

30732

PLI

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20543

FILE: B-216386 **DATE:** March 20, 1985

MATTER OF: AT&T Information Systems, Inc.

DIGEST:

1. When proposal indicates that offered price does not include mandatory technical requirement for interfacing communications system to government-furnished generators for emergency use, offeror has not proposed "fixed" or "finitely determinable" price as required by RFP. Award based on such a proposal is therefore improper.
2. GAO will not consider a protest alleging that the successful offeror cannot meet an installation requirement, since this is a matter of responsibility. The only exceptions are when there is a showing of possible fraud or bad faith on the part of the contracting officer or a failure to meet definitive responsibility criteria.
3. GAO will deny a protest alleging noncompliance with mandatory technical requirements when in camera review of successful technical proposal indicates that awardee proposed to meet the requirements and that the agency properly evaluated the proposal.
4. Agency's failure to require a demonstration of the awardee's communications system, even though such a demonstration may have been contemplated by the solicitation, does not prejudice the protester or violate any law or regulation where (1) the agency's review of the successful technical proposal indicates compliance with technical requirements and (2) the scope, method and purpose of the demonstration were not stated in the solicitation.
5. GAO will deny a protest alleging that the protester's proposal was wrongfully downgraded in three areas where in camera review of the evaluators' worksheets supports the point scores awarded to the protester.

03/525

6. GAO will deny a protest alleging that the agency wrongfully shifted a price proposed by protester from "month 1" to "month 0" for purpose of determining present value where the protester would not be successful even if its price were evaluated as originally proposed.
7. Although GAO will sustain a protest against award of a communications system because the awardee's price failed to include one RFP requirement, it will not recommend corrective action when (1) other grounds of protest are not meritorious, (2) record does not show that the price impact of compliance would be significant enough to change relative standing of offerors, and (3) system has been purchased and installed.

AT&T Information Systems, Inc. protests the award of a contract for the acquisition and maintenance of private automatic branch exchange (PABX) communications systems for six Internal Revenue Service (IRS) service centers. The request for proposals (RFP), No. 83-193, specifically noted the possibility of separate awards for each service center.

We sustain the protest in part and deny the remainder.

Six firms, including AT&T and Universal Communication Systems, Inc., submitted proposals by February 24, 1984, the closing date for receipt of proposals. The evaluation scheme set forth in the RFP further indicated that a maximum of 30 points were available for the technical capabilities, while 70 points were assigned to price; for the latter, the low offeror for each service center was to receive the full 70 points and each higher offeror was to receive a weighted score equal to its offered price divided by the low price, then multiplied by 70.

After initial technical evaluation, three offerors were found to meet all mandatory technical requirements and were included in the competitive range. After IRS evaluators made site visits to these three, the final technical evaluation was completed on May 15, 1984. AT&T received a significantly higher technical score than Universal. Best and final price proposals were submitted by July 3, 1984, and Universal's purchase plan (lease and lease-to-purchase

plans had also been sought) was evaluated as the lowest priced for each service center. When the cost and technical scores were combined in accord with the RFP, Universal received the highest score for each service center. Consequently, IRS awarded the protested contract to it on September 5, 1984.

AT&T protests on seven different grounds, alleging that (1) Universal cannot meet a 120-day cutover requirement to start up the PABX system; (2) Universal cannot meet various mandatory technical requirements; (3) IRS failed to conduct a product demonstration or benchmark of Universal's system as required by the RFP; (4) IRS conducted a faulty present value analysis in evaluating the purchase option in AT&T's price proposal; (5) IRS may have disregarded or failed to correct an error in AT&T's price proposal that had been brought to its attention; (6) IRS wrongfully downgraded AT&T's technical proposal in a number of areas; and (7) Universal's price did not include an amount for interfacing government-provided generators for use in emergencies and thus was evaluated too low.

We sustain the protest on the last ground because, by failing to include an amount for this mandatory technical requirement, Universal also failed to comply with the RFP requirement for a fixed or finitely determinable price.

Paragraph F.10.1 of the RFP states that the "contractor shall provide the requirements for interfacing government-provided generators for use as a direct source of emergency back-up power." In its technical proposal, Universal responded as follows to this requirement:

"F.10.1 - Emergency Generator Back-up Power - [Universal] understands and will comply. Based on the unknown lead requirements of these generators, [Universal] would reserve pricing prior to contract signing."

However, special provision E.3.2.1 of the RFP states:

"To be considered acceptable under the solicitation, offerors must offer fixed prices for the initial contract period for the initial system or items being procured. Fixed prices, or prices which can be finitely determined, must be quoted

for each separate option period and must remain in effect throughout that period. Where optional quantities are offered, prices must be fixed or finitely determinable."

We have held that this clause requires offerors to propose "fixed" or "finitely determinable" prices for all services to be provided under the entire initial contract and evaluated option periods. See, e.g., PRC Information Sciences Co., 56 Comp. Gen. 768, 781 (1977), 77-2 CPD ¶ 11; Burroughs Corp., 56 Comp. Gen. 142, 150 (1976), 76-2 CPD ¶ 472; Computer Machinery Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358, aff'd sub nom C3, Inc., B-185592, Aug. 5, 1976, 76-2 CPD ¶ 128, in which our Office found offerors' failures to propose fixed prices under substantially identical fixed price clauses unacceptable. Cf. American Telephone & Telegraph Co., 60 Comp. Gen. 654 (1981), 81-2 CPD ¶ 157 (tariffed carrier, offering rates that are subject to change, cannot be considered for award of a fixed-price contract).

Our in camera review of the record reveals that at least one IRS technical evaluator noted that this exception by Universal was unacceptable and that this service was required to be included in Universal's fixed price. However, IRS confirms that this discrepancy was neither discussed with Universal nor resolved before award.

Under these circumstances, we cannot conclude that Universal's contract price includes compliance with the emergency power requirements. In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and not form the basis for award. Federal Data Corp., 60 Comp. Gen. 584, 589 (1981), 81-2 CPD ¶ 28; Computer Machinery Corp., 55 Comp. Gen. supra at 1154. We do not believe that Universal has offered a "fixed" or "finitely determinable" price for all services covered by the RFP.

We therefore sustain the protest on this ground. However, for the reasons indicated below, we deny the remainder of AT&T's protest.

First, AT&T's allegation that Universal cannot meet the 120-day installation requirement is a matter of

responsibility. This Office will not review an affirmative determination of responsibility where, as here, possible fraud or bad faith by the contracting officer has not been shown and no allegation has been made that definitive responsibility criteria have not been applied. Ikard Manufacturing Co., 63 Comp. Gen. 239, 240 (1984), 84-1 CPD ¶ 266 at 2-3.

Next, AT&T protests that Universal's system cannot meet mandatory technical requirements for (1) transmitting and switching data in a digital format at specified rates; (2) direct data access at a specified internal transmission speed; (3) direct interface with automated office and electronic mail equipment; (4) modem pooling common use modems; and (5) hourly station usage data.

We have reviewed Universal's technical proposal and the IRS technical evaluation. We find that Universal proposed to meet all of these technical requirements, and IRS found that the system did comply with them. In the absence of specific evidence that Universal's system does not meet the mandatory technical requirements, we deny AT&T's protest on this point. See Rack Engineering Co., B-214988, Sept. 10, 1984, 84-2 CPD ¶ 272.

AT&T asserts that if IRS had required Universal to demonstrate its system, as indicated in the RFP, Universal's inability to meet the above requirements would have been apparent. However, the only place that the RFP indicated that such a demonstration was contemplated was IRS's response to a preproposal conference question, set out in amendment 4 of the RFP:

". . . is it anticipated that IRS will require a product demonstration [of] an existing installed system? If so, what will be the scope of the required demonstration, and when? In competitive government procurements of this size and nature, this is a normal procedure.

"A. Yes, product demonstration will be required. Times and dates shall be coordinated with the various vendors prior to contract award."

IRS admits that Universal did not completely demonstrate its system, but argues that this failure resulted in Universal's receiving a lower score under the evaluation criterion for "capacity and capability of vendor's equipment." AT&T, on the other hand, received a higher score for this criterion, in part because its system was more completely demonstrated. In any case, as noted above, IRS states that it was satisfied from its technical evaluation that Universal's system met RFP requirements.

Although we agree that the RFP contemplated some sort of performance demonstration or benchmark, neither the scope and method to be employed nor the purpose of the demonstration was stated. We have held that the primary purpose of a benchmark is to show whether an offeror's equipment is capable of performing the desired functions, not to substitute for the contents of a technical proposal. See Lanier Business Products, Inc., B-205934, Jan. 30, 1982, 82-1 CPD ¶ 625 at 5; Informatics, Inc., B-194926, July 2, 1980, 80-2 CPD ¶ 8 at 8.

As discussed above, we cannot disagree with IRS's determination that Universal's technical proposal showed that the system met RFP requirements. Consequently, since the establishment of tests and the determination of product acceptability are within the ambit of the expertise of cognizant agency personnel, we cannot find that AT&T was prejudiced by IRS's failure to require a more complete demonstration of Universal's system or that this failure violated any law or regulation. Rack Engineering Co., B-214988, *supra*; Andrews Tool Company, B-214344, July 24, 1984, 84-2 CPD ¶ 101.

AT&T protests the technical evaluation of its own proposal in three areas. AT&T states that its technical proposal was wrongfully downgraded (1) for its training programs; (2) because of an alleged lack of detailed information concerning the expansion capabilities of its "modem pool"; and (3) because of an alleged lack of detailed information on the simplicity of making moves and changes.

In reviewing these contentions, we have examined the individual evaluators' worksheets that formed the basis for offerors' final technical scores. Our review indicates that

AT&T received the maximum points allocated to training and the expansion capabilities of the "modem pool." It is true that the IRS evaluation summary mentions the "modem pool" details as a negative factor; however, this statement is apparently erroneous. The primary reason for AT&T's loss of points on this criterion relates to the expansion capability of its "protocol converter." This deficiency was also noted in the IRS evaluation summary, but AT&T did not comment on it in the protest. Also, we cannot say that IRS's exercise of administrative discretion in the relatively minor deduction of points for an alleged lack of details on the simplicity of making moves and changes was arbitrary or capricious or that AT&T was prejudiced by the evaluation. See Litton Systems, Inc., Electron Tube Division, B-215106, Sept. 18, 1984, 84-2 CPD ¶ 316. In this regard, Universal was unanimously and more severely downgraded for this same subcriterion. Consequently, we deny AT&T's protest on this point.

With regard to AT&T's contention that an arithmetic error that it made in totaling its proposed price may not have been taken into account in evaluating its proposal, the record shows that IRS evaluated AT&T's corrected price. This basis of protest therefore is without merit.

AT&T also protests that IRS used a faulty present value analysis in evaluating its proposed purchase option. The RFP stated that prices would be evaluated according to the present value discount factors identified in a matrix in the RFP, based on when payments were due. This means that the present value of payments made after the beginning of the contract was to be evaluated as a percentage of the proposed price.

AT&T, in its purchase option proposal, priced equipment in "month 1"; the other offerors priced the same items in "month 0." IRS states that since the RFP required such charges to be proposed for "month 0," it transferred AT&T's "month 1" prices for the purchased equipment to "month 0" for evaluation purposes, thus permitting offerors to be evaluated on a common basis. We find, however, that the RFP does not clearly require this pricing structure. "Month 0" charges are to be evaluated at the full price proposed, while "month 1" charges are multiplied by the present value factor .992089.

IRS's calculations, which we have reviewed, show that even if AT&T's price for equipment were evaluated using the .992089 present value factor, it still would not be reduced enough to change the relative ranking of AT&T and Universal for any service center. Therefore, even assuming that IRS incorrectly adjusted AT&T's price in its present value analysis, AT&T would not have been in line for award, and we also deny its protest on this point. See Canon U.S.A., Inc., B-213554, Aug. 20, 1984, 84-2 CPD ¶ 195 at 8.

Although we have sustained AT&T's protest on one ground, we do not believe that it would be in the government's best interest to recommend either termination of Universal's contract or nonexercise of the maintenance options. AT&T's final point scores were significantly lower than Universal's on four of the six service centers, even taking into account the present value of AT&T's purchase price as it was proposed. AT&T's final point score is close, but still not high on the remaining two service centers, also taking into account AT&T's proposed present value. From the record before us, we cannot determine the price impact of Universal's failure to price the requirement for interfacing with government-furnished generators for emergency backup power and we cannot conclude that it was significant enough to have allowed AT&T to become the successful offeror for any service center. In this regard, AT&T has made no allegations as to the potential price impact of this item.

Moreover, IRS has purchased the Universal PABX system, and termination of the contract would undoubtedly be extremely costly. Also, the RFP clearly contemplated that maintenance would be performed by the firm from which the government acquired the PABX system.

Under the circumstances, we cannot make any recommendation for corrective action. However, we are advising the Commissioner, by separate letter, that in negotiating and awarding fixed-price contracts in the future, IRS should take action to assure that all mandatory requirements are included and priced.

The remainder of the protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel