

DOCUMENT RESUME

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[Timely Protest of Noncompliance with One Specification Is Sustained]. B-186979. May 18, 1977. 10 pp.

Decision re: Datapoint Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law I.  
Budget Function: General Government: Other General Government (806).

Organization Concerned: Geological Survey; 3M Co.

Authority: B-181130 (1974). B-172836(1) (1971). B-186313 (1977).  
B-180292 (1974). B-189940 (1976). B-186313 (1976). B-186841 (1976). 4 C.F.R. 202(b)(2). F.P.R. 1-3.805-1(d).

For various reasons, protest that awardee did not comply with specification was timely. One item was nonconforming, where specification was restricted by question-answer exchange, and recompetition was recommended. Cancellation of entire contract was not in Government's best interest. Even if evaluated differently, protester's proposal would exceed low bid on two items, making academic contention that information submitted for other purposes was used for evaluation. (DJM)

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Proc. I.

**DECISION**



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

**FILE: B-186979**

**DATE: May 18, 1977**

**MATTER OF: Datapoint Corporation**

**DIGEST:**

1. Timeliness of protest against award is measured from time when contracting officer refused to confirm or deny that offer of contractor awarded negotiated contract not publicly disclosed complied with specifications and not from time when protester was advised by technical evaluation committee chairman that matter was being handled by contracting officer.
2. Since officer of protesting corporation subsequently joined in protest, question of whether account manager who initiated protest acted without supervisory approval is academic.
3. Since protester's offered prices for two items would exceed prices at which award was made to another offeror even if protester's prices were evaluated as contended, it is academic whether contracting officer had duty to seek clarification of protester's offer and whether use of information provided by protester for other purposes was proper for evaluation.
4. Where request for best and final offers consisted of question-answer exchange, award to offeror whose proposal failed to conform with specification as restricted by question-answer exchange was improper, since effect of exchange was that of RFP amendment restricting specification.
5. Situation where offeror who received award was nonconforming on class of equipment requires renegotiation for item, since contracting agency's requirements have changed and corrective action would necessarily include issuance of amendment to reflect new requirement.
6. Notwithstanding contracting agency's contention that termination of contract will have financial and mission impact, renegotiation is recommended, since integrity of competitive system cannot be served by allowing award to offeror whose noncompliance was inadvertently overlooked.

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By letters dated July 16 and October 22, 1976, Datapoint Corporation (Datapoint) protests the rejection of its offer and the award to the 3M Company (3M) under request for proposals (RFP) 5658 issued on July 29, 1975, by the Department of the Interior Geological Survey (USGS).

The solicitation requested proposals for nine classes of computer terminals designated classes 2.1 through 2.9. The RFP contemplated a firm-fixed-price contract for a definite quantity of terminals. Delivery was to be to multiple locations over a 1-year ordering period. The RFP included an option for the Government to increase the quantities by stipulated amounts for second and third years. Authorized Ordering Activities and required quantities of terminals for years 1, 2 and 3 were listed for each class of terminal.

Only Datapoint's and 3M's initial proposals, submitted as required by October 6, 1975, were considered acceptable for purposes of further negotiation. Negotiations with the two firms were conducted from February 25 to March 1, 1976, with respect to classes 2.7 through 2.9, which are the subjects of Datapoint's protest.

On March 12, 1976, the contracting officer issued to Datapoint and 3M an evaluation formula and a preliminary set of cost tables to enable the offerors to familiarize themselves with the cost sheet and method of evaluation. Datapoint completed the cost tables and submitted them to the contracting officer for verification that Datapoint's method of completion would be acceptable for the final cost tables.

Best and final offers were requested to be submitted by April 1. The request consisted of (1) final printed cost tables requesting fixed prices for lease, purchase, and lease with option to purchase plans; (2) a series of questions from offerors, and USGS answers, concerning the cost tables and evaluation formula (the questions had been posed after receipt of the March 12 issuance from the contracting officer); and (3) a revised evaluation formula correcting several administrative errors.

The contracting officer considered a number of matters in Datapoint's best and final offer, submitted on April 1, ambiguous, and proceeded to seek clarification. As a result of the clarification,

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certain other assumptions and information obtained from Datapoint ostensibly for other purposes, the contracting officer evaluated Datapoint's prices for training related to the class 2.7 through 2.9 terminals to be at a price which made its total proposal for each class more than that of 3M. In the July 16, 1976, protest, Datapoint contended that the evaluation was excessive and erroneous, that the contracting officer should have conducted discussions instead of making assumptions and that it was improper to use for the evaluation information provided by Datapoint for other purposes.

By letter filed in our Office October 22, 1976, Datapoint added another basis for its protest against award to 3M. Datapoint contends that 3M, at the time of award, failed to meet one of the RFP's mandatory specifications concerning the class 2.9 terminal.

The RFP provided:

"Software must be provided which allows synchronous communication with Burroughs B6700, UNIVAC 1100 Series, and CDC Cyber 70 Series Computer System."

It provided further:

"The equipment and software proposed in response to this contract document must have been formally announced for marketing purposes on or before the closing date of the solicitation and/or be capable of a demonstration as specified in the solicitation document."

As noted above, the request for best and final offers included distribution of a series of questions from offerors, and USGS answers, concerning the solicitation. One question and answer set was as follows:

"Question: Is [IBM] 2780 emulation an acceptable form of interface with the CDC Cyber 70 System?"

"Answer: No. The standard CDC supported software interface is the 200 UT synchronous communication discipline."

Datapoint contends, and USGS concurs, that 3M did not have a UT 200 emulator at the time of award. USGS states that 3M did offer at that time an IBM 2780 emulator, which was unacceptable under the question-answer exchange above. In this connection, USGS states:

"The use of UT 200 emulation as an interface method of communication with the CDC Cyber 70 computer is a generally accepted industry standard. IBM 2780 emulation is also an accepted method of interface for CDC Cyber 70 computers having the appropriately equipped front end processor. Because the Department of Interior does not have the required front end processor, IBM 2780 emulation is not possible with a 3-M Linolex terminal.

"Datapoint's contention that 3-M did not have a UT 200 emulator at the time of award is correct. 3-M does offer and did have at the time of award an IBM 2780 emulator which is an accepted industry standard for communication with the CDC Cyber 70 computer series. Therefore, 3-M did comply with the mandatory specifications but not with the restriction set forth in the above question and answer.

"3-M's proposal and firm and final offer provide pricing which includes asynchronous and synchronous communication with all specified mainframe computer systems via its IBM 2780 terminal simulation software. 3-M also states that UT 200 simulation software can be developed, if requested. Unfortunately, the paragraph delineating the foregoing, through an inadvertent oversight, was unnoticed by the Agency until after award."

Datapoint argues that, in view of 3M's failure to meet the specification restriction in the question-answer exchange, award to 3M was improper and the contract for class 2.9 should be terminated.

USGS argues that Datapoint's protest on this issue is untimely and invalid, and should not, therefore, be considered on its merits. USGS states that on October 12 Datapoint's representative informed the contracting officer that he ascertained 3M's noncompliance with the requirement in issue on September 16 at a meeting with the Chairman of the USGS Technical Evaluation Committee (Committee).

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USGS contends that the protest, filed more than 10 working days after September 16, is, therefore, untimely under section 20.2(b)(2) of the Bid Protest Procedures, 4 C.F.R. part 20 (1976).

In response, Datapoint states that in August of 1976 a Government user of 3M equipment advised Datapoint that it was "questionable" whether 3M had a UT 200 emulator. On August 31, Datapoint filed a request under the Freedom of Information Act with USGS, which was denied on September 20, for records that might substantiate that suspicion. Datapoint states that at the September 16 meeting with the Committee Chairman it was informed that the contracting officer was "handling the matter." This statement is verified in an affidavit submitted by the Board Chairman. Datapoint further states, in effect, that it was not until October 12, when the contracting officer refused to confirm or deny whether 3M had the UT 200 emulator, that Datapoint felt constrained to protest, and that Datapoint did not in fact know until October 28, at another meeting with the contracting officer, that its suspicion was properly taken. Datapoint thus argues that its protest, filed within 10 working days after October 12, was timely and should be considered on the merits.

In view of the fact that Datapoint pursued the matter through its August 31 Freedom of Information Act request; that at the September 16 meeting with the Committee Chairman it was advised that the matter was under consideration by the contracting officer; and that because of the nature of the procurement, 3M's failure to provide the UT 200 emulator at award was not for public disclosure, we consider the protest on the issue to have been filed in our Office in a timely manner.

USGS also argues that the protest on this issue is not "valid" in that Datapoint's October 22 letter, signed by its Account Manager, may have been submitted without supervisory approval. However, a corporate officer of Datapoint subsequently joined in the protest, which renders the question of the Account Manager's authority moot. Therefore, we will proceed to examine the merits of the issue.

In regard to the evaluation of Datapoint's best and final offer, the agency report indicates that, even if the training charges were evaluated on the basis that Datapoint argues, the offered prices for each of classes 2.7 and 2.8 would exceed the price at which award was made to 3M. Accordingly, it is academic whether the contracting

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officer had any duty to seek clarification of the best and final offer with respect to those classes and whether the use of information provided by Datapoint for other purposes was proper. In regard to class 2.9, we are recommending below, for unrelated reasons, recompetition for that class. The recompetition will afford Datapoint an opportunity to make clear the training charges for class 2.9.

Concerning the emulator matter, USGS argues that the IBM 2780 emulator offered by 3M was not prohibited by the RFP itself, but only by a question-answer exchange. However, the effect of providing the subject information to Datapoint and 3M was that of an amendment restricting a specification. FPR § 1-3.805-1(d) (1964 ed. amend. 153) suggests that a formal amendment to the RFP should have been issued. See B-172836(1), September 29, 1971.

Accordingly, award of class 2.9 to 3M was based on a nonconforming offer. Thus, corrective action is warranted. See Unidynamics/St. Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107.

In determining whether it is in the Government's best interest to undertake action which may result in the termination of an improper award, we have taken into consideration factors such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact on the user agency's mission. See Honeywell Information Systems, Inc., B-186313, April 13, 1977, 56 Comp. Gen. \_\_\_\_; DPF Incorporated, B-180292, September 12, 1974, 74-2 CPD 159. USGS argues that corrective action which involves reopening negotiations with 3M and Datapoint as to all class 2.9 terminals and, if appropriate, termination of 3M's contract and award to Datapoint would have severe adverse mission and financial impacts and would not, therefore, be in the interest of the Government.

In this connection, although Datapoint contends that 3M's contract should be terminated and award made to Datapoint without further negotiations, USGS now states that its requirements on class 2.9 have changed and that corrective action would, therefore, necessarily

include the issuance of an amendment to reflect the new requirements. In this regard, Datapoint has suggested that since 3M's class 2.9 offer was not for consideration because it was nonconforming, if Datapoint's best and final offer for the combined award of classes 2.5 through 2.9 was less than the total of the actual contract prices of classes 2.5 through 2.8 (classes 2.5 and 2.6 were awarded to Datapoint) plus Datapoint's individual class 2.9 offered price, 3M's contract for classes 2.7 through 2.9 should be terminated and award made to Datapoint so that Datapoint would have a contract for all classes of its special plan at its combined special plan price. However, because of the changed requirements, award of classes 2.7 through 2.9 to Datapoint on the combined basis would not be proper. Moreover, the record discloses a dispute between USGS and Datapoint concerning price balancing and finite costs. In the circumstances, corrective action must be limited to class 2.9 after further negotiation, which would have to include both offerors.

The financial impact of the proposed course of action is alleged by USGS to be:

3M termination costs-JT 200 Emulation Development	\$ 75,000
Separate Charges for failure to exercise option	56,816
Loss of Investment in software development	
USGS	4,289
BIA	175,000
Administrative cost of recompetition	<u>25,733</u>
<b>TOTAL</b>	<b>\$273,838</b>

The value of the procurement is between \$550,000 and \$600,000.

Concerning the mission impact, the three class 2.9 requiring activities and their requirements are as follows:

<u>Requiring Activity</u>	<u>Yr. 1</u>	<u>Yr. 2</u>	<u>Yr. 3</u>
USGS	10	5	0
Bureau of Indian Affairs (BIA)	0	12	24
Bureau of Reclama- tion	0	2	4

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Only three of the terminals required by USGS have been installed, and a fourth is on order. USGS states:

"\* \* \* If the equipment were to be replaced \* \* \* it is obvious that the important work of several of our district programs will be impacted to the degree that scheduled deadlines for providing important investigative results to State and local government cooperators will not be met.

\* \* \* \* \*

"[F]ailure by the Geological Survey to meet its agreements with State governments would have a detrimental effect beyond the confines of Federal government and certainly poses a threat to the Geological Survey's credibility in future dealings with State Governments."

Twelve of the terminals required by BIA have already been installed. USGS states that cancellation of 3M's contract would--

"\* \* \* render impossible the provision of accurate and timely information within prescribed critical deadlines to those programs which directly service the Indian community; \* \* \* and result in the eventual inability to meet requirements placed on the Bureau by a variety of court mandates, congressional legislation and long-standing obligations with which the Bureau is charged. \* \* \*"

Concerning the Bureau of Reclamation, no terminals have been installed, although five have been ordered. USGS states that if corrective action would result in a delay in the availability of terminals, the requirement would be removed from the solicitation and procured on a public exigency basis.

Before proceeding with our recommendation, we note the following. First, in the event award to Datapoint proves appropriate after negotiations and a further round of best and final offers, perhaps the alleged adverse mission impacts could be reduced by, for example, a gradual switchover of contractors. In addition, any critical requirements could possibly be met on an interim basis by time-sharing or other methods. See Honeywell Information Systems, Inc., supra. Further, if such alternatives would prove unsatisfactory with regard

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to the terminals required by the Bureau of Reclamation, and procurement of those terminals on a public exigency basis is justified, there would, in fact, be no adverse effect on that mission if Datapoint wins the recompetition on that basis.

Second, concerning the stated termination costs, we note that the first item involves the capability that was a mandatory requirement under the RFP. We also note that part of the loss of investment costs, not being "out-of-pocket" expenses payable as a result of a change in systems, might not be completely lost by such a change. Further, the administrative costs represent in large part the salaries of permanent USGS employees payable notwithstanding the results of this protest. Datapoint also disputes the legality of the separate charges of \$56,816 in view of the discussion of separate charges in Honeywell Information Systems, Inc., B-186940, December 9, 1975, 56 Comp. Gen. \_\_\_\_, 76-2 CPD 475, and Burroughs Corporation, B-186313, December 9, 1976, 56 Comp. Gen. \_\_\_\_, 76-2 CPD 472. However, our review of the RFP and the question-answer exchange issued 3M and Datapoint with the request for best and final offers indicates that the charges are proper on the basis of our statement in Burroughs Corporation, supra, as follows:

"\* \* \* the payment of separate charges for early termination, which, taken together with payments already made, reasonably represent the value of fiscal year requirements actually performed is proper \* \* \*."

In any event, notwithstanding our awareness that the Government will incur termination costs and possibly suffer certain other substantial adverse effects if Datapoint wins the recompetition, we recommend action leading to a possible termination of the class 2.9 contract, because, in large part, the integrity of the competitive system can hardly be served by allowing award to an offeror whose clear indication to the procuring activity in its best and final offer that it was not meeting a mandatory specification was inadvertently overlooked. Accordingly, the competition on all terminals involved in class 2.9 should be reopened, limited to Datapoint and 3M under requirements revised as necessary. No other offeror need be solicited, since only Datapoint was prejudiced by the foregoing

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procurement deficiency. Any problems concerning Datapoint's class 2.9 training costs, price balancing and finite costs could be resolved during the reopened negotiations. See Fordel Films, Inc., B-186841, October 29, 1976, 76-2 CPD 370. In that connection, Datapoint has offered to conform its pricing strategy to USGS requirements. After negotiations with both sources, 3M's class 2.9 contract should be terminated for the convenience of the Government if Datapoint is the successful offeror. We note that if Datapoint is successful at a lower price than the present contract price, certain of the termination costs will be offset. If 3M is successful at a price lower than that contained in its existing contract, the contract should be modified in accordance with 3M's final proposal.

Since this decision contains a recommendation for corrective action, we have furnished a copy 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 agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and Committees on Appropriations concerning the action taken with respect to our recommendation.

  
Deputy Comptroller General  
of the United States