

DECISION

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

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FILE: B-209938

DATE: September 2, 1983

MATTER OF: CMI Corporation

DIGEST:

1. Agency's requests for three best and final offers did not automatically establish an auction situation since the multiple best and final offers were required by the receipt of contingent offers and the agency's determination that several solicitation requirements, which were inhibiting the competition, were not essential to its minimum needs.
2. Where a solicitation reserved to the agency the right to delay delivery without cost for a specified period of time, best and final offer which included a prompt delivery discount was properly evaluated without consideration of the discount since at that time delays in delivery appeared probable.
3. Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable.

CMI Corporation protests the request for a third round of best and final offers by the United States Marine Corps under request for proposals (RFP) No. M00027-82-R-0030 and the subsequent award of a contract to IBM Corporation. The Marine Corps made its award after receipt and evaluation of the third best and final offers. The RFP solicited offers to provide three systems of IBM computer equipment to be installed in mobile vans and deployed to provide mission support in combat environments. CMI contends the agency conducted an auction by repeatedly requesting subsequent rounds of best and final offers after revising the specifications to accommodate the conditions insisted upon by IBM

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so as to permit IBM's previously unresponsive proposals to become acceptable. CMI asserts these actions exhibit bias in favor of IBM and bad faith by the agency.

The protest is denied.

There are several RFP provisions at issue here, among them being the provision for liquidated damages, the delivery schedule, the requirement for certain manuals and certain maintenance provisions.

As originally conceived, the liquidated damages provision was to apply for late delivery of each component (about 26 in each system) as well as to each system itself, bringing potential liquidated damages to \$14,000 per day or a potential expense in excess of three times the contract value. As discussed below, IBM took exception to this liability.

The solicitation also contained fixed delivery dates for each system. However, since systems 2 and 3 are to be delivered to a "van integration" contractor as Government Furnished Equipment, the solicitation contained a clause that permitted the Government to delay the delivery for these systems for a period of up to 120 days provided certain notice requirements were met. At the time of receipt of the third round of best and final offers, the "van integration" contract had not been awarded so that a delay in the need for the computer equipment was foreseeable.

Four firms responded to a synopsis for the requirement that appeared in the Commerce Business Daily, but only IBM and CMI submitted proposals on June 10, 1982. Each offered the required IBM equipment and each was found to be technically acceptable with respect to the hardware. Each proposal, however, contained exceptions, contingencies and requests for revisions. After discussions with each offeror, the specifications were amended in minor respects and the offerors were requested to submit best and final offers by August 20.

IBM's best and final offer contended that the solicitation provision imposing liquidated damages of \$1,000 per day for late system delivery plus \$500 per day for late delivery of each component or item of software was punitive because it could amount to \$14,000 per day and reflected a

potential risk exposure of 3.5 times the contract price. IBM asked that the liquidated damages be limited to a total of \$1,000 per day. IBM also added a separate one time surcharge for accepting the \$1,000 per day liquidated damage provision, and additional surcharges to cover its potential liability arising from a solicitation provision requiring the contractor to extend on a day for day basis the 90-day component maintenance period and the 365-day central processor maintenance period whenever a component or the processor was inoperative for 8 consecutive hours or more than 10 hours in a 24-hour period.

CMI's first best and final offer took no exception to the liquidated damages provision but did not include a required configuration cost table and a specific list of manuals. CMI also offered a "prompt delivery discount" of \$63,157 each from the price of systems 2 and 3 if the agency accepted them on schedule without exercising its right under the provision to delay delivery for the maximum 120 day period. IBM's price, including its proposed surcharges, was lower than that of CMI whether or not CMI's proposed prompt delivery discount was considered.

The agency states that it was uncertain whether IBM's proposed liquidated damage provision was a condition and whether CMI understood that the provision could result in liquidated damages of \$14,000 per day. The agency reassessed its position and although there was some disagreement within the agency, it issued an amendment limiting the liquidated damages to \$1,000 per day.

A second round of best and final offers was received on August 27. Among other things, IBM again proposed the surcharges mentioned above and took exception to a provision requiring equipment replacement and repair under certain conditions. CMI's best and final offer took no exceptions but it contained an unpriced configuration cost table and again stated that all manuals normally furnished by IBM would be furnished. CMI's prompt delivery discount was increased to \$68,421 each for systems 2 and 3.

On September 29, the contracting officer recommended to the agency's contracts review board that award be made to IBM whose evaluated price was lower than that of CMI. This was so even though full consideration was given to CMI's prompt delivery discount and IBM's price included

the surcharges which were evaluated at the maximum of 12 months because the agency could not determine whether these charges were meant to apply only during the 90-day period or the 1-year period. The review board rejected this recommendation because it felt that substantial agreement had not been reached and it ordered that the negotiations be reopened. The contracting officer, however, then recommended that award be made to CMI on grounds that IBM's proposal was unacceptable because of its insistence on major changes while CMI's failure to provide the cost table and list of manuals was insignificant. This recommendation was also rejected and the review board again ordered that negotiations be reopened with both parties.

The contracting officer then issued an amendment on November 16 to supersede all previous amendments. This amendment listed the required manuals, eliminated the cost table requirement and retained the liquidated damages provision, maintenance response time and downtime credit provisions as previously modified and called for a third round of best and final offers by 2:00 pm, November 23.

CMI and IBM submitted their offers on time and IBM's total price including surcharges for liquidated damages, maintenance response and downtime was \$1,968,966. The specific amount of each of the surcharges was restricted from disclosure by IBM and the agency denied CMI's request for this information under the Freedom of Information Act. This information has, however, been provided to our Office and has been reviewed in connection with this decision.

CMI's offer was:

Hardware & Transportation	\$2,189,474
Less: Prompt Delivery Discount	<u>136,842</u>
	\$2,052,632
Prompt Payment Discount (5%)	<u>102,632</u>
Total	\$1,950,000

The contracting officer recommended that award be made to CMI as the offeror with the lowest price. The review board, however, rejected this recommendation because CMI's price would be low only if the prompt delivery discount could be taken and the agency's ability to take advantage of this discount was speculative. The board recognized that the prompt delivery discount had been evaluated in

CMI's previous best and final offers but pointed out that CMI's price had not been low even when the discount was considered.

CMI's offer was therefore evaluated by disregarding the prompt delivery discount. The prompt payment discount was then applied to the base price for hardware and transportation with the following result:

Hardware & Transportation	\$2,189,474
Less: Prompt Payment Discount (5%)	109,474
Total	<u>\$2,080,000</u>

Award was made to IBM at an evaluated price of \$1,968,005, which was \$961 less than IBM's last offer because a portion of the surcharges were postponed until FY 84.

With respect to CMI's allegations of bad faith, bias and arbitrary action by the agency, we point out that a showing of bad faith requires undeniable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. Bradford National Corporation, B-194789, March 10, 1980, 80-1 CPD 183. Further, we will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260. Thus, even if it is assumed that the agency had a bias against CMI, it must be shown that it was translated into action which affected CMI's competitive position. See Optimum Systems, Inc., 56 Comp. Gen. 934 (1977), 77-2 CPD 165; Earth Environmental Consultants, Inc., B-204866, January 19, 1982, 82-1 CPD 43.

In our view, CMI has not submitted evidence meeting the heavy burden of proof imposed on any party alleging bad faith, bias or arbitrary action by an agency. CMI's allegations are based primarily on the fact that the agency requested three rounds of best and final offers and the agency's relaxation of the specifications which CMI views as unwarranted compromises of the agency's minimum needs in order to accommodate IBM. The record, however, supports the agency's explanation that the multiple best and final offers were required by its failure to receive unconditional offers until the receipt of the third best and final offers and its realization that some solicitation provisions which were inhibiting competition were not

vital to its needs. The fact that IBM might have benefited more than CMI by these actions is irrelevant because there is no evidence that they were taken for any reason other than to promote competition by restating the agency's minimum needs more accurately. International Computaprint Corporation, B-207466, November 15, 1982, 82-2 CPD 440.

The factual situation presented here also does not show that an auction, within the meaning of Defense Acquisition Regulation (DAR) § 3-805.3(c), has taken place. Multiple calls for best and final offers do not automatically create an auction. See Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

Further, we do not agree with CMI's contention that after having evaluated the prompt delivery discount in all of CMI's previous offers without objection, the agency should have given CMI an opportunity to bid on the agency's "real delivery requirements" after the third best and final offers. Perhaps, the agency should have earlier predicted the probability of a delay in its needs for the equipment due to the slippage in the van integration schedule but, at the time of the final evaluations, the agency had no reasonable grounds for believing that this discount could be taken. From the record it appears that CMI was aware of the delay of the van integration procurement and it should have been aware that the discount might not be evaluated. Clearly there was no need for additional best and final offers based on the real delivery requirements because CMI's offer provided a price if the discount could be taken and another price if delays made taking advantage of the discount unrealistic.

CMI also argues that the agency could have accepted, stored and shipped the systems at a cost substantially below the savings it would have obtained if it had accepted the equipment on schedule and taken the discount. We do not agree. Consideration of CMI's prompt delivery discount would have required the agency to change its plans, locate appropriate storage and transportation, determine the attendant costs and evaluate the risks. Thus, at the time of the evaluation, the net savings to be obtained by taking the discount and the ultimate cost and risk to the Government were uncertain. In our view, the Government was not required to assume these risks.

CMI also contends that the agency had no reasonable basis for its belief that CMI may not have understood the extent of the liquidated damages provision and suspects that the agency contrived this reason as additional support for relaxing the provision to meet IBM's objections.

After IBM's objections, the using agency prepared an analysis of the initial liquidated damage clause and concluded that it was reasonable in view of the damages which could be anticipated if delivery of the equipment was delayed. Nevertheless, the contracting officer decreased the maximum liquidated damages exposure to \$1,000 per day, believing that the \$14,000 per day in damages would be viewed as an unenforceable penalty under DAR § 1-310.

We believe that the agency had ample grounds for revising this provision in spite of the analysis and regardless of whether CMI understood it. The analysis assumed complete inactivity on the part of all personnel to be assigned to the systems if the systems were delayed and that all components and items of software would result in equal damages to the Government if any of them were delivered late. The analysis contains no indication as to what the agency could do to mitigate its damages in case of late delivery. Moreover, the initial provision presented a total risk exposure which would exceed the contract price by 3.5 times and may therefore have been unenforceable. See 11 Comp. Gen. 384 (1932); Allis-Chalmers Manufacturing Company, IBCA No. 796-8-69, 70-1 BCA 8279.

We also find no basis to support CMI's speculation that the IBM surcharges may have been evaluated improperly. CMI contends that a correct evaluation would have resulted in IBM's price being \$93,852.20 higher than CMI's price if CMI's prompt delivery discount had been included. However, as our discussion indicates, it was proper for the agency not to evaluate the prompt delivery discount and the record shows that the surcharges in IBM's best and final offer were calculated correctly.

The protest is denied.

for *Harry D. Van Cleave*
Comptroller General
of the United States