DECISION

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

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FILE: B-182965 DATE: May 20, 1975

MATTER OF: Data General Corporation

DIGEST:

1. Although broad language in RFP states that where there are inquiries concerning RFP, questions and answers of substantive nature would be mailed to all offerors, ASPR does not contemplate dissemination to other offerors of information provided by another offeror to improve deficient proposal during negotiation discussions.

2. Rule applicable to formal advertising that would require rejection of nonconforming proposal as nonresponsive does not apply to negotiation and modification of proposal as result of discussions during negotiation is appropriate under ASPR § 3-506(d), which provides that revisions of proposals during usual conduct of negotiations are not to be considered late modifications to proposals, and protester's contention that nonconforming offer was not "otherwise successful proposal" that could be modified under RFP late proposal clause fails.

3. Clerical correction of mutual mistake contained in proposal after closing date for best and final offers which was occasioned by unintended excessive deletion by procuring activity during negotiations is not subject to question as correction only reflects intent of both parties during negotiations.

4. Offer to comply with requirement for real-time clock through use of two components does not comply with RFP requirement for single component, and once procuring activity decided that single component was not essential amendment to RFP should have been issued indicating to offerors that alternate means of compliance would be acceptable; however, since protester would not

have offered anything other than single component and two component method was more costly, nonconforming successful offeror was not given advantage over other offerors and award will not be upset.

5. Record does not establish that modification to computer offered under RFP complied with requirement that modifications offered should be proven in similar systems currently on market; however, termination for convenience of Government of contract awarded for modified equipment is not recommended since procuring activity has indicated that delay in performance of contract would result in considerable financial loss to Government, seriously impact weapon system and simulator support, and negatively affect other ongoing projects.

6. Requirement in RFP that modifications to standard products be minor is construed as requiring minor technical modifications, not minor financial modifications.

On August 5, 1974, request for proposals (RFP) No. DMA700-74-R-0196 for the procurement of pooled minicomputers for analytical stereo instrumentation was issued by the Defense Mapping Agency (DMA) to 114 prospective offerors. Five proposals were received. All were evaluated by the contracting officer and the technical evaluation board.

Live test demonstrations were conducted by all offerors; oral and written discussions were held; each offeror was advised of the deficiencies in its proposal and was given an opportunity to correct or resolve any deficiencies, as well as to revise cost or technical proposals based upon the previous discussions. Best and final offers were required by November 25, 1974, and based upon the submissions, the contracting officer determined that two of the proposals were technically unacceptable; that the three remaining proposals were within the competitive range; and that Modular Computer Systems (ModComp), which proposed the lowest price, would be selected for award at the final negotiated price of $1,490,708. Award was made on December 27, 1974.

Data General Corporation (DGC) received a debriefing on December 30, 1974, and subsequently protested the award of the contract to ModComp to our Office. DGC has based its protest on several grounds, each of which will be discussed below.

DGC contends that after the submission of proposals, ModComp was allowed to raise questions and receive answers of a substantive nature which were not distributed to all offerors as required in part I, section "C," paragraph 24, of the RFP which states:

> "INQUIRIES: Inquiries concerning this RFP including questions of a policy or procedural nature, will be submitted in writing to the issuing office. Questions and answers of a substantive nature will be mailed to all offerors. Closing date for inquiries is 26 Aug 1974."

DGC states that the answers to many of the questions presented would have substantially changed its offer. In that connection, DGC states that ModComp was allowed to modify the Live Test Demonstration Fortran Reentrancy program and to create a new product. This DMA denies. However, it does state that there were deficiencies in the ModComp proposal, as well as in the other proposals, which were allowed to be changed to conform to the RFP specifications. Discussions concerning the deficiencies of each proposal were conducted with the individual offeror responsible for the deficiencies and were not communicated to other offerors. In that regard, Armed Services Procurement Regulation (ASPR) § 3-805.3(a) (1974 ed.) provides that all offerors selected to participate in discussions shall be advised of the deficiencies in their proposals and offered an opportunity to revise their proposals to correct the deficiencies and ASPR § 3-805.3(b) states:

> "Discussions shall not disclose the strengths or weaknesses of competing offerors, or disclose any information from an offeror's proposal which would enable another offeror to improve his proposal as a result thereof."

Therefore, notwithstanding the broad language of paragraph 24, supra, ASPR does not contemplate the dissemination to other offerors of information provided by another offeror to improve its proposal.

DGC also states that ModComp was permitted to substitute a model 4820 parallel link for a modified model 5820 serial link on the live test demonstration and to substitute a model 4126 and 4127 disc for a model 4128 disc whereas certain changes requested by DGC were denied. From the record before us, it appears that the substitutions made by ModComp were proper in that the changes eliminated certain nonconforming aspects of its proposal. DGC, on the other hand, made two requests for substitution after submission of its proposal which were denied. First, DGC requested to substitute a computer expansion chassis for the equipment originally offered. Upon further questioning, however, it was revealed that the computer expansion chassis was a formerly unannounced product and therefore could not be accepted as doing so would be in contravention of paragraph 5.1.2 of attachment II of the RFP. Secondly, DGC requested that a modification be allowed during its live test demonstration due to scheduling difficulties in obtaining a Nova II control computer. DMA stated that it would agree to the modification, but only if DGC could submit proof that the speed of the units being tested would not be adversely affected by the modification. As DGC was unable to submit the requested proof, the request was denied. Upon review, we find no basis to question the above actions by DMA.

DGC next contends that ModComp made several late modifications to its offer although ModComp's initial offer was not "an otherwise successful proposal" as required in part I, section "C," paragraph 33A(e), which states:

> "* * * a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

DGC contends that the proposal should therefore have been declared nonresponsive.

DMA and ModComp acknowledge that modifications were made to the ModComp proposal as a result of discussions held during the negotiation period. This course of conduct, DMA asserts, is appropriate under ASPR § 3-506(d) (1974 ed.), which states:

> "The normal revisions of proposals by offerors selected for discussion <u>during the usual conduct</u>

> of negotiations with such offerors are not to be considered as late proposals or late modifications to proposals." (Underscoring supplied.)

We agree with DMA's position. Under the rules applicable to formal advertised bidding it is clear that ModComp's proposal would have had to have been rejected as nonresponsive. But the immediate procurement was negotiated and all offerors were given the opportunity to modify nonconforming aspects of their proposals. This is one of the primary factors that differentiates an advertised from a negotiated procurement and we find no reason to challenge the modifications made to ModComp's initial proposal. See 48 Comp. Gen. 536, 540 (1969).

The modification, or more appropriately correction, of ModComp's warranty provision after the closing date for best and final offers was necessitated by an unintended excessive clerical deletion by DMA during negotiations. This correction is not subject to question by our Office as the corrected warranty reflects the intent of both of the parties during negotiations.

DGC next contends that ModComp's best and final offer did not meet certain of the mandatory technical requirements of the RFP. DGC questions whether ModComp's control computer memory size meets the 40K requirement of paragraph 5.3.2 of attachment II; whether ModComp successfully completed the Fortran Reentrancy portion of the live test demonstration as required in chapter 3 of attachment III; and whether ModComp's control computer software is in compliance with the software requirements of paragraph 5.4.1.12 of attachment II.

Our review of ModComp's proposal discloses that a 40K core memory was proposed through the use of two 16K modules and one 8K module. Moreover, DMA has stated that the complete live test demonstration, including the Fortran Reentrancy test, was completed on the control computer proposed by ModComp. Finally, we find no exception taken to the requirements of paragraph 5.4.1.12 of attachment II. This paragraph required that:

> "The operating system on the control computer must support a main program being interrupted by a real-time program which uses a portion of the same

> sub-routines as the main program (and in fact both programs may be FORTRAN). This support could be provided with reentrancy of the operating system, FORTRAN library, and the FORTRAN computer-generated code. One acceptable alternative to reentrancy would be the addition of enough memory for a second copy of the FORTRAN library and the operating system support of such an arrangement."

ModComp, in satisfying this requirement, offered an additional memory, over and above that required for the operating system and user area. This, as stated above, was an acceptable means of satisfying the requirement of paragraph 5.4.1.12 of attachment II.

However, there does not appear to have been a literal compliance with the requirement of paragraphs 5.2.7 and 5.3.6 of attachment II. Paragraphs 5.2.7 and 5.3.6 required "a real-time clock with minimum interval of one millisecond which can generate interrupts at least as often as 5 milliseconds * * *." ModComp, in response to this requirement, offered a clock which could send interrupts to the computer every 5 milliseconds, plus an interval timer with a 50 microsecond resolution which could generate interrupts at various intervals including 1 millisecond or 5 milliseconds.

Our Financial and General Management Studies Division, Automatic Data Processing Branch, has reviewed the RFP and ModComp's proposal and has concluded that the requirements of paragraphs 5.2.7 and 5.3.6 were met. However, paragraphs 5.2.7 and 5.3.6 call for a single unit with specific features. While it may be true that ModComp has offered all the features desired, it has not done so in a single unit.

Therefore, once DMA decided that a single unit was not essential to meet the requirements, it should have issued an amendment to the RFP informing all offerors that an alternate method of complying with the requirements would be satisfactory. See ASPR § 3-805.4(a) (1974 ed.). However, we do not believe that DMA's failure to issue an amendment was prejudicial to any offeror. At the conference on this matter in our Office, DGC stated that it had proposed a single unit which fully complied with the requirements of paragraphs 5.2.7 and 5.3.6 and that it would not have offered anything different. DGC's

objection was that ModComp did not comply with the requirements. ModComp stated that its method of compliance was more costly than using a single unit and that, therefore, it was not given an advantage over the other offerors. In the circumstances, the award to ModComp will not be upset, but the deficiency in the procurement practice is being brought to the attention of DMA to preclude a recurrence in future procurements.

DGC further alleges that ModComp offered three unannounced products in contravention of paragraph 5.1.2 of attachment II which states:

> "All hardware in terms of computers and peripherals proposed to satisfy the mandatory requirements must be products that have been previously announced for general distribution * * *."

Both DMA and ModComp rebut this allegation by stating that no unannounced products were included in the package accepted for award. The model 5820 interprocessor link was not the final product offered by ModComp and therefore is not subject to question. The model 4820 computer to computer link and the direct memory processor both appear in ModComp's standard price book dated November 1, 1972. Accordingly, we find no basis to conclude that ModComp's offer was in violation of the provisions of paragraph 5.1.2 of attachment II.

In conjunction with the above allegation, DGC contends that the three above-mentioned items required major nonstandard modifications which have not been proven in similar systems currently on the market as required in paragraph 6.14 of attachment II. Again, model 5820 was not the final product offered by ModComp and therefore is not subject to question. The direct memory processor, with modifications, is operational at the Jet Propulsion Laboratories in California. The model 4820, modified slightly, has been reviewed by DMA and it has verified that the modifications are minor and that it will not change the overall characteristics of the already proven device, as the modification only increases the word transfer rate by 33K words per second. In our opinion, however, the modified model 4820 offered by ModComp is in contravention of paragraph 6.14 of attachment II.

Paragraph 6.14 of attachment II states, in pertinent part, that:

> "* * * Some modifications to the existing computer may be required but they should be minor, well documented, standard modifications which have been proven in similar systems currently on the market." (Emphasis supplied.)

ModComp, in its letter of January 14, 1975, has stated that its modified model 4820 has not been previously offered for sale or supplied on previous contracts. Nor does the record establish that the modification has been proven in any other similar system currently on the market. Therefore, it does not appear that the provisions of paragraph 6.14 of attachment II have been met.

The question now for resolution is what corrective action, if any, is required by ModComp's having failed to comply with paragraph 6.14 of attachment II. DMA has indicated that delays in performance of the contract would result in considerable financial loss to the Government, seriously impact weapon system and simulator support, and negatively affect other ongoing Government projects. Based on these considerations, we are of the opinion that it would not be in the best interest of the Government to recommend that ModComp's contract be terminated for the convenience of the Government. We are, however, by separate letter of today, drawing this and the previously mentioned procurement deficiency to the attention of DMA.

Finally, DGC also questioned the fact that ModComp included in its best and final offer $130,071 for nonrecurring charges for modifications and design changes for various equipment. DGC states that "These charges seem very expensive and extensive to be considered minor and standard modifications as required in Paragraph 6.14 of Attachment II." However, ModComp has responded, and we agree, that the amount referenced by DGC is incorrect. The cost for nonrecurring items quoted by ModComp was $39,296 for year 1. The figures for years 2 and 3 represented the year 1 charge compounded at 10 percent per annum in the event the nonrecurring portion of the contract was not purchased by DMA in year 1. Upon examination of the abstract of proposals, this was the manner in which DMA evaluated ModComp's proposal. Moreover, we are not convinced that the reference in paragraph 6.14 to minor modifications means minor monetary modifications.

When the paragraph is read in its entirety, minor modifications appears to have meant "minor technical modifications," which DMA has indicated the modifications to be.

Deputy Comptroller General
of the United States

DECISION

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

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97287

FILE: B-182730 DATE: May 20,1975

MATTER OF: Flippo Construction Co., Inc.

DIGEST:

Denial of protest against rejection of bid is affirmed, since doctrine of equitable estoppel, only legal basis upon which protester could sustain position, is not applicable where expenses were incurred in reliance on communications from persons without authority to make contract award.

Flippo Construction Co., Inc. (Flippo), has requested reconsideration of decision B-182730, March 7, 1975, wherein our Office denied the firm's protest of a contract award by the Government of the District of Columbia to the Marbro Company, Inc. (Marbro), for a culvert and paving project under invitation for bids No. 226-AA-02-0-4-KA.

Bids were solicited on two alternate approaches. At the bid opening on September 18, 1974, Marbro was the low bidder at $278,035 for each alternate. Flippo was next low bidder at $290,461.50 and $298,058.50 for alternate "A" and "B," respectively. When it was discovered that Marbro had failed to acknowledge two of the three addenda issued, the contracting officer proposed to reject Marbro's bid as nonresponsive and recommended that award for alternate "B" be made to Flippo. This was orally communicated to Flippo on September 26, 1974, by the Deputy Assistant Director of the Bureau of Design, Engineering and Research, Department of Highways and Traffic, for the District.

The award of the contract to Flippo was delayed as a result of its tardiness in submitting the affirmative action program required by the District. Subsequently, it was determined by the Assistant Corporation Counsel, Chief, Special Assignments Division, that Marbro's failure to acknowledge the addenda could be waived as a minor informality.

When the contracting officer informed Flippo on November 8, 1974, that Marbro would receive the award, Flippo protested to the District. Upon denial of the protest by the District, Flippo protested to our Office alleging that it was induced by the Government to incur costs in contemplation of award as a result of the initial notification of intent to make the award to Flippo. The firm contended that in view of the expense incurred the Government should award the contract to it.

In our decision of March 7, 1975, we expressed the belief that the doctrine of equitable estoppel had no application to the situation. We indicated that the communication upon which Flippo relied in incurring costs in contemplation of award was not from an official with authority to bind the Government.

In its request for reconsideration, the protester first maintains that we improperly invoked the doctrine of equitable estoppel. Flippo states:

> "In resorting to the doctrine of equitable estoppel as a basis for denying this protest, it should be noted that this doctrine has been injected into the case by the Comptroller General, without having been invoked either by protestant or by the District's representatives."

While our Office agrees that the doctrine, as such, was never raised, it is our opinion that it is the only legal theory upon which Flippo's position could be sustained. Since it is clear that the District of Columbia Government could waive Marbro's failure to submit addendum 2, Flippo's only grounds for protest would be on the basis that expenses were incurred as a consequence of the Government's announced intention to award the contract to Flippo. However, it has been held repeatedly that the United States is not liable for the erroneous acts or advice of its officers, agents or employees even if committed in the performance of their official duties. See Matter of A. D. Roe Company, Inc., B-181692, October 8, 1974, 54 Comp. Gen. _____; 46 Comp. Gen. 348 (1966); 44 Comp. Gen. 337 (1964); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947); United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973).

Flippo also objects to our disposition of the protest on the grounds that the District officials acted beyond their authority and contends that we ignored administrative procedures followed by the District in awarding contracts. However, the facts clearly demonstrate that Flippo received no communication from the contracting officer awarding the contract to the firm. Rather, Flippo bases its argument on the notice it received from the Deputy Assistant Director of the Bureau of Design, Engineering and Research on September 26, 1974, that it was the apparent low bidder on the project. While it appears that award to Flippo was contemplated in communications of October 2 and October 15 between the District's contracting officer and Assistant Corporation Counsel, there was no direct communication with Flippo of contract award. Moreover, the intention that no contract be manifested before the completion of formalities is evident from the October 17, 1974, letter from the District Labor Standards and Equal Opportunity Compliance Officer to Flippo wherein it is stated that the contracting officer is unable to award a contract to Flippo until it submits the required affirmative action plan program and that failure or refusal to submit the material might result in rejection of the company's bid.

A letter of November 8, 1974, from the contracting officer to Marbro was the first valid notice of award. Informal advice to Flippo prior to that time from persons without the necessary authority to make an award did not create a contract binding on the District.

Accordingly, denial of Flippo's protest against rejection of its bid is affirmed.

Deputy Comptroller General
of the United States