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DECISION



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

FILE: B-189030

DATE: May 31, 1978

MATTER OF: Control Data Corporation - Claim for
Proposal Preparation Costs

DIGEST:

Claim for proposal preparation costs on basis that procuring agency acted improperly in rejecting claimant's Special Lease/Purchase Conversion Plan in RFP for automatic data processing equipment is denied. Reasonable basis for rejection existed in view of our prior decisions holding it improper to accept high offer on basis of occurrence of contingency that may or may not happen.

Control Data Corporation claims that the Internal Revenue Service (IRS) acted improperly in rejecting its Special Lease/Purchase Conversion Plan (Special Plan) that was submitted with best and final prices on proposals that it had previously submitted under request for proposals (RFP) IRS-76-26. The RFP called for the lease with an option to purchase of items or automated data processing equipment. CDC initially protested the matter and sought either termination of any contract that might have been awarded or an award outright to it as the low, responsive offeror. Because award had been made and because the awardee had substantially performed the contract during the pendency of this protest, CDC, in a letter to us dated September 12, 1977, withdrew its request for either termination of any awarded contract or an award to it. In this letter CDC alleged that as the offeror in line for award, it was deprived of fair and honest consideration of its proposal and was entitled to recover its proposal preparation costs. In view of the foregoing, we are at this point treating the matter solely as a claim for proposal preparation costs.

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The record shows that CDC's Special Plan was separate and distinct from the other plans it had submitted. Even though it was transmitted with CDC's best and final offer, it was not submitted as a substitute for, or modification of, CDC's previously submitted principal lease/purchase plan. CDC's principal plan contained no provision specifying during what period of time the Government could purchase the leased equipment. The Special Plan provided that the Government would receive purchase discounts and purchase option credits if it exercised its option to purchase within 30 days after the 24th month from the beginning of the lease. The Special Plan contained no provision for carrying over these credits beyond the 25th month of the lease. If purchase did not occur in the 25th month, the credits were completely lost. Therefore, because the Special Plan was separate from CDC's principal plan, any recovery of proposal preparation costs that CDC may possibly be entitled to should be limited to the cost of preparing the Special Plan. See William F. Wilke, B-185544, March 18, 1977, 77-1 CPD 197.

After analyzing CDC's Special Plan, the IRS concluded that it did not conform to subsections E.8.10 and F.4.1 of the RFP. The former subsection stated that the Government could purchase the leased equipment at any time after it had been placed on lease. The latter subsection gave the Government the right to adjust the quantities of equipment needed at any time.

CDC contends that its best and final offer and the Special Plan together authorized the Government to purchase/convert at any time. Thus, rejection on the basis of subsection E.8.10 was improper. With regard to subsection F.4.1, CDC argues that it inadvertently omitted from the Special Plan a footnote or other reference to the Government's right to adjust quantities. According to CDC, this omission was made known to the IRS before award and, therefore, the IRS should have permitted CDC to correct the error.

Entitlement to bid or proposal preparation costs is controlled by the standards enunciated by the United States Court of Claims in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). The ultimate standard is whether the Government's conduct toward

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the offeror-claimant was arbitrary and capricious. A subsidiary criterion, proof of which establishes arbitrary and capricious conduct, is whether there was "no reasonable basis" for the procuring agency's decision. See also Continental Business Enterprises v. United States, 452 F.2d 1016 (Ct. Cl. 1971).

We conclude that IRS's decision to exclude the price advantages in CDC's Special Plan from the price evaluation of CDC's offer had a reasonable basis. We reach this conclusion because we believe that the low price offered under this plan was contingent in nature. By the clear terms of the Special Plan the price quoted therein would only be realized if the option were exercised in the 25th month. CDC itself indicates that the Special Plan was a new plan which provided for added financial benefits if purchase conversion of all rented equipment occurred during a 30-day interval following 2 years of rental. In Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219, we specifically stated that we have traditionally regarded it improper to accept a high offer on the basis that it will become the low offer upon the occurrence of a contingency which may or may not arise. See also B-162839, December 19, 1967; 41 Comp. Gen. 203, 205 (1961); and 15 Comp. Gen. 1136 (1936). Consequently, if the IRS had included CDC's Special Plan in its price evaluation and awarded to CDC, in a protest by another of the offerors we would likely have found that such award was improper. See Amram Nowak Associates, supra.

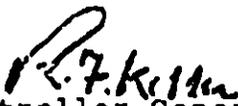
CDC's principal lease/purchase plan was evaluated by the IRS as second highest with an estimated cost of \$14,673,236. Without the price benefits of the Special Plan, then, CDC's price is obviously not the lowest. In view of the fact that the financial benefits of the Special Plan were properly excluded, we do not think it is necessary to discuss whether CDC should have been permitted to correct the Special Plan so that it conformed to the RFP provision allowing the Government to adjust quantities.

Finally, we note that CDC has alleged, without any substantiating evidence, that the IRS evaluated the awardees' plan on the assumption that conversion to purchase would occur during the 25th month. IRS has denied the allegation, stating that Burroughs' offer was evaluated on the basis of conversion to purchase in the 23rd month,

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the optimum month for conversion as stated in its proposal and in accordance with the RFP. It is the responsibility of the protester, however, to present evidence sufficient to affirmatively establish such an allegation. Moreover, we do not conduct any inquiries for the purpose of establishing the truth of such speculative allegations. Mission Economic Development Association, B-132686, August 2, 1976, 76-2 CPD 105.

Accordingly, CDC's claim for proposal preparation costs is denied.


Deputy Comptroller General
of the United States