Protest

DECISION

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

10,967

FILE: B-190632 DATE: August 9, 1979

MATTER OF: Computer Sciences Corporation

DIGEST: Protest Alleging Improper Evaluation Scheme

1. Prior GAO decision sustained protest and recommended corrective action, including possible reopening of negotiations. Agency, in reopening negotiations, issued solicitation document with evaluation scheme. Complaint that evaluation scheme is improper is viewed as new protest, rather than as request for reconsideration of prior GAO decision. Moreover, protest will be considered on merits notwithstanding agency's contention that protest is untimely, since protest raises serious question concerning agency's implementation of recommended corrective action.

2. Protest concerning evaluation of incumbent's fiscal year 1978 Multiple Award Schedule Contract with other vendors' fiscal year 1979 contracts is sustained. Argument that evaluation procedure cannot result in award at higher price than existing order is without merit, as recommendation in prior GAO decision explicitly recognized corrective action might result in award at higher price. GAO recommends that agency evaluate all contractors on basis of fiscal year 1979 contracts and that if incumbent is selected, agency continue with existing order under fiscal year 1978 contract.

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I. Introduction

In Computer Sciences Corporation, 57 Comp. Gen. 627 (1978), 78-2 CPD 85 (B-190632, August 4, 1978), we sustained a protest by Computer Sciences Corporation (CSC) concerning the General Services Administration's (GSA's) selection of the General Electric Company (GE) to receive orders for certain services. The procurement involved GSA's Teleprocessing Services Program, under which GE, CSC and other companies hold Multiple Award Schedule Contracts (MASC's). CSC had contended that the orders should have been placed under its MASC rather than GE's. Our decision concluded (57 Comp. Gen. at 642):

> "We recommend that GSA either (1) expeditiously terminate any orders for CAMMS services issued under GE's MASC and order any further requirements for these services under CSC's MASC, or (2) reopen negotiations, establish a new common cutoff date, make a selection, and terminate any orders issued under GE's MASC in the event a contractor other than GE is selected. * * *"

Subsequently, a GSA letter to the involved contractors dated September 15, 1978, stated in part:

> "In accordance with Comptroller General Decision B-190632 * * * [GSA] plans to conduct a limited reopening of discussions * * *.
>
> "As your company's schedule contract is among those eligible for re-evaluation, the following information is provided so that you will be aware of the significant aspects of this reselection project.
>
> * * * * *
>
> "The five schedule contracts, including that of the incumbent

vendor, will be evaluated as they exist, as amended, as of October 31, 1978. In addition, the incumbent's FY78 schedule contract available under a current systems life order arrangement for CAMMS support, will be re-evaluated.

"The cutoff date for submitting proposed amendments to FY79 schedule contracts will be October 16, 1978. * * *" (Emphasis supplied.)

The cutoff date for proposed MASC amendments was later extended to November 15, 1978.

CSC's letter to our Office dated November 28, 1978, received December 1, 1978, stated in part:

"The [GSA] * * * negotiating process was to take the form of an evaluation of the schedule contracts as they existed on October 31, 1978 -- that is on the basis of FY 79 prices. However, GSA also indicated that they would evaluate GE's FY 78 contract.

"We discussed this latter point with GSA officials because it seemed to present a fundamentally unfair process, where the incumbent was to be evaluated on the basis of old prices, while everyone else would be evaluated on the new year's higher prices. The possibility remained, however, that GSA would compare all the vendors on FY 79 prices, including GE. But today, in conversations with * * * GSA, we learned that * * * GSA has ruled out GE's new MASC contract (FY 79) for evaluation purposes * * *.

"This means that GSA will not compare vendors on an equitable basis, but rather will compare GE's old contract * * * with the later contracts of other vendors. This action is a breach of the fundamental requirements of the competitive procurement

process and is completely inconsistent with dictates of your previous decision in this matter."

II. Procedural Issues

CSC's November 28, 1978, letter did not describe itself either as a protest or as a request for reconsideration, and its vagueness has been a source of confusion. In addition to disputing the merits of CSC's complaint, both GSA and GE have maintained it is procedurally defective. Initially, GSA contends that the letter cannot be regarded as a protest, because it did not contain an adequate statement of grounds of protest and did not specifically request a ruling. In this regard, a protest need not contain the word "protest," so long as it can be understood as taking specific exception to an agency procurement action, and the failure to specifically request a ruling does not preclude consideration by our Office. Sea Containers, Inc., B-193086, February 28, 1979, 79-1 CPD 139. We believe CSC's letter was specific enough to constitute a protest.

GE, however, contends that CSC's November 28, 1978, letter is an untimely request for reconsideration of our August 4, 1978, decision. GE believes it was apparent from the decision's recommendation that in any reopening of negotiations, the existing systems life price (under GE's FY 1978 MASC) would represent a maximum ceiling price which all other contractors would have to try to undercut, since selection of a contractor would be based on lowest system life costs. In GE's view, CSC's challenge to the evaluation method applied by GSA in the reopening of negotiations is actually an untimely attempt to persuade our Office to change the recommendation set forth in our August 4, 1978, decision.

The question of how a reopening of negotiations should be carried out, in the event the protest was sustained, was not addressed by CSC, GSA or GE in their submissions prior to our August 4, 1978, decision. In addition, our decision's recommendation did not specify in detail how GSA should go about reopening negotiations. The recommendation was phrased in general terms and left the details of implementation to the sound judgment and

discretion of GSA. See, in this regard, C3, Inc., et al.-Requests for Reconsideration, B-185592, August 5, 1976, 76-2 CPD 128.

A "request for reconsideration" is described in section 20.9 of our Bid Protest Procedures, 4 C.F.R. part 20 (1978), as a request that a decision be reversed or modified because of errors of law or information not previously considered. We do not believe CSC is asserting that our decision was in error in recommending that GSA reopen negotiations. Rather, CSC is objecting to subsequent actions taken by GSA in implementing that recommendation. We believe CSC's current complaint is a new protest. See, in this regard, University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201, and B-184194, May 26, 1978, 78-1 CPD 401.

GSA next contends that if CSC's complaint is a protest, it is untimely, because under section 20.1(b)(1) of our Bid Protest Procedures, protests based upon alleged improprieties in "any type of solicitation" which are apparent prior to bid opening or the closing date for receipt of proposals must be filed prior to bid opening or the closing date for receipt of proposals. GSA correctly points out that its September 15, 1978, letter to the contractors is the solicitation for the purposes of this type of procurement, and that November 15, 1978, was in effect the closing date for receipt of proposals. While CSC states it discussed the terms of the solicitation with GSA, there is no indication in the record that CSC filed a protest with GSA prior to November 15, 1978.

GSA believes the protest is based upon an apparent solicitation impropriety, because its September 15, 1978, letter clearly stated that the incumbent contractor's FY 1978 MASC would be reevaluated. CSC argues that while the solicitation said that GE's FY 1978 contract would be reevaluated, it did not say that GE's FY 1979 contract would be eliminated, and that the "possibility of fair competition on a common price basis still existed" up to and after the closing date. The protester states that only when GSA ruled GE's FY 1979 MASC out of consideration did an improper evaluation become inevitable. CSC maintains it filed its protest in a timely manner (i.e., within 10 working days after the basis for protest was

known or should have been known, 4 C.F.R. § 20.2(b)(2)) when it was informed of this development.

As GSA points out, the solicitation stated that GE's 1978 contract prices would be "re-evaluated." In GSA's view, the protester should have been aware before submitting its proposal that GSA intended to compare GE's 1978 prices with the 1979 prices submitted by the offerors. However, we need not decide whether CSC's protest is timely. The issue raised by CSC is one which merits our consideration since a serious question has been raised concerning GSA's implementation of our recommended corrective action. Therefore, we will consider the protest on the merits.

III. Substantive Issue

CSC asserts that GSA's evaluation method results in unequal treatment of the competitors because a price reduction for this project, by any vendor other than GE, would have to be made available to all Government users pursuant to section D.19 of the FY 1979 MASC's, whereas GE will not have to offer its FY 1978 prices to any other agency. The protester argues this is prejudicial, because it is required to reduce its price to all Government users as a condition to competing for this particular order, while no such condition applies to GE. CSC also argues that a method of evaluation which compares one vendor's FY 1978 prices with other vendors' FY 1979 prices cannot generate true competition.

CSC further maintains that the present procedure is unlike one in which negotiations are reopened and the incumbent contractor, if successful in the recompetition, cannot in any event receive a higher price than the price reflected in its existing contract (see, e.g., Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256). The protester points out that in the Honeywell situation, all offerors are submitting new proposals in the reopening, whereas, here, some offerors' new proposals are being compared to the incumbent contractor's old proposal. CSC suggests, among other alternatives, that an appropriate method of evaluation would be to recompete based upon all vendors' FY 1979 prices, and that, if GE is successful on this basis, GSA would then hold GE to its FY 1978 MASC prices.

GSA's response is that when it issued a purchase order to GE in 1977, GE, under the terms of its FY 1978 MASC, became bound to all the terms of that contract (including fixed unit prices) for the 34-1/2 months' systems life. GSA maintains that as the Government is entitled to GE's FY 1978 MASC prices for the entire systems life, it follows that in order to determine the lowest overall systems life cost to the Government in any reopening of negotiations, GE's FY 1978 MASC must be evaluated. GE agrees with GSA on this point. GE contends that CSC was free to reduce its FY 1979 MASC prices in order to be competitive for this award, but declined to do so and must live with its decision.

It is a fundamental principle of competitive negotiation that offerors be afforded an opportunity to compete on an equal basis. Union Carbide Corporation, 55 Comp. Gen. 802, 807 (1976), 76-1 CPD 134. When an award is found to be improper and reopening negotiations is recommended, it may not be possible for the agency to assure complete equality of competition among the offerors. The incumbent contractor may have obtained during its performance of the contract a competitive advantage which makes it impossible to "turn the clock back" and reconstruct the circumstances as they existed at the time of the improper award. See Informatics, Inc., Reconsideration, 56 Comp. Gen. 663, 667 (1977), 77-1 CPD 383. However, where it is within the agency's power to equalize the basis of competition, such as by disclosing to all competitors information in the hands of one competitor which gives that offeror a competitive advantage, we have recommended that the agency condition the reopening of negotiations on the privileged offeror's consent to disclosure of the information. See Honeywell Information Systems, Inc., 56 Comp. Gen., supra, at 511-512.

The present case seems to us to represent a situation where the reopening of negotiations is not being conducted on an equal basis and it is within the agency's power to equalize the situation. While perhaps not clearly articulated, we believe the "bottom line" of GSA's position is that it does not believe it can properly place an order at a price higher than the price of the existing GE order.

However, the recommendation in our August 4, 1978, decision explicitly recognized that corrective action might result in additional cost to the Government. Specifically, the first alternative recommendation--termination of GE's order and an award to CSC--would have involved an increase in cost. Further, as long as negotiations are open, each offeror in the competitive range has the right to change its proposal, including price. PRC Information Sciences Company, 56 Comp. Gen. 768, 780 (1977), 77-2 CPD 11; University of New Orleans, 56 Comp. Gen., supra, at 962. The concept of negotiations does not in itself presuppose that offerors must propose prices below a certain ceiling in order to have any chance for award.

The fact that the procedure adopted by GSA limits GE, should it remain the successful offeror, to no more than its FY 1978 contract prices is not objectionable in our view. However, to the extent that the procedure creates inequality in the competition by comparing other vendors' FY 1979 contracts to GE's FY 1978 contract, we see no reasonable basis to support it since another procedure is available which eliminates the inequality while still achieving the objective of holding GE to its FY 1978 prices. Specifically, as CSC suggests, the competition could be held on the basis of all vendors' FY 1979 contracts with GE, if successful, remaining limited to its existing FY 1978 order.

GE argues, however, that it would be unreasonable and unfair for GSA to have required GE to compete in a reopening of negotiations on the basis of its FY 1979 MASC yet to hold GE (if selected) to the prices in its existing FY 1978 order. Also, GE maintains that GSA cannot ignore the existing order without flagrantly violating its legal duty to make an award on terms most advantageous to the Government, citing Friend v. Lee, 221 F.2d 96 (D.C. Cir., 1955), and Federal Procurement Regulations § 1-3.801-1.

What this argument fails to take into account is that GSA's October 1977 selection of GE to receive orders for the work in question was improper. See our decision of August 4, 1978. The authorities GE cites deal with the awarding of contracts; they do not deal with the question of how an improper award should be remedied. A possible

increase in cost to the Government as a result of reopening negotiations is one of the unfortunate consequences of an improper award. In our view, GE has no cause to complain of a remedial procedure which gives it the opportunity to retain an order it received improperly in the first place. However, we see no reason why this remedial procedure should give GE, the beneficiary of an improper award, a further windfall in the form of higher 1979 contract prices in the event it is selected in the reopening of negotiations.

Further, GE's citation of B-148873, April 10, 1962, is not in point. In that case the protester and another company had multiple-award Federal Supply Schedule contracts during the same year, and the protester complained that the other company had reduced its contract prices. We pointed out that the contracts allowed voluntary price reductions and that it was not improper for a contractor to attempt to gain an advantage over other contractors by reducing its prices. In the present case, however, the issue is whether orders under a schedule contract should be competed for on the basis of one contractor's FY 1978 contract versus other contractors' FY 1979 contracts.

GE also maintains that even if GSA acted improperly in implementing the recommendation in our August 4, 1978, decision, any action resulting in termination of GE's order is probably not now justified in light of factors which must be considered in such circumstances. GE cites Honeywell, supra, where we stated (56 Comp. Gen. at 510):

> "In determining whether it is in the Government's best interest to undertake action which may result in the termination of an improper award, certain factors must be considered, 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 of the user agency's mission. * * *"

The recommendation in our August 4, 1978, decision explicitly contemplated the possible termination of

orders issued under GE's MASC. We note that GSA has not asserted that termination of GE's current order has become impracticable and has not requested that we modify that recommendation. In these circumstances, no further comment is necessary on this point.

Finally, GSA has pointed out that on August 24, 1978, GSA personnel met, at their request, with GAO officials to discuss the recommendation in our August 4, 1978, decision. GSA states:

> "* * * Your office advised GSA in that meeting that our proposed reselection plan (which included taking into consideration the prices available to the Government as a contract right under the systems life order placed with GE against its FY 1978 MASC) was in full compliance with recommendation (2) of the GAO's August 4, 1978, decision."

We note initially that at the time this meeting was held, there was no pending case before our Office involving this matter. The advice given by GAO staff members during the meeting was oral, not written. Notes taken by a GAO participant indicate that the main subject discussed was GSA's request for clarification of the term "reopening"--whether this meant a resolicitation open to all MASC contractors or a competition restricted to the contractors which previously participated in the procurement. These notes do not indicate that the subject of evaluating GE's FY 1978 MASC against other contractors' FY 1979 MASC's was discussed. In addition, the written GSA response to our August 4, 1978, decision, by letter dated November 2, 1978, with enclosure, stated in part: "The reevaluation * * * will be conducted using the new prices in the FY 1979 MASC Price Lists." The letter did not state that GE's FY 1978 MASC would be reevaluated along with the FY 1979 MASC's. Finally, informal advice by GAO staff members is not binding on GAO in the event a protest is subsequently filed. PRC Information Sciences Company, supra. In view of the foregoing, GSA's statement concerning the August 24, 1978, meeting provides no basis for denying CSC's current protest.

IV. Conclusion

The protest is sustained.

In our decision of August 4, 1978, we recommended in part that GSA:

> "* * * reopen negotiations, establish a new common cutoff date, make a selection, and terminate any orders issued under GE's MASC in the event a contractor other than GE is selected."

The foregoing is not changed by today's decision. However, we now recommend that in implementing the foregoing, GSA limit its evaluation to each of the involved contractors' (including GE's) FY 1979 MASC's, and make its selection on that basis. If deemed necessary to implement our recommendation, the negotiations may be reopened. In the event GE is selected, GSA should continue with the existing order rather than issuing a new order based on GE's FY 1979 MASC.

By letter of today, we are advising the GSA Administrator of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

Acting Comptroller General
of the United States