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

FILE: B-218266 **DATE:** May 31, 1985

MATTER OF: Computer Data Systems, Inc.

DIGEST:

1. An agency's erroneous evaluation of the awardee's best and final cost proposal as low, and subsequent deletion of a material solicitation requirement from the awardee's contract without reopening negotiations and requesting a new round of best and finals based on the agency's actual needs, were actions that tainted the procurement and unreasonably excluded the protester from any chance to receive the award. However, given the present extent of contract performance, GAO does not believe that a recommendation for corrective action is appropriate in this situation.

2. Under GAO's Bid Protest Regulations, implementing specific provisions of the Competition in Contracting Act of 1984, the costs of filing and pursuing a protest, including attorney's fees, may be allowed where the agency has unreasonably excluded a protester from the procurement, and GAO recommends other than that the protester be awarded the contract. The recovery of bid and proposal preparation costs may also be allowed where the agency has unreasonably excluded the protester and where no other remedy enumerated in GAO's regulations is appropriate.

Computer Data Systems, Inc. (CDSI), protests the award of a contract to Peat, Marwick, Mitchell & Company (Peat Marwick) under request for proposals (RFP) No. ASCS-15-R-84DC, issued by the Department of Agriculture. The procurement is for the acquisition of an accounting, budgeting, and financial management computer system, including software maintenance services. CDSI complains that the award to Peat Marwick was improper because the agency erroneously evaluated Peat Marwick's cost proposal. We sustain the protest.

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Background

After the evaluation of initial proposals, Peat Marwick and CDSI were the only offerors included in the competitive range. Discussions were held with both offerors, and both were requested to submit a best and final offer. Under the evaluation scheme set forth in the RFP, technical and cost proposals were of equal importance. Because Peat Marwick's best and final technical proposal was rated as technically superior to CDSI's (278 versus 232 technical points), and because its total best and final proposed cost was evaluated as only slightly higher than CDSI's ($549,833 versus $544,577), Peat Marwick was awarded the contract on December 5, 1984. The protest was filed on March 1, 1985, after CDSI was debriefed by the agency, and learned at that time of its basis of protest. Therefore, since the protest was not filed within 10 days of the date of the contract award, there was no requirement for the contracting officer to suspend further contract performance pending our resolution of the protest. See GAO Bid Protest Regulations, 4 C.F.R. § 21.4(b) (1985), which implement section 2741(a) of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1199 (to be codified at 31 U.S.C. § 3553(d)(1)).

In its administrative report on the protest, the agency admits that it erroneously evaluated Peat Marwick's cost proposal. Clause H.4 of the RFP, as amended, required offerors to provide all maintenance service for delivered software. Offerors were advised that the agency would evaluate all known or projected costs, including maintenance costs, on the basis of the total system life of 6 years. Peat Marwick's proposed maintenance costs (in its best and final offer) were $50,000 per year. The agency mistakenly evaluated the firm's proposed software maintenance costs for only 1 year, rather than for 6 years, which would have added an additional $250,000 to Peat Marwick's total proposed cost.

Although recognizing that an error was made, the agency contends that the award to Peat Marwick should be allowed to stand. The agency states that the contract is now about 28 percent complete and asserts that termination of the contract, therefore, would not be in the government's best interest. Furthermore, the agency states that, at the time of award, the contracting officer decided not to include software maintenance in

Peat Marwick's contract because he determined that the firm's maintenance plan exceeded the agency's minimum needs. The agency asserts that the effect of the erroneous evaluation in thus mitigated. In this regard, the agency also contends that CDSI's proposed maintenance plan itself may be unacceptable as it apparently did not address all aspects of the required software maintenance. Therefore, the agency believes that termination of Peat Marwick's contract for the convenience of the government and a new award to CDSI are not appropriate.

CDSI strenuously contends that it is entitled to the award under the agency's evaluation scheme. Moreover, the firm asserts that its proposal is acceptable and disputes the agency's contention that it failed to provide for all aspects of the required software maintenance.

Analysis

It is clear that CDSI's evaluated proposed costs would have been substantially lower than Peat Marwick's but for the agency's failure to evaluate Peat Marwick's proposed maintenance costs on a total system life basis. In fact, correctly evaluated, Peat Marwick's total proposed cost is approximately 45 percent higher than CDSI's. The agency does not contend, and we do not believe, that this significant cost differential would have been offset by Peat Marwick's superior technical score (on the order of 20 percent) so as to permit the firm's selection for award under the evaluation scheme, since Peat Marwick's proposal would not have remained more advantageous to the government in terms of its technical/cost relationship. See Medical Services Consultants, Inc.; MSH Development Services, Inc., B-203998 et al., May 25, 1982, 82-1 CPD ¶ 493.

Further, we do not accept the agency's assertion that the erroneous cost evaluation of Peat Marwick's proposed software maintenance plan is now of no consequence. It appears from the record that the maintenance offers were evaluated as part of the technical proposals. In this regard, we note that Peat Marwick's technical score increased upon reevaluation while CDSI's score decreased. (Initially, CDSI's score was higher than Peat Marwick's. The agency explains that the change was due to revisions of the firms' budget software proposals.) Since the agency required maintenance services for the budget software portion of the total acquisition as well, it is likely that the change in technical scoring was, to

some extent, based upon the offerors' different approaches in providing those services.

Therefore, we must conclude that Peat Marwick's technical proposal was rated superior to CDSI's in part because of the apparent merit of Peat Marwick's proposed overall maintenance plan. Because the contracting officer subsequently determined that Peat Marwick's maintenance plan exceeded the agency's minimum needs by emphasizing additional software development and not routine maintenance and error correction, the superior technical rating given the firm's proposal after the evaluation of best and final offers is no longer applicable.

Concomitantly, because the agency now believes that CDSI's offered maintenance plan was deficient in the area of budget software, the specific technical rating given to CDSI's proposal is likewise inapplicable. Since neither best and final proposal fully met its maintenance needs, the agency should have reopened negotiations and requested a new round of best and finals, based either on its original requirements or the deletion of the software maintenance from those requirements, depending on its actual needs. See the Federal Acquisition Regulation, 48 C.F.R. § 15.611(c) (1984). The agency's failure to do so means that the original evaluation process was fundamentally flawed, as it cannot now be determined with any reasonable degree of certainty which offer was in fact more advantageous from a technical/cost standpoint.

In this connection, we note that the agency apparently still requires basic software maintenance, as it has stated that it can always obtain the maintenance from Peat Marwick at the price of $50,000 per year offered in the firm's initial proposal. Even if the software maintenance requirement were properly deleted, however, CDSI's best and final cost proposal without maintenance ($495,827) would only be 0.6 percent higher than the not-to-exceed amount ($492,833) of Peat Marwick's contract, and, in our view, there is now a question of Peat Marwick's technical superiority in the absence of its maintenance offer.

Because a substantial portion of the contract has already been performed, we do not believe that a recommendation for corrective action in the form of

reopening negotiations would be appropriate at this point. See GAO Bid Protest Regulations, 4 C.F.R. § 21.6(b). Instead, we are recommending to the Secretary of Agriculture by separate letter of today that CDSI be allowed to recover its costs of filing and pursuing the protest, including attorney's fees, and also its proposal preparation costs. Our regulations, implementing the CICA, provide that the costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. The recovery of costs for bid and proposal preparation may be allowed where the protester has been unreasonably excluded and where other remedies as enumerated in our regulations are not appropriate. See 4 C.F.R. § 21.6(d)-(e).

In our view, the agency's erroneous evaluation of Peat Marwick's cost proposal, followed by the deletion of the software maintenance requirement from Peat Marwick's contract without reopening negotiations, were actions that tainted the procurement and unreasonably excluded CDSI from any chance of receiving the award. Hence, the firm should be allowed to recover its costs of filing and pursuing the protest, including attorney's fees, since, given the circumstances of this case, we have not recommended that the firm be awarded the contract. Furthermore, as any other corrective action is not appropriate, the firm may also be allowed recovery of its proposal preparation costs.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States