

DECISION



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

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FILE: B-185592

DATE: June 3, 1976

MATTER OF: Computer Machinery Corporation

98863

DIGEST:

1. Allegation that part of successful proposal should have been rejected is not protest against RFP evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under GAO Bid Protest Procedures.
2. While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable.
3. Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government.
4. Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon re-evaluation of proposals.

PUBLISHED DECISION
55 Comp. Gen.

The principal issue raised by the protest of Computer Machinery Corporation (CMC) is whether a portion of the proposal submitted by the successful offeror, C3, Inc., under request for proposals (RFP) No. DAHC26-75-R-0012 should have been rejected. CMC contends that it should have been, and two interested parties--Four-Phase Systems, Inc. (Four-Phase) and Inforex, Inc.--agree. The contracting agency (the Department of the Army's Computer Systems Support and Evaluation Agency) and C3 believe that C3's proposal was properly accepted.

Timeliness of Protest

The threshold question of timeliness must be addressed. CMC first protested on December 24, 1975, after the award of contracts to C3. The Army believes that the protest is untimely because it is actually directed against the RFP's evaluation criteria. The Army points out that, accordingly, the protest should have been filed prior to the closing date for receipt of initial proposals (March 10, 1975), or, at the very latest, the closing date for best and final offers (September 15, 1975). The record also shows that CMC was debriefed on December 8, 1975, and was advised of C3's evaluated prices at that time. This was more than 10 working days prior to the filing of the protest.

However, we agree with CMC's counter-arguments that the principal issue in its protest was timely raised. As CMC points out, the question of whether a portion of C3's proposal should have been rejected does not involve any objection to the RFP's evaluation criteria. Rather, it relates to the Army's application of those criteria in evaluating C3's proposal--particularly, C3's 96-month lease plan, discussed infra--and in deciding to accept it.

Moreover, CMC points out that it did not receive a copy of the pertinent contract documents until December 15, 1975. CMC contends--reasonably, we think--that it could not learn of the alleged improper evaluation of C3's proposal without performing various mathematical calculations based on the information contained in these documents. The protest letter filed on December 24, 1975, clearly puts into issue the question whether accepting the 96-month lease plan as part of C3's proposal was proper. Therefore, we find that the protest was filed within 10 working days after the basis for protest was known or should have been known, in accordance with section 20.2(b)(2) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

Background

The RFP contemplated the award of as many as four firm fixed-price, requirements-type contracts for the installation, purchase, lease and maintenance of Key-to-Disk-to-Tape automatic data processing systems. The RFP estimated that 64 systems would be required, divided into the following award groups:

<u>Location</u>	<u>Estimated quantities</u>	
	Small Systems	Large Systems
Overseas	5	3
Continental United States	49	7

Further, RFP section E.3 provided that "* * * The evaluation will be based and performed on 64 systems as stated in Section D, 'Evaluation and Award Factors.'"

Offers on any or all of the award groups were required to propose at least three "methods of acquisition"--purchase, lease, and lease with option to purchase. Other methods of acquisition offered would also be considered and evaluated. RFP sections D.2, D.19. Within each method of acquisition, offerors could propose various plans. However, as to which plans would be evaluated, amendment No. 4 to the RFP provided:

"If an offeror proposes more than one plan under any method of acquisition, only the one plan (per method of acquisition) with the lowest evaluated systems life cost will be used for evaluation and be entered into any resultant contract. However, the Government reserves the right to enter more than one plan into the contract if it is determined additional plans are advantageous to the Government."

RFP section D.36 provided that lowest overall cost would be determined by taking the sum of the net evaluated costs for the methods of acquisition and dividing by the number of methods of acquisition proposed. For example, if the net evaluated costs were \$100,000 (purchase), \$200,000 (lease) and \$300,000 (lease with option to purchase), the total evaluated cost of the proposal would be \$600,000 ÷ 3, or \$200,000. As noted above, the net evaluated cost of a particular

method to be used in this computation would be taken from the plan offered under that method which had the lowest evaluated systems life cost. In the above example, an offeror might have proposed \$100,000, \$150,000 and \$200,000 purchase plans, but only the \$100,000 plan would be used in the overall cost computation.

C3's best and final offer proposed four methods of acquisition for each award group--purchase, lease, lease with option to purchase, and lease to ownership.

The crux of the present controversy involves the plans which C3 proposed under the lease and lease with option to purchase methods of acquisition. One of these was described as a "96 month" lease plan. In its proposal, C3 stated:

"The lease plan offered by C3, Inc. and included in our pricing schedules is a long term lease plan. For the prices quoted, the Government would be required to enter into a firm 8 years lease for the equipment and maintenance. * * *"

However, as the protester points out, the C3 "96 month" lease plan was subject to a condition which sharply limited its effective duration. In this regard, the two contracts awarded to C3 state: "This plan is applicable only if equipment is installed no later than 31 March 1976." It is to be noted that the contracts were awarded to C3 on November 28, 1975, and that their basic term extends to September 30, 1976. Moreover, by exercising options the Government can extend the duration of the contracts to a maximum of 100 months after award.

C3's proposal also offered other lease plans. The proposal stated:

"At the request of the Government, C3, Inc. hereby offers four optional lease programs. These * * * are to be used only when the 8 year lease program * * * cannot be used. For these reasons, these lease programs will not be used in evaluating C3, Inc.'s cost proposal. * * *"

As noted, supra, RFP amendment No. 4 provided that only the one plan per method of acquisition with the lowest evaluated cost would be considered in evaluating the overall proposal costs, although additional, unevaluated plans could be included in the contract. Since C3's "96 month" lease plan was the lowest in cost, it was the only plan included in the overall cost evaluation by the Army, even though the Army would be able to take advantage of its prices for only a few months subsequent to the award of the contracts. C3's other lease plans, which did not expire by March 31, 1976, were not considered in the evaluation but were included in the contracts.

This result has produced a variety of objections from CMC, Inforex and Four-Phase. The most basic contention raised is that C3's 96-month lease plan should have been rejected because it was nonresponsive to the RFP.

"Responsiveness" of C3's 96-Month Lease Plan

"Responsiveness" means the exact conformity of a bid with all of the material terms and conditions of a formally advertised solicitation. Cf. 37 Comp. Gen. 780 (1958); 38 id. 612 (1959). As such, it is a concept which is not directly applicable to proposals submitted in a negotiated procurement. Engineered Systems, Inc., B-184098, March 2, 1976, 76-1 CPD 144. Nonetheless, the RFP in the present case used the term responsiveness. The following excerpts are pertinent:

- "D.1 BASIS OF AWARD. Award will be made to the responsive, responsible offeror whose offer represents the lowest overall cost to the Government, price and other factors considered.
- "D.2 RESPONSIVENESS. The offeror is cautioned to read and comply with all provisions of this solicitation. To be considered for award, an offer must comply in all material respects with the essential requirements of the solicitations so that all offerors may be equally evaluated. * * *"

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While the term responsiveness is inapposite in a negotiated procurement, we believe that its use in the RFP should reasonably be taken to mean that terms and conditions so referenced were intended to be material requirements, and that a proposal failing to conform to them would be considered unacceptable. Cf. Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

Of particular significance is the RFP's use of the term responsiveness in connection with a requirement that fixed or determinable prices be offered for the systems life. RFP sections D.7 and D.8 stated:

"D.7 FIXED PRICE OPTION. This solicitation is being conducted on the basis that the known requirements exceed the basic contract period to be awarded but due to the unavailability of funds, the option(s) cannot be exercised at the time of award of the basic contract, although there is a reasonable certainty that funds will be available thereafter to permit exercise of the option; realistic competition for the option periods is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a 'buy-in.' Therefore, to safeguard the integrity of the Government's evaluation and because the Government is required to procure ADPE and related items on the basis of fulfilling systems' specifications at the lowest overall cost, subsequent as well as initial requirements must be satisfied on a fixed price basis. Since the systems or items to be procured under this solicitation have an expected life of 96 months, hereafter referred to as 'systems' life', and since systems' life costs are synonymous with lowest overall costs, the

contract resulting from this solicitation must contain options for renewals for subsequent fiscal years throughout the projected systems' life at fixed prices, and, if applicable, at fixed prices for services not included in the initial requirement. Should the offeror desire, separate charges, if any, which will incur to the Government should the latter fail to exercise the option(s), may be stated separately. Options included in offers submitted in response to this solicitation will be evaluated as follows:

(a) FIXED PRICES. To be considered responsive to this solicitation, offerors must offer fixed prices for the initial contract period for the initial systems or items being procured. Fixed prices, or prices which can be finitely determined, must be quoted for each separate option renewal period and must remain in effect throughout that period.

(b) OPTIONAL QUANTITIES. Offers will be evaluated for purposes of award by adding the total price of all optional periods to the total price for the initial contract period covering the initial systems or items. Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation.

(c) UNBALANCED PRICES. An offer which is unbalanced as to prices for the basic and optional period may be rejected as nonresponsive. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items.

"D.8 EVALUATION OF OPTIONS. Evaluation of options will not obligate the Government to exercise the options. Offers which do not include fixed or determinable systems' life prices cannot be evaluated for the total requirement and will be rejected as nonresponsive. Offers which meet the mandatory requirements will be evaluated on the basis of lowest net evaluated cost to the Government, including all stated options. See D.7 above." (Emphasis added.)

Among other things, these provisions establish that it was necessary for the Government in evaluating the proposals to be able to accurately determine systems life costs. As noted previously, under RFP section D.36 the evaluated systems life costs for various methods of acquisition would be considered in determining a proposal's overall cost. Also, amendment No. 4 to the RFP, supra, clearly provided that only the one plan (per method of acquisition) with the lowest evaluated systems life cost would be considered in the overall evaluation.

In interpreting the RFP, we believe that RFP sections D.7, D.8, D.36 and amendment No. 4 should be read and reasonably construed together. Cf. Lite Industries, Inc., 55 Comp. Gen. 529, 531, (1975), 75-2 CPD 363. In doing so, we believe that the only consistent and reasonable interpretation is that a particular plan offered under a method of acquisition, in order to be eligible for evaluation, was required to offer fixed or finitely determinable prices for both the initial contract period as well as the entire systems life.

C3's 96-month lease plan failed to conform to these terms. The plan was a 96-month lease plan in name only. In actuality, its prices were fixed and effective only through March 31, 1976--a period of about 4 months after the award of the contracts. This does not even cover the initial contract period, much less the entire systems life. Thus, it was not a plan which was eligible for consideration in the overall evaluations, and the Army erred in accepting it for evaluation. The Army should have rejected the 96-month lease plan,

and instead used in the overall evaluation the next lowest cost plan proposed by C3 which contained fixed or determinable prices for the systems life.

Moreover, since the Army evaluated only C3's 96-month lease plan, and did not use C3's other lease plans in the evaluation of overall costs, the overall cost evaluation was based in part on a plan which did not offer fixed or determinable prices throughout systems life. To this extent, the overall evaluation of C3's proposed costs for the various award groups was flawed, because the portion of C3's overall costs derived from the 96-month lease plan was incorrect. The fact that C3's other lease plans were included in the contracts (as provided for by Amendment No. 4, supra) is irrelevant, because the pertinent issue is whether the evaluation was conducted in accordance with the terms of the RFP, not the extent of actual costs which are incurred by the Government under whatever plans are in the contracts. Under these circumstances, there is no reasonable assurance that the awards were made at the lowest overall cost for the several award groups.

In reaching this conclusion, we have carefully considered but cannot concur with the contentions advanced by the Army and C3 that the evaluation of C3's proposal was proper. The Army reports that as a result of the protest, the contracting officer recomputed C3's proposal based on the assumption that 18 systems could conceivably be delivered under the 96-month lease plan, with the balance of the requirements furnished under the other lease plans in the contracts. This reevaluation shows that C3's proposal is still lowest in evaluated price. The other offerors dispute this analysis by pointing out that no systems were in fact installed by March 31, 1976--the expiration of C3's 96-month lease plan.

We do not believe that either of these positions is pertinent. As already noted, the issues raised by the protest involve the evaluation of proposals submitted in response to the RFP and the propriety of the awards resulting therefrom. Whatever orders are actually placed under the contracts, and whatever costs are ultimately incurred by the Government, are not dispositive of these issues one way or the other. The Government must reasonably assure itself that probable lowest ultimate costs will be obtained prior to awarding any requirements contract. Cf. Edward B. Friel, Inc., 55 Comp. Gen. 231, 238

(1975), 75-2 CPD 164. The RFP here established an evaluation procedure for doing this, but it was improperly applied as regards a portion of C3's proposal.

A further point mentioned in the Army's report is that section D.18 of the RFP provided: "For purposes of evaluation, the installation date will be month one (1) of the total system life." This provision might appear to justify evaluating C3's 96-month lease plan--since the plan did cover the first month of total systems life. However, we believe RFP section D.18 refers to the present value analysis of proposals--i.e., the adjustment of payments made over a period of time to reflect their present value as of the date of contract award, or some other stipulated date. As such, this section merely provides a common standard to be used in the cost evaluation of proposal plans. It does not affect the requirement that a plan be eligible for evaluation in the first place--i.e., that the plan be acceptable under the other terms and conditions established in the RFP.

C3 has pointed out that RFP section D.7 called for fixed prices in the option periods. C3 contends that since its 96-month lease plan covered the entire systems life (and thus did not involve any option periods), the Government "* * * had firm fixed prices for each and every month of the 96 months. * * *"

C3 is correct that RFP section D.7 primarily treats of the option periods. However, it also established a requirement for fixed or determinable prices throughout the systems life, and it must be read and applied consistently with the other provisions of the RFP. Moreover, the prices of C3's 96-month lease plan were effective for only about 4 months, not 96.

C3 also suggests that "the systems' life cost for various long term leases is easily calculated; that is, the life cost of 4 two-year leases can easily be compared with the cost of 1 eight-year lease." While this may be true, the fact remains that the RFP did not provide that a combination of several lease plans could be considered in the evaluation as the lowest evaluated cost of a particular method of acquisition. Rather, the RFP provided that the evaluation would consider only the one plan with lowest evaluated systems life cost under a given method of acquisition. Also, the Army did not in fact consider a combination of C3's various lease

plans in its evaluation, and therefore reasonable assurance that the awards represent the lowest overall cost is lacking.

Another of C3's contentions is that it would have been unrealistic for the Army to have refused to evaluate the 96-month lease plan simply because the plan, standing alone, could not fulfill the total estimated requirements of the Government. C3 points out that the RFP merely contained an estimate of requirements, and thus that even a minimum actual quantity of systems to be ordered could not be accurately forecasted.

The RFP provided that the evaluation would be based and performed on an estimate of 64 systems (section E.3, *supra*). Also, as previously discussed, fixed or determinable prices extending over the systems life were required, and only the one lowest cost plan per method of acquisition was to be considered in the overall cost evaluation. The application of a reasonably accurate estimate of the Government's anticipated needs to the prices quoted in bids or offers is the proper basis upon which to determine lowest overall cost in awarding a requirements contract. *Edward B. Friel, Inc., supra*. See, also, 49 Comp. Gen. 787 (1970), where it was held that a bid which failed to offer a firm price commitment for a portion of the Government's estimated requirements was properly rejected as nonresponsive.

C3 also contends, in effect, that the RFP permitted offerors to be innovative in their pricing strategy. C3 argues that it properly took advantage of this flexibility by offering an innovative and unique competitive approach, and that other offerors which did not do likewise should not be allowed to obtain a "second bite at the apple."

The extent to which a bid or proposal can be innovative in the sense suggested by C3 depends on the circumstances of the particular case. For example, in 53 Comp. Gen. 225, 227 (1973), we remarked that a bid offering a nominal trade-in price for certain items in order to achieve a more favorable total evaluated price would not have been objectionable. However, in that case the terms of the solicitation permitted the submission of such a bid. Here, C3's proposal was innovative in a manner that rendered a portion of it unacceptable under the terms of the RFP.

The submissions in connection with the protest have raised a number of subsidiary issues. However, these have either been dropped by the protester, have been resolved by the Army's report, or otherwise appear to be academic. This decision is limited to considering those issues necessary for a proper disposition of the protest.

Recommendation

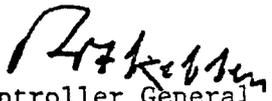
In view of the foregoing, the protest is sustained.

We recommend that the Army reevaluate the best and final offers (excluding C3's 96-month lease plans) to determine which proposal(s) offer the lowest overall cost for the various award groups. Appropriate termination for convenience and reaward action, if necessary, should then be taken.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the Army to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Also, by letter of today we are advising the Secretary of the Army of our recommendation.

Deputy


Comptroller General
of the United States