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DECISION

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

[Protest of GSA Contract Award]

FILE: B-195982.2 DATE: May 14, 1981

MATTER OF: CompuServe Data Systems, Inc.

DIGEST:

1. Although denial of motion for preliminary injunction does not go to merits of case, when arguments presented to court deal with identical issues raised in protest, GAO will consider court's findings.

2. When protest involves questions regarding timing of Government-supervised benchmark which have not previously been considered by GAO, matter is significant and will be considered even though protest is untimely.

3. Contracting agency may seek clarification of proposals from offerors, and when contacts between agency and offerors are for limited purpose of seeking and providing clarification, discussions need not be held with all offerors in competitive range.

4. When information is requested and provided which is essential to determining acceptability of proposals, negotiations have been reopened and discussions have occurred; actions of the parties, not characterizations of contracting officer, must be considered.

5. When offeror has been given opportunity to clarify aspects of proposal with which contracting agency is concerned, and responses lead to discovery of technical unacceptability, agency has no obligation to conduct further discussions and may drop proposal from competitive range without allowing offeror to submit revised proposal.

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6. If, in connection with Government-supervised benchmark, questions are likely to arise or additional information to be needed, benchmark is inherent part of negotiation process during which deficiencies must be identified and offerors given an opportunity to correct them. In this case, benchmark should precede best and final offers or agency should be prepared to reopen negotiations.

CompuServe Data Systems, Inc. protests the award by the General Services Administration (GSA) of a contract for teleprocessing services to Boeing Computer Services Company. The dispute primarily concerns CompuServe's interpretation of and ability to meet solicitation provisions designed to enable GSA to audit charges under the contract. CompuServe also alleges that GSA improperly conducted discussions after best and final offers and permitted Boeing--but not CompuServe--to make changes in its proposal. For the following reasons we are denying the protest.

I. Background:

The procurement was conducted by GSA for the Army Military Personnel Center, which uses a computerized reservation system, REQUEST/RETAIN, to identify and allocate training spaces for enlisted personnel and new recruits. This was a new competition for services previously provided by Computer Sciences Corporation on its Infonet system. Award to Boeing was based on its offering a system meeting all mandatory technical requirements at the lowest evaluated life-cycle cost.

Two benchmarks, with programs which simulated actual REQUEST/RETAIN operations, were scheduled during this procurement. Offerors ran the first before completing their proposals, submitting cost tables based on the results, printouts, and written descriptions of their execution of the required programs to GSA. A second, Government-supervised benchmark was held after best and final offers.

II. Resource Consumption Routine Requirements:

CompuServe's first basis of protest is that after it had completed both benchmarks, GSA informed the firm that its proposal was technically unacceptable because of

deficiencies in its resource consumption routine (RCR). The solicitation required offerors to provide such a routine, which would measure and print out (1) the elapsed time for execution of each program included in the benchmark and (2) the types and quantities of all computer resources consumed by the programs. GSA indicated that this information would be used to monitor the successful contractors's performance and charges.

After protesting to our Office, CompuServe sought but was denied a court order suspending performance by Boeing pending our decision. CompuServe Data Systems, Inc. v. Freeman, No. 80-2327 (D.D.C., October 17, 1980) (memorandum opinion and order denying preliminary injunction).

The specific deficiencies which GSA found in CompuServe's resource consumption routine, as described in a letter dated April 3, 1980, involve "dynamic calculation [sic] of core" and the "bundling of element T_a." CompuServe alleges that with regard to both of these, the agency is now imposing new and more stringent requirements than were in the original solicitation.

As a matter of law, CompuServe argues that GSA should have amended the solicitation to reflect its new requirements. If the solicitation is regarded as ambiguous as to what the resource consumption routine required, CompuServe continues, it should be construed against GSA, which drafted it. In any case, the firm argues, the requirements exceed GSA's minimum needs and unduly restrict competition. Alternatively, CompuServe contends that GSA either knew or should have known of the so-called deficiencies in its proposal when it accepted results of the pre-proposal benchmark, and should have discussed them before best and final offers.

GSA, on the other hand, indicates that none of the problems with CompuServe's resource consumption routine was apparent from its proposal. Rather, the agency states, it was only after the Government-supervised benchmark that it was able to determine that CompuServe's routine did not provide data in the form required by the solicitation.

According to GSA, satisfactory "repairs"[1] to CompuServe's Government-supervised benchmark could have been made only if the firm had concurrently changed its technical and cost proposals; since best and final offers had been submitted before GSA made this determination, the agency refused to allow any changes on grounds that they would be late modifications.

III. Alleged Deficiencies in CompuServe's Proposal:

A. Dynamic Allocation of Core:

Dynamic allocation of core (main memory) was a mandatory feature of the system GSA sought. This means that instead of a system in which it was charged for a fixed amount of core, GSA required one which, before program execution, would calculate the amount of core needed to complete the program and allocate it accordingly, so that the Government would not be charged for more than it actually used.

As the court observed in its memorandum opinion, CompuServe offered what appeared to be an even more efficient system, one which allocated and de-allocated core as needed throughout program execution. CompuServe, however, did not display changes in core usage as they occurred, but merely summarized them in a printout at the end of the program. This, according to GSA, did not comply with the solicitation and was not sufficient for audit purposes. CompuServe, on the other hand, contends that the requirement for displaying and quantifying resources every time the amount consumed changes during program execution is new.

B. The Bundling of Element T_a:

Section F.2.2.4.4.b. of the solicitation required that offerors display "specifically and separately all unique resource elements for which a charge [was] made." Any elements which were "bundled" to produce a compound billing unit of any kind were to be "unbundled," and offerors were required to certify that all elements were presented in this form.

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[1] Repair is a broad general term which may be used to mean anything from manual correction or change to a complete re-running of a benchmark.

According to GSA, its ability to audit CompuServe also was limited because the firm combined the elements E, representing the number of instructions the computer is directed to execute, and M, representing the amount of memory exercised, to form a unit identified in its billing algorithm by the algebraic term T_a.

CompuServe argues that since neither E nor M is separately recorded or billed, the element T_a should not be considered a bundled unit. The firm concludes that it fully complied with the solicitation, since it provided a routine which measured and printed out resources consumed at the end of program execution and which included all elements for which it charged.

IV. GAO Analysis of RCR Requirements:

In the words of the District Court, the Government was clearly dissatisfied with its ability to audit the precise elements of the charges for which it had been billed under the Computer Sciences Corporation contract. The requirements for a resource consumption routine were intended to facilitate examination of charges under the new contract and to insure accurate billing. The court found that CompuServe did not meet these requirements.

We recognize that a denial of a motion for a preliminary injunction, such as was issued here, is by its nature interlocutory and provisional, and does not go to the merits of a case. Nevertheless, since the extensive oral and written arguments presented to the court deal with the identical issues which have been raised in this protest, we believe it is appropriate to consider the court's findings. See CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225.

With regard to dynamic allocation of core, the court stated:

> "* * * Apparently, the Government had to take CompuServe's system on faith that the final charge for memory space used was an accurate calculation of the various component charges set during the stages of the program."

As for the bundling of element T_a, the court found:

> "* * * CompuServe admits that nowhere does it display or calculate these two units [E and M]

> separately. The fact that the CPU [central processing unit] is divided into two units * * * at all, appears to bundle elements in apparent violation of the RFP [request for proposals], abrogating the Government's determined ability to audit separately each aspect of the calculated computer charge."

The court concluded:

> "* * * The language of the RFP is unambiguous--the Government wanted to audit each separate component of the final charge, and it appears that in both the calculation of CPU and the allocation of memory space, CompuServe bundled elements of the final figure in such a manner as to preclude the Government from auditing the usage precisely." (Emphasis in the original.)

A computer scientist for the National Bureau of Standards concurs in these findings; in an affidavit prepared for submission to the court, he stated:

> "* * * In my professional judgment, CompuServe's element T_a is a bundled element. It is my judgment that the separate display of the component elements of T_a, namely E and M, is necessary to satisfy the Resource Consumption Routine (RCR) requirements of the RFP.
>
> "In my professional judgment, the core value printed out at the termination of the benchmark programs provided to the Government does not comply with the Resource Consumption Routine (RCR) provisions of the RFP and does not provide enough information to perform a detailed audit per the requirements stated in the RFP.
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> "In my professional judgment, the description of the SRU [system resource usage] algorithm provided to the Army by CompuServe in its cost proposal, along with its technical proposal

and its Resource Consumption Routine (RCR) and benchmark listings, was not sufficient information for the Army to know:

a) that T_a was a bundled unit; and

b) that the algorithm recomputed SRU's when dynamic core allocation took place within a program.

"It is my professional judgment that the Army's evaluation that CompuServe's Resource Consumption Routine (RCR) should be capable of quantifying and displaying at the termination of a program its usage of the elements making up the SRU * * * is not a change in the requirements set forth in the RFP. Rather, the Army's evaluation was totally consistent with the RFP requirements in that the display of those elements was necessary for CompuServe to submit an acceptable Resource Consumption Routine (RCR)."

We agree with the court and the National Bureau of Standards, and find that the resource consumption routine requirements were neither new nor ambiguous. Moreover, we do not believe these requirements exceeded GSA's minimum needs or were unduly restrictive. With compound billing units, it would be possible to change the weights in a billing algorithm to make actual programs cost relatively more than benchmark programs, which will be rerun for the purpose of validating costs. Since there will be no adjustments to the contractor's invoices unless actual costs exceed benchmark costs by more than five percent, substantial overcharges could result. We find that GSA's audit methodology is a reasonable attempt to prevent this type of manipulation.

The final question with regard to CompuServe's first basis of protest is whether CompuServe met solicitation requirements.

In written responses to GSA's questions following the Government-supervised benchmark, CompuServe acknowledged that there were no programs available at that time which could be used by the Army for verification of its SRU algorithm. CompuServe merely offered to provide, 30 days after award, a software interrupt capability which would allow the Government to detect changes

in core allocation as they occurred and to determine precisely the amounts used in CompuServe's calculations. Nor did Compuserve show, in its responses to GSA's questions, that it met the Government's requirements for presentation of all elements in unbundled form. Rather, CompuServe stated, "Our operating system specialists have indicated that we could provide the factors 'E' and 'M' to the Army; however, this would require prohibitively high processor overhead."

In view of these admissions, we cannot conclude that CompuServe's resource consumption routine met solicitation requirements.

V. Discussions:

CompuServe's second broad basis of protest is that GSA improperly conducted discussions after best and final offers without affording the firm an opportunity to revise its proposal. The firm cites questions posed in a letter from the technical evaluation team to CompuServe and various exchanges between GSA and Boeing which resulted in repair of Boeing's Government-supervised benchmark and reconciliation of its cost proposal. GSA's actions, CompuServe alleges, violated procurement regulations in that all offerors were not treated fairly and equally.

GSA argues that this basis of protest is untimely, since it was not raised within 10 days after CompuServe knew of the alleged improper communications. The agency also asserts that it was merely seeking clarification and that it did not conduct discussions, since it permitted no changes in proposals. Such clarification was an essential part of the evaluation of best and final offers, the agency continues, and had deliberately been deferred until the Government-supervised benchmark in order to safeguard proprietary information until the latest possible stage of the procurement process.

While CompuServe's protest may be untimely, we believe it raises significant issues, not previously considered by our Office, in terms of when a Government-supervised benchmark should be conducted and what type of questions may follow it. We therefore will consider the matter. See Association of Soil and Foundation Engineers, B-199548, September 15, 1980, 80-2 CPD 196; 4 C.F.R. § 20.2(c) (1980).

In our opinion, GSA did conduct discussions with CompuServe after best and final offers. The chronology was as follows: best and finals were submitted on December 28, 1979; CompuServe ran its Government-supervised benchmark on February 8, 1980. By letter dated February 29, 1980, the contracting officer advised CompuServe that results of that benchmark had been analyzed and that all but two capabilities described in its proposal had been successfully demonstrated. The first is not at issue here; the second was CompuServe's resource consumption routine. The contracting officer posed 11 specific questions regarding CompuServe's billing algorithm and resource consumption routine which he indicated must be successfully clarified for the firm to remain in the competition. On March 10, 1980, CompuServe responded to those questions in writing, leading to a determination by the technical evaluation team on March 19, 1980 that CompuServe's resource consumption routine was unacceptable, primarily because it did not provide the audit capability which the Government sought.

Contracting agencies are permitted to seek clarification of proposals from offerors, and when contacts between the agencies and offerors are for the limited purpose of seeking and providing clarification, discussions need not be held with all competitive range offerors. John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367. On the other hand, when an offeror is permitted to change a proposal or when information is requested and provided which is essential to determining the acceptability of a proposal, the contacts go beyond mere clarification and, as we have often held, negotiations have been reopened and discussions have occurred. ABT Associates, Inc., B-196365, May 27, 1980, 80-1 CPD 362 and cases cited therein; Raytheon Service Company et al., 59 Comp. Gen. 316 (1980), 80-1 CPD 214 at 20. The actions of the parties, not the characterizations of the contracting officer, are what must be considered. ABT Associates, Inc., supra.

In this case, the questions asked and the written responses provided related to how CompuServe calculated costs; they went to the heart of CompuServe's proposal. CompuServe's responses offered various alternatives and considerable elaboration and detail not offered in its initial proposal, and had a substantial effect on GSA's finding of unacceptability. In our opinion, this exchange therefore constituted discussions and not mere clarification. See The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459.

This does not mean, however, that GSA was required to give CompuServe an opportunity to revise its proposal after this evaluation was completed. When an offeror has been given an opportunity to clarify aspects of its proposal with which the contracting agency is concerned, and its responses lead to a determination of technical unacceptability, the agency has no obligation to conduct further discussions. Genesee Computer Center, Inc., B-188797, September 18, 1977, 77-2 CPD 234. Although it was not until after the Government-supervised benchmark that the technical evaluation team discovered that CompuServe's proposal was unacceptable with respect to the resource consumption routine requirements, and that a complete revision would be needed for it to meet those requirements, the agency could properly drop the proposal from the competitive range at that point without allowing the offeror to submit a revised proposal. General Electric Company, 55 Comp. Gen. 1450 at 1456 (1976), 76-2 CPD 269; Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15; cf. Proprietary Computer Systems, Inc., 57 Comp. Gen. 800 (1978), 78-2 CPD 212, involving a proposal which the agency doubted was acceptable and dropped after discussions confirmed this.

CompuServe has argued that GSA either knew or should have known of the deficiencies in its proposal before it requested best and final offers, and thus suggests that GSA failed to conduct meaningful discussions with it. However, the technical evaluation report, included in the record, indicates that until the Government-supervised benchmark, GSA believed that CompuServe had submitted the information required, both in narrative form in its cost and technical proposals and in its resource consumption routine.

For example, according to GSA, CompuServe indicated that it provided dynamic allocation of core, but did not explain how it dynamically allocated and de-allocated core during program execution. Therefore, according to GSA, this feature was never evaluated in relation to CompuServe's resource consumption routine, and it was only during the Government-supervised benchmark (and the discussions which followed) that GSA determined that CompuServe could not be audited to the extent required by the solicitation. Under these circumstances, we cannot conclude that GSA did not meet its duty to conduct meaningful discussions.

In view of our finding that GSA had no obligation to allow CompuServe to revise its proposal following the post-benchmark discussions, CompuServe's complaint that it was denied an opportunity that was given Boeing is without merit.

We believe, however, that this procurement demonstrates the need to run a Government-supervised benchmark earlier in the procurement process than was done here. If such a benchmark is merely to be used to validate results of an earlier one, it may logically be considered part of the evaluation of best and final offers. We understand, however, that in the majority of cases it is likely that questions will arise or additional information will be needed upon completion of the benchmark. In those cases, as here, the benchmark becomes an inherent part of the negotiation process, during which deficiencies should be pointed out and offerors given a chance to correct them if possible. See The Computer Company--Reconsideration, B-198876.3, January 2, 1981, 60 Comp. Gen. ___ (1981), 81-1 CPD 1. In such cases, therefore, the benchmark should precede best and final offers or the agency should be prepared to reopen negotiations if necessary. By letter of today, we are so advising the Administrator of General Services.

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States