III of the contract or, if necessary to resolve concerns about BTG's offer, obtain revised BAFOs and evaluate the revised submissions. If TVA determines that a firm other than BTG is entitled to award of this portion of the contract, TVA should terminate this portion of BTG's contract for the convenience of the government and make award to the eligible firm if otherwise proper. We also are recommending that TVA reimburse Sylvest's costs of filing and pursuing this aspect of its protest, including reasonable attorneys' fees. Sylvest should submit its certified claim, detailing the time expended and the costs incurred, directly to TVA within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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