

DECISION



18656 *G. J. ...*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-196722

DATE: June 26, 1981

MATTER OF: Control Data Corporation and KET,
Incorporated

DIGEST:

1. Agency could consider all-or-none best and final offer notwithstanding that three of five line items were not included in offeror's initial proposal since initial proposal was included in competitive range, offerors may alter their proposals in best and final offer and agency found that proposal with respect to additional items was technically acceptable.
2. Protest that RFP for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid.
3. RFP provision allowing benchmark of tentatively selected equipment after closing date for best and final proposals is not in itself objectionable.

This decision responds to two protests concerning a procurement conducted by the Internal Revenue Service (IRS) under request for proposals (RFP) 79-57 for peripheral equipment to support the IRS Integrated Data Retrieval System (IDRS). The procurement was for various quantities of disk, tape, and card reader, card

[Protests of IRS Procurement]

115665

017431

punch and line printer equipment to replace leased Control Data Corporation peripheral equipment presently supporting IDRS Control Data 3500 series computers. A contract has been awarded to Centennial Systems, Inc. (CSI) for all items.

KET, Incorporated, which did not submit a proposal, complains that the RFP was unduly restrictive of competition in that except for the disk equipment the RFP specified essentially outmoded Control Data or equal equipment preventing consideration of equipment of current manufacture. KET says it was not possible to locate sufficient quantities of some of the equipment even on the used market. Thus, KET expected Control Data, which as the incumbent could offer to continue to furnish equipment (other than disk equipment) then in place, to enjoy a significant competitive advantage. Because the RFP permitted Control Data to submit an all-or-none price if it also priced all items individually, KET complains that a firm in a position such as Control Data enjoys could prevent meaningful competition on individual line items by submitting unbalanced prices, i.e., by setting arbitrarily high prices for scarce items, by submitting below cost prices for items likely to be offered by firms such as KET, and by offering a somewhat lower aggregate price, thus assuring that its aggregate price would be lower than the total cost of any combination of multiple awards.

On the other hand, Control Data protests that it should have received award on an all-or-none basis but did not because CSI was improperly permitted to propose an all-or-none price in its best and final offer by adding prices for three line items which it had not included in its initial proposal. Moreover, Control Data says the IRS permitted CSI to offer equipment which was not "formally announced" as required by the RFP, and relaxed its delivery schedule for CSI shortly after award, thereby materially changing the basis on which proposals had been submitted. Further, Control Data says the IRS in evaluating cost should have considered the cost of continuing to use existing equipment while new equipment was being installed.

KET also complains that the RFP benchmark requirement was improper in several respects and that the IRS improperly refused to make its Control Data 3500 equipment available to support such a test.

KET's protest is dismissed in part and denied as to the remainder; Control Data's protest is denied.

1. Timeliness

At the outset, the IRS and Control Data join in insisting that KET's protest should be dismissed as untimely. KET's protest, which involves alleged improprieties apparent from the solicitation, was filed in our Office before the closing date set for proposal receipt, as required in section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (b)(1)(1980). However, the IRS and Control Data point out that the contracting officer did not receive notice of the protest until after the closing date for receipt of proposals had passed. This, they say, was contrary to the purpose of § 20.1(c) of our Bid Protest Procedures, which states that a copy of a protest to the General Accounting Office shall be filed with the contracting officer.

KET's protest is timely. The filing of a protest for purposes of § 20.2(b) is defined in § 20.2(b)(3) to mean filing in the General Accounting Office or contracting activity "as the case may be," which means that timely delivery of a protest must occur at the place where the protest is lodged. See National Designers, Inc., B-195353, B-195354, August 6, 1979, 79-2 CPD 86. Since KET's protest was directed to our Office and was received here before proposals were due, it was timely filed in accordance with our Bid Protest Procedures.

Control Data argues, however, that it was prejudiced by KET's failure to advise the IRS of the protest at the time it was filed with our Office, because Control Data had made special arrangements with the contracting officer to return Control Data's proposal unopened if a protest were filed before the time and date for closing passed.

We see no basis for Control Data's concern. Control Data could at any time before award have withdrawn its proposal if it did not wish to have it considered. United Electric Motor Company, Inc., B-191996, September 18, 1978, 78-2 CPD 206.

Therefore, we will decide both protests on their merits.

2. Sufficiency of RFP

We consider first KET's complaint that by specifying equipment as the IRS did -- on a brand name (Control Data)

or equal basis -- the IRS imposed an undue restriction on competition. According to KET, only Control Data 3500 compatible disk equipment remains in current production. The remainder of the IRS's equipment needs (tape, card reader, card punch and line printer equipment), KET says, could be met only by furnishing obsolete and outmoded equipment which was readily available only to Control Data which as the incumbent, could continue to furnish existing leased equipment (other than disk equipment).

KET questions IRS' insistence on the continued use of card reader and card punch equipment as its primary means of entering data. It sees no reason why a 4000 card tray is specified for card readers, or a 1200 card hopper and 1500 card stacker for card punches, and says the IRS should have permitted offerors to propose 1200 card trays and 1000 card hoppers and stackers typical of other comparable equipment. KET also challenges IRS's continued reliance on 200/556/800 bpi (the density with which data is packed) for seven track tape drives, arguing that 1600 bpi is now the established industry baseline, and questions why all three densities (200, 556, and 800 bpi) must be available in each unit. Further, in KET's view the IRS's need for equipment capable of handling large numbers of cards to support headquarters programming operations does not justify including large card tray requirements for equipment to be used at IRS regional facilities. Nor, allegedly, has the IRS shown that all tape densities and other required specific capabilities will be used at each of its installations.

This portion of KET's complaint is without merit. The IRS explains that it is not seeking to upgrade IDRS or to alter in any way how equipment would be used; rather, it is acquiring equipment which it needs to continue operating IDRS until that system can be replaced. We believe it is sufficient that in defining its interim requirements the IRS has attempted simply to acquire equipment based on the types of equipment it has in place. Determination of an agency's needs is a matter falling within the sound discretion of the contracting activity which will not be disturbed unless shown to have no rational basis. Science Spectrum, B-189886, January 9, 1978, 78-1 CPD 15. Because the IRS is attempting to meet only a short term need, we believe it may reasonably base its requirements on equipment which is in place. In this

respect, in our decision in Information International, Inc., 59 Comp. Gen. 640 (1980), 80-2 CPD 100, aff'd. B-191013, October 7, 1980, 80-2 CPD 246, we stated that the Government is under no obligation to acquire technologically advanced equipment if less sophisticated equipment will meet its actual needs at lower cost or risk.

KET further contends that by allowing offerors to submit proposals for all five types of equipment on an all-or-none basis the IRS permitted a firm which was able to offer all items to prevent others able to offer only some of them from being considered. KET anticipated that this would favor Control Data because the IRS permitted Control Data to offer equipment (other than disk equipment) which was already in place. Control Data did not receive the award. However, KET was unable to locate sufficient quantities of the required equipment (other than disk equipment) notwithstanding diligent effort and believes that the disk equipment (which is still manufactured) is distinctly different from the IRS's other needs and should have been the subject of a second procurement. (It is the IRS' position that any economy which the Government might gain through a multi-item award can be achieved only if offerors are permitted to offer lower prices on a combination of items.)

In this connection, KET argues that in requesting a Delegation of Procurement Authority (DPA) from GSA the IRS indicated that it would not permit all-or-none bids, and thus implicitly admitted that to allow an all-or-none bid which included the disk equipment would limit competition.

We do not believe the IRS acted improperly in this regard. The IRS included the following language in the RFP:

"* * * All offerors must propose each subsystem as an individual pricing proposal. Only an alternate proposal may be qualified as 'all or none'; vendors who submit a single or primary proposal which is qualified as 'all or none' will be considered [unacceptable]."

Additionally, the IRS required offers to furnish certifications of cost and pricing data pursuant to Federal Procurement Regulations (FPR) § 1-3.807-4 (1964 ed.).

We do not see how KET was injured. The IRS, by allowing proposals to furnish any of the five required systems, assumed no duty to prevent a disk equipment buy-in. Had IRS adopted KET's view and procured the disk system separately, Control Data would not have been precluded from offering disk equipment at less than cost. The most that the IRS could have done would have been to prevent an offeror from making up losses by overpricing other items, which the IRS did by requiring that items be separately priced and supported, thus placing the Government in a position to determine that it was paying a fair and reasonable price. Breaking out some items or prohibiting an offeror from submitting an alternate all-or-none proposal would not have further enhanced competition, but only would have prevented the Government from obtaining a better total price if it could do so on a package basis.

On a related point, KET complains that Control Data was permitted to offer currently-installed disk equipment by warranting that the equipment was remanufactured. KET insists that this violates a prior understanding resulting from a controversy which extended from 1976 through 1978 regarding a past IRS attempt to acquire disk equipment on a sole-source basis from Control Data. See KET, Inc., B-189482, February 10, 1978, 78-1 CPD 115. At that time, KET says, the General Services Administration granted the IRS authority to procure disk subsystems for the IDRS on an interim basis on condition that the IRS would competitively replace all peripheral subsystems, including the disk subsystem, and that Control Data Corporation was not to be permitted to propose installed equipment. Even though the RFP stated that "currently-installed" disk equipment could not be offered, however, IRS explained in response to a pre-proposal inquiry that this did not prevent Control Data from offering such equipment if it were first removed, remanufactured and warranted as the same as new.

Since the apparent purpose of the understanding KET refers to was to prevent Control Data from gaining a competitive advantage as a result of the sole-source procurement mentioned, and since KET was permitted to offer remanufactured equipment also, if it wished, we cannot see how KET suffered any legal prejudice by the procedure which the IRS adopted. KET's complaint in this regard is therefore rejected.

3. Propriety of Award

We consider next Control Data's protest against the award made to CSI.

Control Data argues that CSI was permitted to submit a late proposal in that award was based on an all-or-none best and final offer in which CSI for the first time added prices for three of the five types of equipment covered in separate line items. In its initial proposal CSI only offered to furnish the tape and disk equipment. Prices to furnish used card punch, card reader and card printer equipment (all originally manufactured by Control Data) were added in CSI's best and final offer. If the expanded CSI best and final offer, and alternate all-or-none price, is considered to be a distinct proposal, Control Data's argument continues, it is clearly not for consideration under any of the exceptions to the rule against making award on a late proposal.

In this regard, Control Data insists that the IRS, by evaluating and making award based on the CSI best and final offer, essentially allowed CSI to avoid a technical evaluation of its entire proposal because the best and final proposal offered to furnish three types of equipment which were never included in a competitive range determination. Control Data further asserts in this regard that the CSI best and final offer did not include adequate information and did not indicate how CSI would maintain the additional equipment. As a result, Control Data charges, the IRS was forced to continue discussions with CSI after making award to it in order to deal with problems which were ultimately resolved only when Control Data agreed to service any CSI-furnished Control Data equipment.

The IRS argues that the CSI proposal was not late. Regarding the relationship between the late proposal rule and modifications to proposals after discussions, the IRS points out that FPR § 1-3.802-1(d) states:

"The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or later modifications to proposals but shall be handled in accordance with § 1-3.805."

(FPR § 1-3.805 deals generally with the selection of an awardee in a negotiated procurement.) In the IRS's view, CSI simply expanded its original proposal to include card reader, card punch and line printer equipment thus enabling it to submit an all-or-none proposal. The IRS says it had no choice but to make award to CSI since CSI agreed to meet all of the RFP requirements and explained in pricing the additional items that it would provide Control Data on-call maintenance on a 24-hour per day, seven day per week basis. The IRS says a technical evaluation of the proposed equipment was not necessary because the equipment added was identical to that being replaced.

Further, the IRS cites our decision in Jones & Guerrero Co., Incorporated, B-192328, October 23, 1978, 78-2 CPD 296, as supporting its view that offerors are permitted to amend their proposals as CSI did. There, we considered a complaint that the Air Force improperly amended a solicitation to require award based on the lowest aggregate proposal to furnish all items listed on the schedule. We noted that the protester was not prejudiced by the amendment because although its initial proposal did not price all line items, it had revised its proposal and priced all items in its best and final offer. Thus, the IRS argues, our decision approved what CSI did in adding prices for the line items it chose initially to omit.

Finally, the IRS says that its view that an offeror's general right to submit an amended best and final proposal in circumstances similar to this case is supported by our decision in Northrop Services, Inc., B-184560, January 28, 1977, 77-1 CPD 71, where we approved award based on an alternate proposal which differed from the awardee's original proposal in regard to the use of in-house rather than subcontracted labor.

We find Control Data's argument that the IRS's consideration of the CSI best and final offer must be limited to two line items unconvincing. The existence of the late proposal clause in the RFP establishes a cut-off date for the receipt of initial proposals, defining the field of competitors who may participate further in the procurement. E-Systems, Inc., B-188084, March 22, 1977, 77-1 CPD 201. Thus, in LaBarge, Inc., B-190051, January 5, 1978, 78-1 CPD 7, we concurred with the

Army's rejection of LaBarge's entire proposal as late because LaBarge failed to respond timely to a solicitation amendment which added a line item to the schedule when only one aggregate award was to be made. We viewed LaBarge as having failed to submit a timely offer for the minimum of what could be awarded. CSI's initial proposal, however, did respond to what was minimally acceptable and its proposal was considered by the IRS to be within the competitive range; CSI survived the initial round and was free in our view to make or to submit an alternate best and final offer which it believed would enhance its competitive position. We are aware of nothing which precluded CSI from doing so, provided it was willing to take the risk that the changes might result in rejection of its proposal. See Northrop Services, Inc., supra; Electronics Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15, where the changes made rendered a theretofore acceptable proposal unacceptable.

Moreover, Control Data has not shown that it suffered any legal prejudice as a result of CSI's action. Control Data should not have known before the closing date for receipt of best and final offers, and presumably did not know, who its competition was, or whether its competitors had offered all five or only some of the RFP line items. Control Data was afforded an opportunity to submit a best and final offer and could have made any changes to its proposal which it believed necessary. Thus, it was placed at no disadvantage.

Finally, Control Data believes that IRS's review of the CSI best and final offer, which proposed to furnish Control Data equipment with Control Data maintenance, was inadequate. By accepting at face value CSI's agreement in its best and final offer to meet the IRS's requirements, Control Data says the IRS accepted proposals for the three additional systems which did not include, as required in the words of the RFP:

"A detailed statement of the offeror's ability to meet each of the mandatory support requirements [covering maintenance] and reference(s) to the technical documentation which substantiate the claim must be provided * * *."

Moreover, Control Data believes that the IRS's failure to require CSI to explain its maintenance proposal led to discussions after award since it was only then that the IRS learned that CSI had no maintenance agreement with Control Data. Evidently, CSI assumed that the IRS could order maintenance from Control Data under its Federal Supply Schedule (FSS) Contract, although there was no guarantee that Control Data would continue to service the types of equipment involved under the FSS for the duration of CSI's contract. (Control Data has since agreed to provide maintenance.)

CSI offered the same type of printers, card punches, and card printers which Control Data offered, and indeed, had been furnishing for a number of years. CSI bound itself to furnish Control Data maintenance. There is no apparent reason why the IRS should have questioned CSI's proposal in this regard. While the RFP required technical documentation to substantiate CSI's proposal, it is well settled that an agency may not reject a proposal which fails to furnish required information if that information is not actually needed to evaluate its offer. In the circumstances, we view Control Data's complaint as principally questioning CSI's ability to meet its agreement to furnish Control Data maintenance, thus disputing the IRS's affirmative determination of CSI's responsibility. However, it is well settled that this Office will not review such determinations except in circumstances which are not present in this case. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

4. Acceptability of CSI Disk & Tape Equipment

Further, Control Data asserts that the CSI disk and tape equipment (offered in CSI's initial proposal) did not meet an RFP requirement for "formally announced" equipment which was "fully proved and tested."

The requirement for "formally announced" equipment is contained in paragraph E.10 of the RFP, which provided:

"The equipment proposed in response to this solicitation * * * must have been

formally announced for marketing purposes on or before the closing date [for receipt of proposals] and be capable of a demonstration * * *."

Paragraph E.10 addresses the prospect that the IRS otherwise might receive offers proposing to furnish equipment which was not yet fully developed. That the IRS would not accept such an offer is confirmed by its answer to a written question submitted before the closing date for receipt of initial proposals. Offerors were advised that:

"Formally announced means announced by the offeror to the 'market place' or public with notice that equipment is in production, has been fully tested and that orders are being accepted. Proposals submitted to other Government Agencies do not necessarily constitute 'formally announced.'"

Control Data complains that the CSI-proposed disk and tape systems were not formally announced. In fact, Control Data indicates that it (a) had never heard of a CSI disk system compatible with the Control Data 3500, which is to be supported, before this procurement, and (b) has been unable to find any formal announcement of the CSI-proposed Telex 6803-1 tape controller for use with 3500 series computers. As Control Data points out, there is no evidence in the record that the IRS considered whether the CSI equipment was formally announced until after Control Data had filed its protest. As further support for its assertion, Control Data says in effect that the systems could not have been formally announced because the delivery requirements were relaxed after award, evidencing in Control Data's view that the systems had not yet been fully tested.

However, the IRS insists that in fact the CSI equipment was announced. Regarding the two items of equipment in question, the IRS says the CSI 5000 Disk Controller (which CSI offered with its disk system) was announced as available for use with Control Data 3000 series equipment in a press release dated one day before the closing date for receipt of proposals. The IRS treats the other

item -- the CSI tape controller -- as similar to a related "formally announced" Telex controller. Moreover, the IRS argues, the disk and tape controllers were only components of the disk and tape systems, and it was not the IRS's intention that paragraph E.7.1.1 should require that a vendor have announced each piece of equipment which made up a system.

In our decision in Intermem Corporation, B-188910, December 15, 1977, 77-2 CPD 464, we considered the meaning of the phrase "announced, commercially available" in a similar context and concluded such language did not require a published announcement (e.g., through trade journals) if in fact the equipment was available and was being offered for sale. The IRS could have but did not use that phrase in this RFP. Instead, it required "formally announced" equipment capable of demonstration, a choice of language which in contrast with the phrase "announced, commercially available" required some kind of specific, i.e., "formal," announcement.

The IRS has produced a copy of the CSI press release which is on a CSI letterhead, and which purports to announce the availability of both systems for use with Control Data 3000 series equipment. As stated, the document is dated one day before the closing date for receipt of initial proposals. We cannot conclude, therefore, that this equipment was not formally announced as required by the RFP.

5. Benchmark-Related Issues

KET complains that the IRS improperly reserved to itself the right after best and final offers to benchmark equipment without defining the nature of the benchmark in advance and without allowing IRS Control Data 3500 series equipment to be used to support the test. In KET's view, any such test should be conducted before best and final offers so that offerors may take the results of their tests into consideration in their final proposals and correct deficiencies if there are any.

The provision complained of was set out as paragraph E.7.1.1 of the RFP, which states:

"At the Government's option, those responsive and responsible vendors may be required to demonstrate in a pre-contract award operational test that any equipment offered is

indeed plug-to-plug compatible with the [Control Data] equipment and operates so as to meet the requirements called for in Section F of this document. The test will be conducted at other than an IRS site. After contract award and upon installation, the thirty day acceptance test defined in E.7.2. below shall be conducted."

We do not share KET's view that post-closing benchmarking should be forbidden altogether. Benchmarking may impose a significant cost burden on offerors, as noted in our decision in ADP Network Services Inc., 59 Comp. Gen. 444 (1980), 80-1 CPD 339. To the extent that agencies by limiting testing to firms tentatively selected for award, can reduce the cost other vendors would otherwise incur, we see no basis for objection to such a procedure. Cf. CompuServe Data Systems, Inc., B-195982.2, May 14, 1981, 60 Comp. Gen. ____, 81-1 CPD ____, indicating that postclosing benchmarking is likely to prove inappropriate in the majority of cases. In this regard, we view RFP paragraph E.7.1.1. as limited in scope -- as permitting testing to determine whether the equipment offered by a tentatively selected awardee would function when connected to a Control Data 3500 computer and whether while connected it would perform the specific functions described in the specification. Also, we do not find objectionable the fact that there may have been some difficulty encountered during the test in connecting CSI's equipment to the 3500 computer since CSI was able to satisfactorily connect the equipment, which was the purpose of the test.

Regarding KET's view that the benchmark requirement was not adequately defined, we know of no legal basis for requiring that the specific content of a benchmark be published in advance for the benefit of offerors who may not participate in it. Further, and contrary to KET's fears, we do not believe the IRS could have rejected equipment because it did not successfully accomplish a task requested during the benchmark, unless the ability to do that task was identified as a salient characteristic in the RFP or unless the IRS first reopened negotiations with all offerors and amended the RFP to require the capability to perform that task. Likewise, contrary to

KET's belief, the IRS could not reject an offeror's equipment if it failed to perform a test because of some peculiarity of the 3500 computer used to support the test since the IRS permitted offerors to select any Control Data 3500 to support the test.

Finally, KET argues that the IRS unreasonably refused to permit the acceptability of proposed equipment to be shown through simulation, or alternatively, to make IRS Control Data 3500 equipment available to support such a test. Instead, the IRS required in the solicitation that vendors make their own arrangements.

In a prior decision involving these parties, we sustained similar complaints by KET regarding an IRS-required benchmark. KET, Incorporated, 58 Comp. Gen. 38 (1978), 78-2 CPD 305. Although the IRS professes to see no reason why it should accede to KET's view and make its equipment available, we concluded in our prior decision that the IRS' insistence that KET furnish CDC 3500 equipment to support the test was inconsistent with the Government's statutory duty to seek maximum competition. We note, in this regard, that KET is only saying that the IRS is requiring that a test be performed using specific supporting test apparatus (*i.e.*, a Control Data 3500 system) which due to limited availability is readily available only at the IRS.

We do not believe, however, that KET can complain without showing that it was in fact unable to perform the benchmark as provided in the solicitation. CSI apparently used facilities at Walter Reed Medical Center to run its benchmark. KET has not shown that it could not have made similar arrangements, as it eventually did in connection with the cited earlier case.

6. Other Issues

Control Data complains that the delivery schedule was relaxed for CSI's benefit and that the IRS improperly failed to take into account overlapping equipment rental in computing expected costs for CSI's all-or-none alternative proposal.

Regarding overlapping costs, we have indicated generally that costs relating to conversion from an incumbent

contractor's system to a new contractor's system must be identified in the RFP evaluation criteria if they are to be considered. Informatics, Inc., B-194734, August 22, 1979, 79-2 CPD 144; Computer Data System, Inc., B-187892, June 2, 1977, 77-1 CPD 384. Since such costs were not identified here, this portion of Control Data's protest is denied.

With respect to the relaxed delivery schedule, Control Data says that had it known that the schedule would be relaxed, it could have offered significantly lower pricing.

The IRS responds by stating that apart from an inadvertent error in preparing the original CSI contract documents -- which the IRS says would have been corrected had it not been overtaken by events after award -- the changes made arose as matters of contract administration which should not be considered by our Office. The IRS attributes slippage in the delivery schedule to the need for site preparation (such as installation of electrical wiring) and to a need to accommodate post-award changes by CSI in the physical (including electrical) configuration of its equipment.

Our examination of the record indicates that the problem of schedule slippage concerns primarily the disk and tape equipment. In this respect, however, the record fails to support Control Data's contention that the IRS actually knew or should have known before making award to CSI that the schedule for installation of the tape and disk equipment would slip. It has not been shown, therefore, that the IRS relaxed its schedule requirement in making award to CSI or made award with the intention of altering the schedule. A & J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 40.

As stated earlier, the protests are denied in part and dismissed in part.



Acting Comptroller General
of the United States