

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

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FILE: B-184336

DATE: March 2, 1976

MATTER OF: Saturn Systems, Inc.

98534

DIGEST:

RFP for computer maintenance service, which called for consideration of prompt-payment discounts, provided for award to offeror on basis of lowest total cost. Contract awarded to other than low offeror was properly terminated for convenience of Government and award made to low offeror after reevaluation where, after award, Government discovered that prompt-payment discounts had not been considered in price evaluations even though discovery resulted from post-award conversation with eventual contractor. No evidence of "auction," change in evaluation criteria, or revision in eventual contractor's proposal found prior to second award.

Saturn Systems, Inc. (SSI), protests the award of a contract to Sorbus, Inc. (Sorbus), under request for proposals (RFP) DAAD05-75-R-0028 issued by the United States Army Test and Evaluation Command (TECOM), Aberdeen Proving Ground, Maryland.

The solicitation, issued on April 28, 1975, sought proposals for the services necessary to maintain Government-owned IBM and Honeywell Automatic Data Processing (ADP) equipment located at the Aberdeen Proving Ground. Section D of the RFP allowed prospective offerors to submit offers for only IBM equipment, only Honeywell equipment, or on both, and provided that "AWARD WILL BE MADE TO A SINGLE BIDDER WHOSE OFFER REPRESENTS THE LOWEST TOTAL COST FOR PROVIDING MAINTENANCE SERVICE * * *."

Offers were submitted by 4 of the 27 companies which received solicitation packages. On June 25, 1975, contract DAAD05-75-C-0162 effective July 1, 1975, was awarded to SSI.

As the incumbent contractor, Sorbus was required to remove all of its equipment and spare parts stored on the site before July 1, 1975. Immediately following award, Sorbus was notified by telephone that it was not the successful offeror. When advised of the award price, Sorbus asked whether the contracting officer had considered its prompt-payment discount of 15 percent in the evaluation of its offer.

According to the contracting officer, Sorbus' inquiry made it immediately evident that the price analysis of all offers conducted prior to award failed to give consideration to any prompt-payment discounts. Three of the four offerors, including Sorbus and SSI, had offered prompt-payment discounts. A re-evaluation of all offers was made on June 26, 1975, to learn what effect the overlooked discounts would have on the standing of the offerors. This revealed that Sorbus' offer was \$1,188 less than the offer of SSI. Since the contracting officer believed that an erroneous award had been made to SSI, he determined that the contract should be terminated for the convenience of the Government and that a new award be made to Sorbus, the low responsible offeror. On June 27, 1975, SSI's contract was terminated and an award was made to Sorbus.

In protesting this action, the contentions made by SSI's counsel are that the contracting officer: (1) erroneously and arbitrarily terminated the contract with SSI, an act far beyond his discretionary authority; (2) failed to enter into discussions or negotiations with, or request a best and final offer from, SSI before making the award to Sorbus; (3) improperly revealed SSI's proposal and/or contract price to Sorbus on June 25, 1975; (4) engaged in an auction by indicating to Sorbus that its price was not low and the price which must be met to win award; (5) changed the evaluation criteria to include evaluation of a prompt-payment discount and failed to reflect such a change by an amendment to the RFP to enable all offerors to compete equally under revised evaluation criteria; and (6) made an improper, noncompetitive award to Sorbus after entering into and then terminating SSI's valid and binding contract. It is also alleged that the legally valid binding contract with SSI was made in accordance with the evaluation criteria intended to be applied by the contracting officer at the time of award. Therefore, it is maintained, the Government can not now allege a "mistake" after award to use different evaluation criteria and then, to the prejudice of SSI, correct the "mistake" and award on a sole-source basis. Accordingly, SSI requests that the present contract with Sorbus be canceled and that the Army resolicit its requirement.

The contracting officer states that had the discounts not been overlooked in the evaluation of all proposals, SSI would not have received its contract. It was also his view that discounts were a part of the evaluation and had to be considered in making an award. In this regard, the contracting officer noted that no communications regarding prompt-payment discounts were conducted with Sorbus prior to the award of the

contract to SSI on June 25, 1975. Therefore, he felt the action to terminate an improper award for convenience was considered proper and necessary in order to rectify a situation in which proposals were evaluated and a contract awarded improperly to an offeror whose offer was not the lowest eligible for award in accordance with the terms of the RFP.

In deciding whether a contract has been awarded erroneously but in good faith, all relevant and material factors surrounding the award must be considered in light of the best interests of the United States. Under procurements negotiated pursuant to the authority of 10 U.S.C. § 2304 (1970), the Government reserves the right to make award to other than the lowest offer and to reject any or all offers. However, sound procurement policy requires that any award be made in accordance with all the evaluation factors stated in the RFP. 51 Comp. Gen. 272 (1971).

As mentioned above, the criteria for award in the RFP called for award to the proposer whose offer represented the "lowest total cost" for providing the maintenance service. In addition, the concept of award being based on the "lowest total cost" is emphasized throughout the RFP. The RFP also contained Standard Form 33A, "SOLICITATION INSTRUCTIONS AND CONDITIONS," paragraph 9 of which, entitled "DISCOUNTS," as amended states:

"(a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers.

"(b) In connection with any discount offered, time will be computed from the date of completion of performance of the services or from the date correct invoice or voucher is received in the office specified by the Government, if the latter is later than date of completion of performance. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check."

A key premise to the SSI protest is that a contracting officer may, but is not required to, consider prompt-payment discounts in evaluating offers under an RFP, as opposed to a formally advertised solicitation. Also, SSI questions whether the solicitation put offerors on notice that discounts would be considered. Counsel for SSI proffers an analysis of paragraph 9(a), quoted above, as interpreted and applied by decisions of our Office, including Linolex Systems, Inc., et al., 53 Comp. Gen. 895 (1974), 74-1 CPD 296, involving a negotiated procurement where we held:

"While the RFP makes no mention in its evaluation section that prompt payment discounts would be evaluated, paragraph 9(a) of Standard Form 33A, included in the RFP, states that discounts for a period of not less than 20 days would be considered in evaluating offers for award. While this provision was not included or referenced in the evaluation section of the RFP, the Government properly could consider the discount in the evaluation of offers. * * * In evaluating offers it is required that there be deducted from the gross price the amount of discount tendered by an offeror, since it is presumed that the Government will take advantage of any discount offered. 32 Comp. Gen. 328, 330 (1953). The practice of offerors tendering prompt payment discounts is so well established that the Government may accept the same even when the solicitation is silent as to discount."

Conceding the right of the contracting officer to consider prompt-payment discounts, SSI argues that, here, a conscious decision was made not to consider the discounts. Therefore, SSI contends,

"The conclusion by the Contracting Officer that an RFP evaluated, negotiated, and awarded under 10 U.S.C. 2304(g) without consideration of prompt payment discount must be canceled is at best improper, and at worst, an act of gross negligence and arbitrary and capricious overreaching by the Contracting Officer of his discretionary powers."

We do not find it necessary to analyze generally the rights and requirements of contracting officers insofar as evaluating

prompt-payment discounts in negotiated procurements vis-a-vis advertised procurements. In our view, the resolution of this matter is found in the ground rules for the competition, the RFP itself and the responses thereto. There can be no question that paragraph 9 of Standard Form 33 apprised all prospective offerors that any appropriate prompt-payment discounts would be considered. For SSI to now argue to the contrary is rendered incongruous by the fact that the firm offered such a discount in its proposal. To say that SSI offered the discount to give the contracting officer an option to accept or reject it ignores the realities of competition.

Furthermore, in the context of a RFP emphasizing award on the basis of "lowest total cost," the failure of the contracting officer to consider any acceptable prompt-payment discount proposed would violate the concept inherent in the evaluation factors. Therefore, we find that, following the above-quoted reasoning in the Linolex case, this RFP required the consideration of the offered prompt-payment discounts. See also Jerry Fairbanks Productions, B-181811, March 14, 1975, 75-1 CPD 154.

The record contains nothing from which we can conclude that the contracting officer consciously decided to not evaluate the prompt-payment discounts. On the contrary, the contemporaneous documentation covering the critical period indicates that what occurred was an inadvertent oversight on the part of contracting officials which was corrected immediately following discovery.

The determination whether a contract should be terminated for convenience is a matter of administrative discretion which does not rest with our Office, and the validity of such action will not be questioned unless there has been a showing of abuse of discretion or bad faith. Service Industries, Inc., et al., B-183535, November 24, 1975, 75-2 CPD 345, and Electronic Associates, Inc., B-184412, February 10, 1976. Even if the contracting officer were not required to evaluate the discounts, the termination and resultant award in accordance with the stated evaluation criteria of the solicitation to remedy the considered error did not evidence any abuse of discretion and, in our view, was appropriate under the circumstances.

The other contentions made by SSI likewise provide no basis for disturbing the award to Sorbus. The post-award revelation of

the award price of SSI was in consonance with ASPR § 3-508.3 (1974 ed.), which provides that in negotiated procurements the contracting officer shall give to each unsuccessful offeror information regarding the award including the name of the contractor and the contract price. There is no evidence, other than SSI's allegation, that the contracting officer engaged in any negotiations regarding a "price to be met" by Sorbus after award or that SSI's price proposal was revealed to Sorbus prior to the June 25, 1975, award. The record shows that the subsequent award to Sorbus was made on the basis of the initial and only proposal submitted by Sorbus under the RFP. Sorbus did not offer nor was the firm afforded an opportunity to revise its proposal after the initial award to SSI. It is evident that the consideration of the discounts cannot be viewed as a change in evaluation requiring an amendment to the RFP and discussions with all offerors in the competitive range. And, we cannot subscribe to the argument that the subsequent reevaluation of proposals was, in effect, an auction which should have caused the obtaining of best and final offers from all the offerors after it was discovered that the initial award had been in error.

Accordingly, SSI's request that the award be canceled and the requirement be resolicited is denied. The Army has advised that the option in the contract with Sorbus will not be exercised and a new solicitation covering the required services after June 30, 1976, is in the process of being issued with maximum practical competition, including SSI and Sorbus, to be solicited.


Deputy Comptroller General
of the United States