



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tandem Computers, Inc.--Request for Reconsideration
File: B-221333.2, B-221333.3, B-221333.4
Date: September 18, 1986

DIGEST

1. A supplier to a government contractor that did not actively participate during the consideration of the original protest is not entitled to request reconsideration of a decision recommending termination where the prime contract is found to have been improperly awarded.
2. Request for reconsideration is denied where requesting party does not demonstrate an error of law or fact in original decision, but rather, reargues issues that have been previously considered.
3. Previous recommendation that agency terminate a contract is modified to allow postponement of termination pending results of reprocurement where the agency will place no orders against the contract until the reprocurement is completed, at which time it will terminate the contract if award can be made at lower price.

DECISION

The Naval Supply Systems Command, Federal Computer Corporation, and International Business Machines Corporation (IBM) request reconsideration of our decision in Tandem Computers, Inc., B-221333, Apr. 14, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 362. In that decision, we sustained Tandem's protest after finding that the Navy, in evaluating offers received in response to request for proposals (RFP) No. N00189-85-R-0379, ignored several salient characteristics of Tandem's brand name products in awarding a contract to Federal Computer. The award to Federal Computer was based on a proposal to furnish IBM PC and PC/XT microcomputers. The Navy accepts our conclusion but requests that we reconsider our recommendation that it terminate the contract awarded to Federal Computer. IBM and Federal Computer seek reconsideration of the decision.

We modify our recommendation as requested by the Navy.

First, we dismiss IBM's request because that firm is not eligible to seek reconsideration. Our Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1986), permit the protester and "any interested party who participated in the protest" to request reconsideration. IBM, although it contended it "filed as an interested party" during our initial consideration of the protest, did not submit its views or otherwise actively participate in the protest. In promulgating section 21.12 of our regulations, we intended to limit those who could request reconsideration of a protest decision to parties who had sufficient interest in the matter, and who had engaged in the effort necessary to reasonably participate in the protest process before a decision was reached, thus minimizing the possible disruption to the procurement process that could arise from a decision on reconsideration. See Small Business Administration--Aunyx Mfg. Corp.--Reconsideration, B-208002.3, Dec. 7, 1982, 82-2 CPD ¶ 510. Accordingly, we have held that where a party is on notice of a protest, but does not participate in the protest by filing comments, that party may not request reconsideration. See DLI Engineering Corp.--Reconsideration, 65 Comp. Gen. 34 (1985), 85-2 CPD ¶ 648. Accordingly, IBM's request is dismissed.

Federal Computer's request for reconsideration is denied because it has merely reiterated arguments presented earlier and has not identified any error of law or mistake of fact that would warrant reversal of our decision. Cardkey Systems--Request for Reconsideration, B-220668.2, Mar. 12, 1986, 86-1 CPD ¶ 243.

As indicated in our decision, the RFP called for an indefinite quantity of hardware, software and related services to be provided over a 3-year period from the date of award. The procurement was to be conducted on a brand name or equal basis; the principal hardware items to be furnished were display terminals, identified as Tandem Model 6530, or equal; workstations, identified as Tandem Model 6546, or equal; and cluster concentrators, identified as Tandem 6820, or equal. Relying on this, Tandem offered its brand name products. Federal Computer did not, instead substituting IBM PCs and IBM PC/XTs and Tandem 6600 cluster controllers. The Navy selected Federal Computer because its price was well below that of the brand name products. Tandem protested that the products offered did not have features identified in the RFP as salient characteristics of the brand name products.

We agreed with the protester. We found that while the solicitation required that workstations have 16 programmable function keys, as well as 10 IBM PC compatible function keys, the IBM equipment had only the latter. We also found that

the IBM equipment did not have an adjustable keyclick identified in the RFP as a salient characteristic. Further, we found that Federal Computer's proposal did not conform to the RFP cluster concentrator communications requirement because it would not use the Tandem 6530 line protocol to communicate with Navy mainframe computers. Recognizing that the Navy's acceptance of Federal Computer's proposal showed that its actual needs could be met with the less expensive equipment offered by Federal Computer, we concluded that the Navy, in accepting Federal Computer's offer, relaxed requirements that it had overstated in the solicitation. We held that the protester was prejudiced by the Navy's action because it was induced to incur the cost of preparing an offer for equipment the Navy had sought, but did not actually need.

Federal Computer argues that we have adopted "an extremely narrow reading" of the RFP requirements. That firm supports its request for reconsideration with a lengthy argument that our conclusions regarding its compliance with the function key and protocol requirements were incorrect. Federal Computer insists, as it did earlier, that the IBM PC meets the RFP requirement because its 10 function keys are programmable and can perform up to 40 functions. The firm also continues to maintain that the RFP cluster concentrator communications requirement is adequately met by the 6600 cluster controller because that equipment supports communications between the controller and workstations using the Tandem 6530 protocol. Both arguments were considered at the time of our original decision, but were rejected because we concluded the RFP required 16 distinct function keys, as well as the 10 PC keys, and a 6530 data stream between mainframe equipment and the concentrator controllers. While Federal Computer now seeks to blur the distinctions drawn in our decision by arguing that the 6600 cluster concentrator fully supports mainframe-to-controller communications, the firm concedes that this is accomplished "in a manner different from the Tandem 6820," that is, as noted in our prior decision, through the use of an IBM SNA rather than the Tandem 6530 protocol.

Federal Computer further contends that we erred by ignoring the absence of prejudice to Tandem, which Federal Computer defines as including only prejudice to Tandem's competitive position vis-a-vis its competitors. We rejected this argument during our initial consideration of the protest, concluding that prejudice is established where it is shown that an offeror was induced by the terms of the RFP to incur the cost of submitting a proposal where it might well have chosen not to do so had it known that less expensive equipment, which it did not then manufacturer, could meet the

agency's actual needs. Federal Computer is still simply disagreeing with our conclusion; it has not shown that the conclusion is incorrect or inappropriate.

Finally, Federal Computer asserts that we accepted without critical inquiry Tandem's contention that there are many manufacturers who offer less expensive units that are functionally similar to the IBM PC equipment that Federal Computer offered. According to Federal Computer, the task of linking IBM PCs to the Navy's existing Tandem equipment is complex, preventing firms lacking extensive experience with such systems from competing. To its knowledge, Federal Computer says, there is only one third party software package that will provide complete emulation of the required features. Federal Computer's argument is, in essence, a rebuttal to contentions Tandem made in connection with its initial protest. The argument, however, also misses its mark. Federal Computer does not claim that an acceptable Tandem IBM PC emulator is available only to it, or that other experienced firms could not have constructed a proposal to furnish a variety of functionally similar non-IBM machines once it was established that the equipment specified in the RFP was not actually required. This is consistent with the point made in our decision, that consideration of IBM PC-like equipment broadens considerably the choice of suitable hardware.

In the circumstances, we see nothing new in Federal Computer's request that would warrant reversal of our prior decision.

The Navy has not requested reconsideration of our decision, as such, but has requested that we review our recommendation that it terminate its contract with Federal Computer and resolicit the procurement after revising its solicitation to reflect its actual needs. According to the Navy, we should drop the recommendation altogether or allow it to postpone termination until the requirement is resolicited and a lower priced offeror is found to be in line for award. The Navy believes some kind of modification is appropriate because it shares Federal Computer's concern that the scope of competition may be limited. It will not know until new proposals are received whether better prices will be offered.

We do not agree with the Navy's desire to avoid resoliciting its requirement because, as stated, potential competition for a PC type workstation is available. We see no basis for objecting, however, to the Navy's request that the recommendation be modified to permit it to reprocur before terminating the Federal Computer contract. Federal Computer has not objected to this approach. The interest of potential

offerors will be protected because the Navy has voluntarily offered to suspend placing orders under the Federal Computer contract until a reprocurement can be conducted.

Consequently, our recommendation is modified to permit the Navy to reprocure its requirement before terminating the Federal Computer contract, in which event the Federal Computer contract should be terminated for convenience only if after resolicitation it appears that a more favorable offer is available.

for 
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