



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Computer Based Systems, Inc.
File: B-240963; B-240963.2
Date: January 7, 1991

J. Patrick McMahon, Esq., for the protester.
Michelle R. Cappello, Esq., Network Solutions, an interested party.
Carl J. Peckinpaugh, Esq., and Richard C. Bean, Esq., Department of the Air Force, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest, which was initially filed with and then withdrawn from the General Services Administration Board of Contract Appeals (GSCA), may be considered by the General Accounting Office (GAO), despite the fact that the GSCA did not issue an order dismissing the protest until 2 days after the protest was filed at the GAO, where the protester sought withdrawal of its GSCA protest in order to pursue its protest at the GAO, the withdrawal was not opposed by the agency, and the protest was otherwise timely filed at the GAO.
2. Award to a higher-priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and the agency reasonably concluded that the protester's price advantage over the awardee was outweighed by its significantly higher evaluated risk.
3. Protest that meaningful discussions were not conducted is untimely filed under the General Accounting Office Bid Protest Regulations, where the protester only identifies in its post-conference comments the specific areas where it contends discussions were not conducted even though it was made aware of the facts on which it bases this contention at a debriefing conducted prior to the filing of the initial protest.

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DECISION

Computer Based Systems, Inc. (CBSI) protests the award of a contract to Network Solutions under request for proposals (RFP) No. F19628-89-R-0113, issued by the Electronic Systems Division, Department of the Air Force, for the acquisition, integration and installation of specified computer hardware and software. CBSI protests that the Air Force improperly evaluated its low priced offer and failed to conduct meaningful discussions.

We deny the protest in part and dismiss it in part.

The RFP, issued as a small disadvantaged business set-aside, contemplated the award of a fixed-price contract for specified hardware and software to support the agency's Sentinel Aspen II training program.^{1/} Under the Sentinel Aspen II program, general intelligence skills will be taught, using computer aided and managed instruction.^{2/} The system sought by the RFP consists of computer workstations, equipped with 80386 microprocessors, connected by a multiple Ethernet Local Area Network and using a UNIX operating system. Each workstation provides computer-based training, graphics, wordprocessing, database and communications support.

The RFP identified the specific hardware and software required and provided that the system architecture, hardware and software must replicate, to the maximum extent possible, that employed in the agency's computerized Sentinel Bright II training program, to assure that the two training programs are completely compatible.^{3/} Offerors were informed that all offered hardware and software must be commercial-off-the-shelf (COTS) or a non-developmental item (NDI) and that any alternatives or deviations from the RFP requirements must be identified, explained and tested.

^{1/} Travel and material aspects of the contract, which are associated with interim systems support, are cost reimbursable.

^{2/} These general intelligence skills are currently taught manually.

^{3/} The Sentinel Bright II program is a computerized training program to provide computer aided and managed instruction, with graphics, audio and interactive video, to provide cryptologic analysis and reporting training.

The RFP provided that evaluation of proposals would be conducted under the streamlined source selection procedures of Air Force Regulation 70-30, and that award would be made, based on an integrated assessment of information contained in the proposals, to the offeror with the most advantageous proposal, price and other factors considered. The solicitation listed system architecture, technical support, and management as technical evaluation factors and provided that the first two were of equal weight and more important than management. Technical considerations were stated to be more important than cost/price. The RFP also provided that cost/price would be evaluated for realism and reasonableness to include an evaluation of the extent to which the proposed cost/price indicated a clear understanding of and sound approach to satisfying the RFP requirements.

The Air Force received five offers, including those of CBSI and Network Solutions, and determined that all offers were within the initial competitive range. Discussions were conducted with all the offerors through the issuance of deficiency reports (DR) and clarification requests (CR).^{4/} After evaluation of the offerors' responses, the Air Force determined that only four offerors, including CBSI and Network Solutions, remained in the competitive range. Written points-for-negotiation (PFN) were issued, face-to-face discussions conducted, and best and final offers (BAFO) requested from the remaining competitive range offerors.

The final evaluation results were as follows:

	System Architecture	<u>Rating/Risk</u> ^{5/} Technical Support	Management	<u>Price</u>
Offeror A	E/L	E/L	A/L	\$11,668,000
Network	A/L	A/L	A/M	\$ 9,481,000
CBSI	A/H	A/H	A/M	\$ 8,104,000
Offeror B	M/H	A/L	A/L	\$10,121,000

^{4/} DRs were issued when an offeror's proposal did not meet minimum RFP requirements; CRs were issued when the evaluation team did not understand a portion of an offeror's proposal.

^{5/} The letters under the technical rating represent the following: "E" for exceptional; "A" for acceptable; "M" for marginal; and "U" for unacceptable. Under risk assessment, the letters represent the following: "H" for high; "M" for moderate; and "L" for low.

The source selection authority (SSA) determined that Network Solutions had the most advantageous proposal to the government under the evaluation criteria. Specifically, the SSA determined that offeror A's proposal, while evaluated to be exceptional overall, was not worth the \$2.2 million price premium over Network Solutions' technically acceptable, low risk proposal. The SSA also concluded that CBSI's \$1.4 million price advantage over Network Solutions' offer was outweighed by CBSI's significantly higher evaluated risk. Award was made to Network Solutions on August 7, 1990.

CBSI was debriefed on August 15, and on August 17, protested to the General Services Administration Board of Contract Appeals (GSCBA). In response to the agency's motion to dismiss,^{6/} the protester sought leave to withdraw its GSCBA protest and filed this protest with our Office on August 29, 10 working days after its debriefing. The Air Force did not oppose CBSI's motion to withdraw, and on August 31, the GSCBA dismissed CBSI's protest without prejudice.

Initially, the Air Force argues that the protest to our Office should be dismissed as untimely. Specifically, the agency contends that pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(6) (1990), CBSI could not file its protest with our Office while its GSCBA protest was still pending. The Air Force argues that since CBSI's protest to our Office could only be filed after the GSCBA's dismissal of the protest, which occurred more than 10 working days from the date of CBSI's debriefing, CBSI's protest could not be timely filed with our Office.

While it is true that CBSI protested to our Office prior to the GSCBA's actual dismissal of its board protest, this is not a situation, such as was presented in TAB, Inc., 66 Comp. Gen. 113 (1986), 86-2 CPD ¶ 639, where the protester sought to actively litigate its protest before both forums. Rather, the protester acted to withdraw its GSCBA protest in order to file its protest here; its withdrawal was not opposed by the

6/ The Air Force contended that the GSCBA did not have jurisdiction to hear CBSI's protest pursuant to the Warner Amendment to the Brooks Act, see 40 U.S.C. §§ 759(a)(3), (f) (1988), because the computer system being procured here involves intelligence and cryptologic activities related to national security and is critical to the direct fulfillment of intelligence missions.

agency; and the GSBICA promptly issued an order confirming the withdrawal and dismissing the protest. Since CBSI affirmatively acted to withdraw the GSBICA protest before filing this protest, as opposed to maintaining duplicate proceedings in both forums, its protest was in effect no longer before the GSBICA. See Sector Technology, Inc., B-239420, June 7, 1990, 90-1 CPD ¶ 536; Idaho Norland Corp., B-230598, June 6, 1988, 88-1 CPD ¶ 529.

The Air Force attempts to distinguish these cases by noting that in Sector Technology the GSBICA had actually dismissed the protest at the time the protest was filed at our Office and that in Idaho Norland we had specifically confirmed with the GSBICA that the protest would be dismissed before we accepted jurisdiction. However, in the absence of any evidence that CBSI's request to withdraw its GSBICA protest would not have been routinely granted (as indeed it was), we see no legally significant difference between this case and Idaho Norland, where the GSBICA also had not issued an order dismissing the board protest at the time the protest was filed with our Office. Given the fact that CBSI filed its protest here on the tenth working day after the date of its debriefing, we find its protest to be timely filed.

The basic point of CBSI's protest is that the Air Force improperly evaluated its proposal as being of high risk and thus erroneously determined that CBSI's \$1.4 million low offer was not the most advantageous to the government. The determination of the relative merits of proposals is primarily a matter of agency discretion, which our Office will not disturb unless it is shown to be unreasonable. GP Taurio, Inc., B-238420; B-238420.2, May 24, 1990, 90-1 CPD ¶ 497. In this regard, we have consistently upheld awards to offerors with higher technical scores and higher costs where it was determined that the cost premium was justified, considering the technical superiority of the awardee's proposal, and the result is consistent with the evaluation criteria. See Pacific Architects and Eng'rs Inc., B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494.

The Air Force identified numerous weaknesses and risks in CBSI's technical proposal,^{7/} which caused CBSI's proposal to

^{7/} The Air Force defines "weakness" to be a proposed approach that is unacceptable or is marginally acceptable and was communicated to the offeror during the discussions process. "Risk" is defined to be the "result of a proposed approach that causes disruption of schedule, increase in cost or degradation of performance."

be evaluated as a significantly higher risk than Network Solutions' higher priced, low risk proposal. Indeed, CBSI's proposal was evaluated as a high risk for both of the primary technical evaluation factors, systems architecture and technical support.

Under the technical evaluation factor, "system architecture," the Air Force considered CBSI's proposal to be a high risk, even though it was rated technically acceptable. Specifically, the agency found the following areas of CBSI's system architecture to be of high risk: (1) CBSI's unexplained deletion in its BAFO of the required MT-800 Multiport Transceiver from its system; (2) CBSI's proposed bulk storage device did not meet the RFP durability requirements; (3) CBSI's BAFO was ambiguous regarding the power supply proposed; (4) CBSI's mounting of the Elographic E271-140 Controller outside the monitor created additional costs and maintenance; (5) CBSI's use of one student workstation as a server for a laser printer degraded the performance of the workstation; and (6) CBSI's failure to tailor system menus as required by the RFP. While CBSI contests each of these evaluated risks, we find the agency's evaluation of this criterion to be reasonable.

The apparent deletion of the required Cabletron MT-800 Multiport Transceiver in CBSI's BAFO was considered one of the most significant system architecture risks.^{8/} The Air Force states that the MT-800 is essential to the operation of the system network because the MT-800 is used to join network segments into a single environment, provides signal integrity by regenerating the signal at its optimum level, provides network monitoring and fault isolation, and allows the rapid configuration of the system to compartmentalize sensitive and classified information. From its review of CBSI's BAFO, the Air Force was uncertain whether CBSI actually intended to delete this required item, since CBSI provided no explanation or justification of the deletion of the MT-800 in its BAFO and its BAFO contained ambiguous references to the use of the MT-800. Furthermore, CBSI had offered the MT-800 in its initial proposal and stated no intention of deleting this item during the extensive face-to-face discussions. The Air Force evaluated this apparent deletion to be both a weakness and a significant risk in CBSI's proposal.

^{8/} CBSI argues in its comments that the MT-800 is not required by the RFP. We disagree. The MT-800 is specifically identified in Table 3-2 to the RFP specification as hardware that is required for system operation. The protester's contention that this table does not show the quantities required and therefore the quantity required could be none is without merit.

CBSI argues that the deletion of the MT-800 should not have been evaluated as a weakness but an enhancement, since the MT-800 was unnecessary in its proposed hardware configuration and the elimination of the MT-800 improved the design of the system architecture by eliminating a point of failure. We disagree and find reasonable the agency's evaluation of CBSI's unexplained deletion of the MT-800 in its BAFO as a significant risk and weakness. The RFP specifically required the use of the MT-800 in the proposed system and required that any deviation from the specified hardware or system architecture be identified and explained. As noted above, CBSI offered no explanation in its BAFO concerning the deletion of this solicitation requirement and the Air Force was unsure whether CBSI actually intended to delete the MT-800 from its offer. The agency now maintains that had it known that CBSI's deletion of this solicitation requirement was intentional it would have rejected CBSI's proposal as technically unacceptable.^{9/} Therefore, CBSI's approach was reasonably considered a high risk.

CBSI's BAFO also contained conflicting information regarding its proposed power supply. CBSI in its initial proposal offered a 200 watt power supply. In discussions it stated its intention to use a 250 watt power supply. CBSI's BAFO, however, references power supplies of 200, 250 and 300 watts. The agency states that it was unsure which power supply was offered and notes that the selection of a power supply is important to determining the potential for expandability of the system as well as the fundamental viability of the offerors' design approach and the available safety margin.

CBSI argues that the Air Force should have known from the block diagrams in its BAFO that CBSI intended to offer a 300 watt power supply. We disagree that the block diagrams, which reference a 300 watt power supply, adequately informed the Air Force as to CBSI's intention regarding the power supply when the BAFO also contained descriptive literature, referencing a 200 watt power supply,^{10/} and the BAFO elsewhere indicated that a 250 watt power supply would be provided. We find that CBSI's proposal was ambiguous in this matter and

^{9/} CBSI did not confirm that it intended to delete this item until the protest was filed.

^{10/} The descriptive literature provided in the BAFO also states that power supplies of 230, 375 and 450 watts are available as options. The 300 watt power supply, which CBSI now contends it would provide, is not listed, much less described, in the descriptive literature CBSI provided with its proposal.

that the Air Force reasonably considered the possibility that CBSI may not offer an adequate power supply to be a risk.

Under the other important technical evaluation factor, "technical support," for which CBSI was also evaluated to be acceptable but with a high risk, the Air Force also identified numerous risks and weaknesses in CBSI's proposal. Specifically, the Air Force found that: (1) CBSI's preliminary room layouts did not take into account maintenance and student accessibility; (2) CBSI failed to propose sufficient labor hours to accomplish the testing required by the RFP and to perform the enhanced testing, which was not required by the RFP but which CBSI offered; (3) CBSI's offer to preassemble workstations prior to shipping exacerbated the risk of hardware damage; (4) CBSI's proposed placement of computer and floppy disk drives showed incomplete human factors analysis; and (5) CBSI failed to demonstrate a system meeting RFP configuration requirements. Here, too, CBSI contests these identified risks and weaknesses, but our review indicates that the agency again reasonably evaluated CBSI's proposal.

For example, the Air Force evaluated CBSI's preliminary room layouts to be a risk because they did not take into account maintenance accessibility and student viewability of previously installed white boards. CBSI argues that this risk assessment is unreasonable because the RFP only required preliminary drawings and CBSI proposed to prepare final room layouts after contract award. The RFP required offerors to provide block diagrams for each subsystem configuration with a depiction of equipment layout within each room. During discussions CBSI was informed that the block diagrams must take into consideration existing equipment (such as power outlets, fire extinguishers, white boards) in each of the rooms. CBSI's BAFO did not provide diagrams that accounted for this equipment; instead, CBSI promised to conduct an on-site survey and prepare a site preparation and installation plan after award in accordance with the RFP statement of work. Such a promise obviously is not a substitute for the detailed block drawings; under the circumstances, the agency could reasonably find CBSI's response represented a high risk, given the problems with CBSI's preliminary room layouts.

The agency also determined that CBSI had failed to propose sufficient labor hours to perform the testing required by the RFP.^{11/} CBSI offered to test its system and software in conformance with DOD-STD-2167A, which is a standard used by the Department of Defense to establish uniform requirements for software development. The Air Force questioned how CBSI could perform the RFP-required testing within its proposed price while also testing its system and software at the DOD-STD-2167A enhanced level of testing.^{12/} The agency evaluated CBSI's proposed testing approach to be both a weakness and a risk.

CBSI contends that DOD-STD-2167A enhanced testing is necessary because two software packages required by the RFP are not NDIs as represented in the RFP.^{13/} CBSI argues that it did not

^{11/} The RFP required testing to "assure that the functional capabilities of the [Sentinel Bright II] COTS/NDI system are replicated in the [Sentinel Aspen II] system, assure that [Sentinel Aspen II] meets the functional capabilities specified in [the RFP specification], and assure that any differences between the [Sentinel Bright II] COTS/NDI system and [Sentinel Aspen II] system are qualified at the hardware/software component level."

^{12/} The agency considered testing pursuant to DOD-STD-2167A to be unnecessary because the solicitation sought only COTS or NDI software/hardware, and software/hardware development was not required.

^{13/} CBSI, in its post-conference comments, acknowledges that whether these software packages, which were required by the RFP, are actually NDIs "is a specification problem [that] should have been addressed prior to submission of proposals." Despite its acknowledgment, CBSI, after the receipt of the Air Force's comments, filed a second protest that award was improperly made to Network Solutions because the awardee did not comply with the mandatory requirements of the RFP by not offering NDI software. On the other hand, CBSI concedes that Network Solutions' software was that required by, and identified as an NDI in, the RFP. We fail to see how the awardee's proposal can be noncompliant when it offered software that was specifically required by the RFP. In any event, the question of whether the software packages are actually NDIs concerns an apparent solicitation impropriety that CBSI was required to protest prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

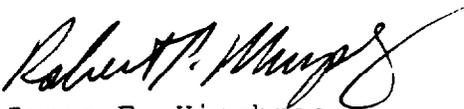
propose to test all of its system components in conformance with DOD-STD-2167A, only the two software packages in question. However, our review of the protester's initial and revised proposals, as well as its response to the agency's DR concerning this enhanced testing, indicates that CBSI did indeed offer to test all its system components at the higher level testing of DOD-STD-2167A. The protester does not otherwise dispute the agency's statement that CBSI cannot perform both the DOD-STD-2167A level tests on all system components and the RFP-required tests with the number of labor hours proposed. Under the circumstances, we think CBSI's response to this requirement is indicative of a lack of understanding of the agency's requirements, and find that the agency reasonably found CBSI's proposal to be of high risk in this regard. See Cygna Project Mgmt., B-236839, Jan. 5, 1990, 90-1 CPD ¶ 21.

Based on our review of the record, we find that the agency reasonably determined that CBSI's proposal contained numerous weaknesses and risks in the most heavily weighted technical areas, such that it was reasonably considered as being of high risk overall. Also, the agency, in accordance with the RFP, conducted a price realism assessment to evaluate CBSI's performance risks, by assessing the impact of CBSI's evaluated weaknesses and risks on its proposed price. Based on this analysis, the agency concluded that CBSI's low price reflected its high risk technical approach. We find nothing in the record that calls into question the reasonableness of this conclusion. See Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441. Network Solutions' technical proposal, on the other hand, was evaluated to be acceptable with low risk. The record shows that the SSA properly weighed the technical merit and costs of the competing proposals in light of the RFP criteria and reasonably found that CBSI's \$1.4 million price advantage was not worth CBSI's significantly higher risk.

CBSI also protests that the Air Force failed to conduct meaningful discussions. The record shows that the agency conducted extensive discussions with the protester through the issuance of 63 CRs, 8 DRs, and 41 PFNs and during 2 days of face-to-face discussions. The protester, in its initial protest letter, made only a general, broad allegation that discussions were not meaningful, and CBSI did not identify any deficiencies or areas of its proposal that it contends were not discussed with it. In its post-conference comments, CBSI, for the first time, identified six evaluated deficiencies in its proposed system, which it admits it was apprised of during its debriefing, but which CBSI alleges were not disclosed during discussions.

CBSI's piecemeal presentation of this issue resulted in an agency report and post-conference comments from the Air Force that did not address CBSI's subsequent specific allegations concerning these six deficiencies. The protester's raising of this issue in its post-conference comments, even though it knew the specific bases for these allegations at the time it filed its protest, is untimely under our Bid Protest Regulations and is dismissed. Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ ____; 4 C.F.R. § 21.2(a)(2). In any event, the record establishes that CBSI's proposal contained significant weaknesses and risks, apart from the six identified "deficiencies." Thus, CBSI was not prejudiced, even if these particular areas were not mentioned during discussions. See Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel