

109813

2/11

**DECISION**



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

10,669

FILE: B-192298

DATE: July 5, 1979

MATTER OF: United Computing Systems, Incorporated

**DIGEST:**

1. Although contract terms and handbook governing issuance of orders under multiple award schedule contract (MASC) in GSA's teleprocessing services program did not, at time subject order was issued, require disclosure of evaluation factors, once user agency discloses projected duration of order which impacts on cost evaluation, prudence dictates that subsequent changes in duration be communicated to participating vendors.
2. It is not proper for agency to evaluate offeror's benchmark as if it could order two cost elements at one price level where offeror's pricing limits use of each price level to only one price element.
3. Although protest is sustained, best interest of Government would not be served by cancellation of order under MASC where one deficiency occurred in area not covered by regulation, where it has not been shown that other deficiency in cost evaluation caused awardee to be evaluated as low offeror, and where substantial performance has occurred on final option period of order.
4. Claim by protester for cost of benchmark is denied because protester has not shown that procurement deficiencies were motivated by caprice or bad faith and that protester was denied award to which it was otherwise entitled.

United Computing Systems (UCS) protests the issuance on May 24, 1978, of a purchase order to Computer Sciences Corporation, Infonet Division (CSC) by the Naval Electronic Systems Engineering Center (Navy) pursuant to the General Services Administration's (GSA) teleprocessing services program (TSP). The purchase order provides for services between June 1 and September 30, 1978 with an option to renew for another year.

UCS argues that the Navy improperly evaluated offers by using a system life and dollar ceiling amount which were not specified in the requirements statement. In this connection, the protester complains that the Navy did not follow the proper procedures for modifying its GSA commercial procurement approval (GSA Form 2068). UCS also complains that Navy improperly evaluated both its costs and CSC's costs. We have received and considered submissions regarding the protest from the Navy, GSA and CSC as well as the protester.

The protester, CSC and other firms have each entered into a Multiple Award Schedule Contract (MASC) with GSA under TSP. The TSP is the mandatory means by which Federal agencies acquire teleprocessing services. See Federal Property Management Regulations (FPMR), Temporary Regulation E-47, as amended. Under this program, user agencies which have received approval from GSA on a Form 2068 may place orders for teleprocessing services against the MASC's which are negotiated by GSA and provide Government-wide volume discounts.

The MASC requires that selecting activities evaluate the technical service features of each MASC, eliminate from consideration those that do not meet the activities' requirements, and select the MASC offering the lowest system cost, price and other factors considered.

Here, the Navy obtained Form 2068 purchase approval from GSA to acquire teleprocessing services from October 1, 1977 through September 30, 1980. On August 17, the Navy sent an inquiry to 28 MASC firms. The firms which met the mandatory requirements set forth in the

initial inquiry were informed of the criteria to be used in the benchmark competition. The Navy decided to use a benchmark despite the fact that the estimated system life and annual costs were below the threshold which would have required benchmarking. Five firms, including the protester were benchmarked. A cost analysis was performed using the benchmark results and the Navy determined that CSC would provide the lowest cost service.

Initially, UCS, an MASC contractor, insisted that the Navy's cost evaluation was flawed in four of the six monthly cost categories (monthly costs were the basis of the cost evaluation). In response to UCS's protest the Navy recalculated that firm's benchmark and agreed with UCS's calculations in the areas of on-line storage and timesharing connect. The Navy did not change its calculation of the bulk terminal input/output costs. UCS indicated that it "will allow the Navy's judgment to stand" in this area.

UCS still seems to object to the Navy's calculation of its central processor unit (CPU) costs maintaining that its CPU costs should be \$659 per month rather than the \$760 figure used by the agency. However, beyond stating that the Navy's calculations are a "violation of the procedure stated in schedule N of UCS' TSP manual" UCS does not explain the alleged error. Therefore we conclude that the Navy's calculations of these costs were reasonable.

UCS's main complaint is that while the original announcement of the requirements specified a system life of 36 months, the benchmarks were actually evaluated on the basis of a 14 month system life. UCS insists that such action constitutes a breach of a fundamental tenet of Federal procurement that all prospective contractors must be advised in advance as to the basis upon which offers will be evaluated and that any changes in that basis must be communicated to all offerors. The protester points out that the reduction in the system life and the lowering of

the estimated value from \$80,000 to \$36,000 was especially prejudicial to UCS because it, like all nonincumbents, was subject to fixed conversion costs of \$6,944 to be amortized over the projected system life. The reduction of the projected system life resulted in higher evaluated total monthly costs for UCS than for CSC, which, as the incumbent, was not subject to conversion costs.

The Navy states that it originally planned to order 36 months of these services but during the evaluation process the Chief of Naval Material prohibited the purchasing activity from acquiring more than 14 months of service. While the Navy admits that the change from 36 to 14 months and the corresponding lowering of the estimated value of the requirement did have the effect of displacing UCS as the evaluated low offeror, it argues that this was an inherent and unavoidable part of the acquisition process and notes that the regulations in force at the time this order was placed were silent on the issue of communicating evaluation scheme changes to prospective contractors.

GSA points out that the provisions of the MASC do not require ordering activities to distribute the evaluation criteria to the contractors being considered for selection. Further, GSA points out that its guidelines effective at the time, contained in its Special Notice Concerning the TSP, April 1977 did not require release of this information.

Although the MASC's and the GSA guidelines did not require the Navy to disclose the basis for its cost evaluation, the agency did inform all those concerned that it anticipated ordering services for 36 months. Once the Navy undertook to inform vendors of this significant requirement, which assumed an important role in the cost evaluation, we believe the Navy should have informed those vendors that the requirement had been changed and given them the opportunity to respond to that change. We believe the change in the anticipated duration period, with

its concomitant effect on proposal evaluation, in effect constituted a change in the ground rules of the procurement and therefore should have been communicated to the vendors. See Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134. It is significant to note in this respect that GSA has modified its guidelines to user agencies (see Handbook, Teleprocessing Services Program, October 1978) to require notification to potential offerors of anticipated system life duration as well as any subsequent significant changes to what was initially anticipated.

Although UCS's competitive position was adversely affected as a result of the change in anticipated duration, it is not clear that had UCS been informed of this change it would have been able or willing to amend its MASC to reduce its prices in other areas to make up for the increased conversion cost assessment. In this regard we note that price modifications under a MASC must apply not to just a particular order but to all orders placed under the MASC. On the other hand, because the Navy did not notify vendors that the previously disclosed duration period had been considerably shortened, UCS never had the opportunity to consider whether it wanted to enhance its competitive position under those circumstances by amending its MASC. We think this warrants sustaining the protest.

We are also concerned with the Navy's use of CSC's pricing profiles in the benchmark cost evaluation. CSC offers four pricing levels for each of the major cost elements which make up the teleprocessing service. The buyer is permitted to select one price level for each cost element. Generally the buyer will select the lowest price level for the element it expects to use most. Although CSC apparently does not permit a customer to use the same level for two different elements and UCS points out that the Navy's order for CSC's service in fact prices each element at a separate pricing level, the Navy evaluated CSC's benchmark as if it could order two elements at one price level.

The Navy states that it merely used the optimum pricing schedule in its evaluation, explaining that all offerors including UCS have their benchmarks set up for ideal pricing conditions which may not occur in an actual order. The Navy maintains that both the offers of UCS and CSC were susceptible to similar discrepancies between potential and actual use and that each firm was permitted to compete on an equal basis.

The problem with the Navy's evaluation approach is that it ignores actual pricing conditions and utilizes prices that could not be realized under the terms of the contract. Such an approach raises the risk that the evaluation will not accurately indicate the lowest probable cost offer. In this case, however, UCS, although it had ample opportunity to do so, has not shown that the discrepancy caused CSC to be evaluated as the low offeror. Consequently, we are unable to conclude that this deficiency was prejudicial to UCS, and we find nothing in the record which indicates that the Navy made other than a good faith attempt to evaluate each offeror's benchmark on what it believed was a reasonable basis.

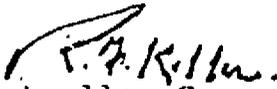
In light of this record, we do not believe a recommendation to cancel the order is warranted. The determination whether to so recommend involves the consideration of several factors, including but not limited to the seriousness of the procurement deficiency, the degree of prejudice to other competitors, the good faith of the parties, the extent of performance, cost to the Government, the urgency of the requirement and the impact of a cancellation on the using activities' operations. System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. In this case we note that the first deficiency occurred in an area not specifically covered by regulations and that it is speculative whether the protester would have been evaluated as the lowest cost vendor had the agency properly notified vendors of the changed requirement or evaluated the benchmark differently. There also has been no showing that the Navy acted other than in good faith. We are also aware that

the final option period of the order is in its 9th month of performance. Thus, although we sustain this protest, we do not think it would be in the best interest of the Government to cancel the order issued to CSC.

UCS has claimed the cost of preparing its benchmark. These costs are in the nature of bid/proposal preparation costs, reimbursement of which this Office first permitted in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, where we adopted the standard announced in Keco Industries, Inc. v United States, 492 F.2d 1200 (Ct. Cl. 1974). The standard is whether the agency's actions were arbitrary and capricious towards the claimant. A second requirement is that the agency's actions deprive the claimant of an award to which it was otherwise entitled. System Development Corporation, supra. UCS's claim fails under both criteria.

First, it does not appear that UCS would have been issued an order had the deficiencies noted herein not occurred. Second, UCS has not shown that the Navy knew or should have known that its failure to inform vendors of the duration change was improper or that the deficiencies in this procurement resulted from caprice or bad faith. Indeed, at least with respect to the first deficiency, the lack of regulatory guidance in the area would make such a finding unlikely. In the absence of a finding of bad faith or arbitrary action, bid/proposal costs are not awarded even if the claimant had been in a position to receive an award but did not because of the agency's mistake or inadvertence. Base Information Systems, Inc., B-186932, October 25, 1978, 78-2 CPD 299.

The protest is sustained. The claim is denied.

  
Deputy Comptroller General  
of the United States