

DECISION



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

FILE: B-195832

DATE: April 29, 1980

MATTER OF: Cummins-Allison Corporation

DIGEST:

1. Agency's decision to cancel request for proposals (RFP) and continue leasing ADP equipment from GSA schedule contractor does not represent abuse of competitive procurement system because Federal Procurement Regulations require agency to seek competition prior to making award under schedule contract.
2. Where agency provides offeror with opportunity to revise proposal price but concludes that incumbent's schedule contract price represents lowest overall cost for system's life, agency could reasonably cancel RFP rather than request best and final offer.

Cummins-Allison Corporation (Cummins) protests the cancellation of request for proposals (RFP) 79-03, issued on January 2, 1979, by the Federal Communications Commission (FCC). The solicitation was for computer hardware and accompanying software to replace the existing system. For the following reasons, we deny the protest.

The Cummins proposal was the only proposal evaluated by the FCC; another proposal was received late. After negotiation sessions with Cummins, a functional demonstration and preliminary price negotiations, the FCC notified Cummins on August 9 that the RFP had been canceled because of "budgetary limitations."

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In its report to our Office, however, the FCC stated that this was not the reason for canceling the RFP. Rather, after an evaluation of Cummins' technical proposal and proposed costs, the FCC decided that it could obtain the needed equipment at the lowest overall cost to the Government by upgrading its existing equipment through the General Services Administration (GSA) ADP schedule contract of its incumbent supplier, Nixdorf Computer Corporation (Nixdorf).

Initially, the protester maintains that we should sustain the protest because the agency has stated that it did not cancel the RFP because of "budgetary limitations." Cummins argues that GAO should not consider the cost argument now advanced by the agency. However, in considering a protest we will look at whether, in light of the record, the agency's action can be supported, not simply examine the rationale which the agency advanced at the time it took the action. See Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329. Therefore, we will review the FCC's cancellation of the RFP in light of the record before us.

Basically, the protester raises three substantive issues: 1) whether the FCC properly solicited competitive proposals; 2) whether the FCC properly could cancel the RFP instead of requesting a best and final offer from the protester; and 3) whether the protester's lease price, as proposed during negotiations, is less than the Nixdorf price.

Regarding the first issue, the Federal Procurement Regulations (FPR) state that the existence of an ADP schedule contract does not preclude or waive the requirement for maximum practicable competition in obtaining ADPE, software, or maintenance services. Temporary Regulation 46, 40 Fed. Reg. 40015-40018, September 8, 1978, § 1-4.1107-6(b)(1). The regulations also require that an agency synopsize a procurement in the CBD before it places an order for the continued lease of equipment. FPR Temporary Regulation 46, 1-4.1107-6(b)(3)i. In this connection, we have recently

taken note of the advantage of soliciting competitive offers or bids when, as an alternative, an agency is faced with continuing its lease with an ADP contractor. See Federal Data Corporation, B-196221, March 3, 1980, 80-1 CPD 167. In our view, the FCC properly sought competitive proposals and anticipated making an award thereunder before it decided that its incumbent contractor could provide the equipment at the lowest overall cost for the system's life.

The protester contends that the FCC was required to request a Cummins best and final offer rather than cancel the RFP, since all technical aspects of its proposal had been discussed and price negotiations had begun. Ordinarily, a procuring agency must allow offerors within the competitive range to submit a best and final offer by a common cutoff date. University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201.

Here, however, the record indicates that the FCC conducted price negotiations with Cummins at two separate meetings. Initially, the FCC informed Cummins that its proposed prices were not "any more advantageous to the Government than those offered [by Cummins] to commercial firms." After an analysis of the most advantageous method of acquisition -- lease -- and after expressing in-house concern regarding the Cummins proposal price vis-a-vis the Nixdorf lease price, the FCC held more price negotiations with Cummins and requested "a figure close to their best and final offer." At this point, Cummins offered a rental discount of five percent for months 1-48, seven percent for months 49-60, 10 percent for months 61-72, and 15 percent for months 73 through 84.

Although the FCC did not request a formal best and final offer, we believe the record reasonably supports the FCC determination to cancel the RFP at this stage of the procurement. Cummins, as indicated above, offered gradually increasing discounts for the system's life. It appears, however, that the protester would have had to substantially increase these

rental discounts in a formal best and final offer to overcome the competitive cost advantage of the Nixdorf equipment during the first four years of the system's life. The memorandum of price negotiations shows that although Cummins stated that its discounts could be increased, it conditioned this offer on the FCC's willingness to include a favorable liquidated damages clause in the contract, as well as more favorable delivery and transportation cost provisions. Because these and similar modifications to the RFP were not acceptable to the FCC, it appears unlikely that further negotiations with Cummins would have resulted in substantially more favorable rental discounts.

✓ We also do not agree with the protester's contention that its system's lease price is less than the ADP schedule price of the Nixdorf system. Using the analysis presented by the protester, it appears that in the first year, Cummins' proposed price, including the five percent discount for four years continuous rental it offered during price negotiations, would be less than Nixdorf's schedule price, excluding discounts. However, the RFP provides that award will be made to the technically acceptable offeror with the lowest overall cost for the system's life (84 months). Thus, we think that the FCC appropriately considered the cost to the Government over the system's life, with discounts, rather than merely the first year cost of Cummins' and Nixdorf's equipment.

The FCC concluded that the long term overall cost of the Cummins equipment would be greater than the Nixdorf equipment because of the extended rental discounts associated with Nixdorf's equipment. Cummins maintains that the FCC cannot compare its proposed lease price with the discounted schedule prices for the Nixdorf system because the RFP requested "data entry systems to replace" the installed Nixdorf equipment. Thus, the protester argues that any cost comparison with Nixdorf must be based on new equipment without considering extended rental discounts. We disagree. The RFP only required that proposed equipment be manufactured since 1976, and indicated that used

equipment must have the same warranty as new equipment. Therefore, an offeror need not propose only new equipment, but as the FCC reports, it could have furnished refurbished equipment. We believe that to determine the lowest cost over the system's life, and in the context of its decision to cancel the RFP, the FCC could consider the discounts it would earn by continuing to lease Nixdorf equipment; we agree with the agency's conclusion that Nixdorf's lease cost for an upgraded system, including the extended rental discount for equipment now being used, would be less than Cummins' lease cost over the system's life.

The FCC reports that it also considered the protester's \$31,000 conversion cost in making its decision. The protester asserts that the FCC should not consider such cost in making its cost comparison. In light of the fact that Nixdorf is evaluated low irrespective of conversion costs, we need not resolve this dispute. We point out, however, that an agency properly may be concerned with conversion costs in the context of its decision to cancel a solicitation. See Honeywell Information Systems, Inc., B-193177.2, December 6, 1979, 79-2 CPD 392.

In summation, we believe that the FCC complied with the intent of Temporary Regulation 46, supra, in seeking competitive proposals and then ascertaining whether the schedule contract price represented the lowest overall cost. In the circumstances, the FCC had sufficient reason to cancel the RFP and was not required to obtain "best and final" offers under the solicitation before cancellation.

While FCC also argues that Cummins' initial proposal had expired by its own terms and could not be accepted, we believe this issue is academic in view of the conclusions reached above. Nevertheless, we note that an offeror's participation in the negotiation process generally operates to extend its offer. Dynallectron Corporation, 54 Comp. Gen. 562, 579 (1975), 75-1 CPD 17.

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The protest is denied.

Milton J. Fowler

For the Comptroller General
of the United States