



Comptroller General  
of the United States

Washington, D.C. 20548

REDACTED VERSION'

## Decision

**Matter of:** Lockheed, IMS

**File:** B-248686.3

**Date:** July 23, 1993

C. Stanley Deos, Esq., and Robert J. Sherry, Esq., McKenna & Cuneo, for the protester.

Wendy T. Kirby, Esq., and Thomas L. McGovern, Esq., Hogan & Hartson, for International Business Machines, an interested party.

Barbara Robbins, Esq., Department of Health and Human Services, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest filed 11 working days after firm received debriefing is dismissed as untimely; Inauguration Day is considered a working day of the federal government for purposes of determining the timeliness of a protest where it does not fall on the tenth day of the filing period.

2. Protest that agency used inappropriate labor mix in calculating estimated costs of contract performance under indefinite delivery, indefinite quantity (IDIQ) contract is denied, where record shows that labor categories used were consistent with solicitation's description of the work to be performed during IDIQ portion of contract.

3. Protest that agency failed to adequately document evaluation and source selection results is denied where evaluation materials adequately show the bases for the evaluators' judgments and conclusions.

'The decision issued on July 23, 1993, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

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## DECISION

Lockheed, IMS protests the reevaluation of cost proposals under request for proposals (RFP) No. 233-90-0102, issued by the Department of Health and Human Services (HHS) to acquire supplies and services in connection with the establishment and maintenance of a national child support enforcement computer network.

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

## BACKGROUND

Lockheed previously protested HHS' actions in connection with its award of a contract under this RFP to International Business Machines (IBM), arguing primarily that the agency improperly had failed to evaluate the firms' cost proposals in accordance with the solicitation's requirement for the agency to evaluate "total system costs." The RFP contemplated the award of a combined fixed-price, indefinite delivery, indefinite quantity (IDIQ) contract in which various system hardware and software would be furnished for a fixed-price, and developmental support services would be furnished on an IDIQ basis. Lockheed argued that the agency failed to fully evaluate the costs of performing the IDIQ developmental services portion of the contract.

We sustained Lockheed's protest, finding that HHS had not evaluated all costs associated with contract performance. Lockheed, IMS, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180. Specifically we found that, although HHS was required to evaluate "total system costs" under the terms of the RFP<sup>2</sup> (as well as under the requirements of the Federal Information Resource Management Regulation), the agency improperly failed to evaluate the costs associated with performance of the IDIQ developmental services portion of the contract, which accounted for as much as 40 percent of the total contract cost. We recommended that the agency develop an appropriate method for evaluating total system costs (including the developmental services portion of the requirement) and, if necessary, amend the RFP and afford offerors an opportunity to submit revised cost proposals. We also recommended that the agency terminate for the convenience of the government the contract awarded to IBM if, upon reevaluation, HHS determined that another offeror was properly in line for award.

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<sup>2</sup>The RFP defined "total system costs" as all costs which might be incurred to make the system fully operational.

In response to our recommendation, HHS determined that it would reevaluate cost proposals using a sample task model. The model was comprised of six sample tasks which HHS considered to be representative of the developmental effort required to make the system fully operational, and assumed that the majority of the estimated labor hours specified in the RFP would be required.<sup>3</sup> To arrive at the offerors' estimated costs the agency divided the estimated labor hours among the six tasks and then multiplied the number of hours for each task by four different hourly rates; the hourly rates used were those offered in the firms' proposals for senior engineers, junior engineers, senior computer systems analysts and junior computer systems analysts. The labor mix used was based on HHS' estimate of the number of hours for each of the four labor categories which it viewed as necessary to make the system fully operational.

In addition, the agency reviewed the proposals to determine whether any of the sample task work would be performed under the fixed-price portion of the contract; where the agency was able to determine that a firm had offered to perform a developmental support task as part of its fixed-price effort, the cost of performing the task was excluded from the firm's developmental support cost evaluation. In this way, HHS avoided double-counting costs that already were provided for in the fixed-price proposals. Thus, for example, since HHS determined that IBM had offered to perform [deleted] (one of the six sample tasks) as part of its fixed-price effort, it calculated IBM's estimated developmental support cost without including the cost of performing this sample task.

Following the reevaluation, HHS determined that its initial award to IBM still represented the best overall value to the government. The agency reached this conclusion based on its finding that the estimated cost of performance for IBM was \$9,716,132, compared to Lockheed's \$10,045,920, and its earlier conclusion that IBM had submitted the best overall technical proposal. (Two other offerors had estimated costs lower than IBM's, but both firms had been ranked significantly lower during the technical evaluation.) HHS advised Lockheed and the other offerors of its determination to continue performance of the IBM contract on December 18, 1992.

Thereafter, on January 5, 1993, Lockheed filed an agency-level protest, raising four alternative speculative arguments (since it had no specific evaluation information).

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<sup>3</sup>The RFP provided that an estimated 60,154 manhours would be required during the developmental portion of the contract; HHS used 59,418 manhours in its reevaluation.

Lockheed argued that if the reevaluation was based on use of all the RFP's estimated labor hours, its proposal should have been found to be lower in cost because of its lower hourly rates. Alternatively, if the evaluation was based on the use of a sample task or hypothetical plan, Lockheed argued that the reevaluation was improper because; HHS did not reopen the acquisition to permit firms to submit proposals based on the sample task or hypothetical plan; the sample task reevaluation did not take "total system costs" into account; or the mix of labor hours chosen for the sample task did not accurately reflect the developmental support costs of the offerors.

On January 7, while its agency-level protest was pending, Lockheed attended a debriefing with HHS contracting officials. During the debriefing, Lockheed was given information regarding the particulars of HHS' reevaluation. Specifically, Lockheed was informed that the reevaluation was conducted using six sample tasks; each sample task was comprised of five to seven subtasks or functions; each sample task was assigned a discrete number of labor hours divided among the four labor categories described above; and IBM was, but Lockheed was not, found to have included developmental support tasks under its fixed-price effort, which had the effect of reducing IBM's evaluated cost.

On January 25, while its agency-level protest was still pending, Lockheed protested to our Office, alleging that: (1) the labor categories selected for use in the model were not representative of the developmental support service effort proposed by Lockheed, and (2) HHS improperly failed to credit Lockheed with having included certain developmental support work under its fixed-price effort, while at the same time crediting IBM for such work.<sup>4</sup> HHS provided our Office with an agency report responding to Lockheed's protest on March 3, and on March 17 Lockheed filed a supplemental protest purportedly based on information in the report.

#### TIMELINESS

HHS argues that Lockheed's January 25 protest is untimely because it was filed on the eleventh working day after the firm had its debriefing, at which time Lockheed was provided all of the information upon which that protest was based. Lockheed, on the other hand, asserts that its January 25 protest was timely because 1 of the 11 days between the

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<sup>4</sup>An additional allegation, that the sample tasks improperly paralleled the IBM proposal, resulting in the inequitable award of fixed-price credits to IBM, was subsequently withdrawn by Lockheed.

debriefing and its protest filing was Inauguration Day (January 20); it maintains that our Office does not consider Inauguration Day a working day for purposes of calculating timeliness.

The first of Lockheed's two January 25 protest issues--that the agency's mix of labor hours and categories did not accurately reflect the developmental support costs of the offerors--clearly is timely irrespective of HHS's argument. It was then pending before the agency as an agency-level protest. A protest to our Office following an agency-level protest will be considered timely (to the extent that it raises the same issues), where it is filed within a reasonable time after the agency has had an opportunity to respond to the agency-level protest but has failed to do so. Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247.

The second issue raised in Lockheed's January 25 protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1993), require protests to be filed no more than 10 working days after the basis of protest is known or should have been known. In calculating this 10-day period, Inauguration Day is considered a working day of the federal government. Tracor Applied Sciences, B-218051, Feb. 8, 1985, 85-1 CPD ¶ 168, aff'd on recon., B-218051.2, Apr. 12, 1985, 85-1 CPD ¶ 422; Saco Defense Sys. Div., Maremont Corp., B-218089, Mar. 7, 1985, 85-1 CPD ¶ 285. This is because, although Inauguration Day is a holiday in the District of Columbia and our Office is closed, federal offices around the country are open. Thus, there is no valid reason for considering the day to be unavailable to protesters for preparing their protests. The only exception to this rule is where Inauguration Day is the tenth day of the timeliness period; in such cases, since the general rule would preclude a protest filing on the tenth day (because our Office is closed), the filing deadline must be extended 1 day to afford protesters a full 10-day filing period. Mutual of Omaha Insurance Co., B-201710, Jan. 4, 1982, 82-1 CPD ¶ 2. In this case, however, Inauguration Day was the eighth working day after Lockheed's debriefing, and its protest does not fit into the exception.

Lockheed states that before filing its protest one of its attorneys called this Office, (citing the telephone number of the attorney who had participated in the earlier proceeding), and asked "if Martin Luther King, Jr. Day and Inauguration Day were considered federal holidays and would not be counted among the ten 'working days' allowed for filing protests under the GAO rules." The Lockheed attorney states that the individual he spoke with, a junior secretary in one of the divisions of this Office, "reaffirmed that they were federal holidays and would not be counted as

'working days' in calculating the timeliness of a GAO filing. [She] neither referred me to a GAO attorney nor indicated in any other way that she was unauthorized to provide such information to the public." The secretary in question does not recall the conversation. Even accepting the protester's account, we do not believe that oral advice by a clerical employee which contradicts consistent decisions of this Office constitutes a waiver of the timeliness rules as interpreted in those decisions.<sup>5</sup> See generally Langfur Constr. Corp., B-221954.2, May 2, 1986, 86-1 CPD ¶ 427. As discussed below at page 11, the untimely issue would not have provided a basis to sustain the protest.

Alternatively, Lockheed maintains that its second January 25 allegation--that the agency improperly assigned credit for IDIQ work included under the firms' fixed-price effort--is timely because it is the same as an issue previously protested to the agency--that if HHS used a sample task it improperly did not consider "total system costs". We disagree.

Lockheed's "total system costs" allegation was based on the theory that a sample task-based evaluation, by its nature, could not have taken total system costs into account because it is not based on using all of the RFP's estimated manhours. This argument assumed that the evaluation did not take into account a significant number of the estimated manhours. At the debriefing, Lockheed learned that HHS had used virtually all of the RFP's estimated labor hours in formulating the sample task. In contrast, Lockheed's "improper award of fixed-price credit" argument concerns the agency's alleged failure to award Lockheed credit for IDIQ work to be performed as part of its fixed-price effort (and, correspondingly, its improper award of credit to IBM); this argument is based on knowledge gained at the debriefing concerning the specifics of HHS' reevaluation model, and assumes that the agency's sample task model was a proper vehicle (that was improperly employed) for reevaluating "total system costs" because it used virtually all of the RFP's labor hours. These two arguments are thus entirely distinct, and the argument in Lockheed's agency-level protest cannot serve to render its January 25 protest argument timely.

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<sup>5</sup>According to the Lockheed attorney, after the agency requested that we dismiss the untimely issues, he spoke with another clerical employee of this Office, who, he states, confirmed that Inauguration Day was a federal holiday excluded in determining whether protests have met timeliness limitations.

Lockheed raised this same issue again on March 17, with more specifics, arguing that the agency did not reevaluate offers on a subtask-by-subtask basis and, as a consequence, erroneously failed to provide Lockheed credit for work included under the fixed-price portion of its proposal while providing IBM with such credit. Lockheed's untimely January 25 protest explicitly challenged the agency's determination as to whether the firms had included any of the evaluated work under their fixed-price efforts; subsequently suggesting a reason why this alleged impropriety occurred (i.e., the agency's failure to perform a subtask-by-subtask evaluation) did not create a new argument and thereby overcome the untimeliness of the basic argument.

In any case, it appears Lockheed was provided with all the information necessary to raise this argument in its debriefing and in a January 15 follow-up letter.<sup>6</sup> (Indeed, this explains why, in our view, Lockheed was able to raise this issue in its January 25 protest.) Specifically, Lockheed was told that a sample task comprised of tasks and subtasks was used, that a subtask-by-subtask review was conducted to avoid double counting work already included under the fixed-price proposals, and that IBM had received credit under this review and Lockheed had not. Thereafter, the January 15 letter provided Lockheed with a detailed breakdown of the six sample tasks on a subtask-by-subtask basis and a table showing what labor hours (by labor category and subtask) were used to reevaluate Lockheed's developmental costs.

#### LABOR CATEGORIES AND MIX

Lockheed argues that HHS' selection of the four labor categories for the reevaluation (senior and junior engineers, and senior and junior computer systems analysts) was improper because it failed to take into account work to be performed during the fixed-price portion of the firm's proposal by personnel not fitting into one of these categories. Essentially, Lockheed maintains that certain of its management personnel would be providing developmental support services under the fixed-price portion of the contract (paid for as overhead), but because these individuals did not fit into one of the labor categories, no credit was given for their efforts.

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<sup>6</sup>One of Lockheed's representatives who attended the debriefing and reviewed the letter stated in an affidavit that, "we . . . discovered when we saw the letter and attachments that the subtasks . . . would involve work included in Lockheed's fixed price. This perception was confirmed when we saw the task descriptions in the agency report."

This allegation is without merit. The record shows that HHS' task order model was designed to take into consideration only the technical developmental support effort necessary to address each state's software development and case management and data distribution requirements, as opposed to project management and oversight activities. This was consistent with the RFP's definition of developmental support activities to be provided under the IDIQ portion of the contract, and also consistent with the RFP's description of personnel who were to provide these services. In addition, these actions were responsive to our objection to the agency's initial cost evaluation, which was limited to HHS' failure to account for the costs of these developmental support services during the first evaluation. In short, the RFP's developmental support requirement was for solving technical problems arising during implementation of the system.

The efforts of management personnel were not evaluated under the task order model because that work did not involve providing support in the form of technical assistance. For example, Lockheed maintains that it should have received credit against the developmental support requirement for the efforts of its [deleted]. HHS did not credit Lockheed for this effort because these tasks were in the nature of management and oversight, or system marketing, and thus did not fall into the sample task model or RFP definition of technical assistance. The record shows that the agency consistently applied this distinction in determining whether offerors should receive developmental support credit for efforts to be performed under the fixed-price portion of their offers, and we have no objection to the agency's reevaluation on this basis.

#### ADEQUACY OF REEVALUATION DOCUMENTATION

Lockheed maintains that the record of HHS' reevaluation contains insufficient documentation to show that the agency examined the proposals on a subtask-by-subtask basis to determine whether various developmental support task requirements were to be provided in the offerors' fixed-price proposals. Lockheed contends that this alleged lack of documentary evidence reflecting the reevaluation shows that the agency never examined the offerors' fixed-price proposals in sufficient detail to make reasonable judgments regarding the award of credits against each firm's estimated cost of developmental support services.

The record establishes that HHS adequately documented its reevaluation effort as it relates to its review of the fixed-price proposals. The source selection evaluation board reviewed the fixed-price portion of the proposals in order to determine whether any of the developmental support

services would be provided under the fixed-price portion of the requirement. In performing this review, the evaluators examined the proposals to determine whether they contained affirmative language obligating the firm to perform one or more of the developmental support service tasks as part of their fixed-price proposal. The evaluators' worksheets contain detailed statements regarding their ability (or inability) to find affirmative references to each given task in each offeror's fixed-price proposal, and where credit was awarded, specific proposal page references and quotations are provided to explain the evaluators' award of credit. We conclude that the evaluators in this case adequately documented their findings.

#### REMAINING CONSIDERATIONS

Although Lockheed's protest argument concerning the purported "improper award of fixed-price credits" is untimely for the reasons stated above, we nonetheless examined the record in light of this allegation, and find that it would have provided no basis for sustaining the protest.<sup>7</sup> As noted, Lockheed argues that HHS improperly awarded IBM credit for developmental support efforts to be performed during the fixed-price portion of the acquisition, while failing to similarly credit Lockheed. Based on a review of the proposals and the agency's reevaluation documentation, we disagree.

As the agency explains in its report to our Office, it reviewed the proposals to determine whether some or all of the required developmental support services would be provided during the fixed-price portion of the acquisition. In performing this review, HHS awarded credit only where an offeror's proposal reflected a firm, unequivocal commitment to provide a developmental support service as part of the fixed-price effort; where the evaluators were unable to find some affirmative, binding language, no credit was awarded.

For example, HHS credited IBM with offering [deleted] as part of its fixed-price offer. This was because IBM unequivocally stated in its proposal that it would provide

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<sup>7</sup>We also find that the record does not support Lockheed's assertion that HHS failed to perform a subtask-by-subtask review of the proposals. That HHS performed such a review is evidenced by the fact that one of the other firms, Martin Marietta, received credit for some, but not all of the subtask work under one of the six sample tasks.

[deleted].<sup>8</sup> Lockheed claims that it also should have received credit for [deleted]. In support of its position, Lockheed provides only a single reference to its proposal. The section referred to by Lockheed describes generally its [deleted], but is silent regarding when [deleted]. While Lockheed maintains that the agency should reasonably have inferred that its [deleted] would be provided during Phase 1, there is nothing in its proposal which would have affirmatively required it to provide it at that time, and the RFP required only that [deleted] be provided during Phase 2 (the cost reimbursement portion).<sup>9</sup> In our view, therefore, HHS acted reasonably in crediting IBM, but not Lockheed, with offering [deleted] as part of its fixed price.

We have also reviewed Lockheed's other claims regarding HHS' allegedly improper award of credits, and find no possible errors which would require reversal of the agency's selection decision. The record shows that HHS consistently required affirmative, binding language before awarding credit during its reevaluation, and Lockheed has not shown that the agency improperly ignored aspects of its proposal which unequivocally bound it to perform developmental support services during the fixed-price portion of the acquisition.

The protest is dismissed in part and denied in part.

James F. Hinchman  
General Counsel

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<sup>8</sup>The fact that IBM offered [deleted] under its fixed-price Phase 1 effort is corroborated by other portions of its proposal, as well as the agency's earlier technical evaluation, performed long before the cost reevaluation. In fact, the technical evaluators considered it as one of IBM's strengths that it was offering [deleted] as part of its Phase 1 effort, and this (in conjunction with other features of the proposal) led to their conclusion that IBM was technically superior to Lockheed.

<sup>9</sup>Likewise, the record supports the agency's determination to credit IBM, but not Lockheed, with including the [deleted] in its fixed price. IBM's proposal shows that the [deleted] capability would be available during Phase 1 of the contract, while Lockheed's proposal is silent regarding precisely when the capability would be available. [Deleted].