

95357

DECISION



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

58532

FILE: B-182397

DATE: February 12, 1975

MATTER OF: Data 100 Corporation

DIGEST:

1. Allegation regarding successful offeror's ability to comply with contract specifications is primarily for resolution by contracting agency and technical determination of this nature will only be overturned where clear abuse of discretion reserved to contracting officer is shown.
2. Where pertinent portions of RFP and contract documents require mandatory 4-hour response time for optional alternative "on-call, per-call" remedial maintenance but contract, as executed, states that optional remedial maintenance will be performed on an "as available" basis, intent to be bound by all mandatory provisions cannot be discerned from a reasonable interpretation of all documents and only conclusion to be drawn is that there was no meeting of the minds between awardee and procuring activity regarding optional remedial maintenance response time.
3. Since optional maintenance plan was not evaluated for award purposes and cannot conclusively be shown to be cause for awardee's lower price being offered, termination of award is not warranted, but to eliminate possibility of future violation it is recommended that optional maintenance plan not be selected.

On October 25, 1973, the procurement office of the Directorate of ADPE Selection, Electronic Systems Division, Air Force Systems Command, issued request for proposals (RFP) No. F19628-74-R-0028 for 180 data processing systems. On May 1, 1974, amendment 0012 was issued, which required the submission of an optional "on-call, per-call" remedial maintenance plan in addition to the "on-call" remedial maintenance plan required by the RFP. Both remedial maintenance plans contained certain mandatory provisions which will be discussed in detail below. The RFP was issued to 75 vendors and in response, 6 proposals were considered for selection. All proposals were evaluated in accordance with the evaluation plan as set forth in the RFP and it was determined that the award should be made to Honeywell Information Systems, Inc. (HIS).

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Data 100 Corporation (Data 100) received notice of the award of the contract to HIS on September 26, 1974. On October 2, 1974, Data 100 submitted a request to the Air Force for a copy of HIS's contract. A copy of the contract was received on October 9, 1974. By telefax dated October 11, 1974, Data 100 protested the award of the subject contract on the basis that it did not conform to a number of mandatory requirements in the RFP. Specifically, Data 100 alleged that in six areas the Government had allowed HIS to deviate from mandatory requirements in violation of the RFP, which stated that proposals that fail to meet the mandatory requirements will not be considered for selection.

The first allegation presented by Data 100 is that the equipment proposed by HIS is not capable of achieving the mandatory technical requirements as stated in attachment II, Chapter 5, tables 5-5A, 5-5B, 5-5C and 5-5D. These tables listed throughput requirements for each of the 180 sites involved. It is Data 100's opinion:

"* * * that it does not appear possible for Honeywell to meet the mandatory throughput requirements with the modems as outlined above. The data volumes as contained in the RFP are such that the line speed requirements for many of the sites are greater than can be met by the Honeywell proposed modems."

The Air Force, however, replies to this allegation by stating that after the performance of a technical evaluation, it was determined that the HIS proposed equipment did meet the RFP requirements.

Allegations of this nature have been considered by our Office on many occasions. It is our consistent and well-established position that the determination of the Government's minimum needs, and the subsequent determination of whether a given item or system conforms to the specifications, are primarily the responsibility of the contracting agency. B-169365, June 30, 1970. Accordingly, our Office will overturn technical determinations of this nature only where a clear abuse of the discretion reserved to the contracting officer is shown. B-174770, July 14, 1972. Based upon the detailed record before us, we cannot conclude that an abuse of discretion has occurred.

Next, Data 100 raises five allegations concerning the optional alternative "on-call, per-call" maintenance program incorporated in HIS's contract. Data 100 contends that in five separate areas, HIS will fail to meet the mandatory requirements of the RFP if the optional maintenance plan is selected. The five allegations are summarized as follows:

1. Selection of a maintenance plan for a "systems network" in lieu of on an individual site basis violates a mandatory requirement.
2. The mandatory requirement for 4-hour maintenance response time has been violated by providing optional "on-call, per-call" remedial maintenance on an "as available" basis.
3. The optional on-call, per-call maintenance plan does not meet the mandatory requirement to provide on-call, per-call remedial maintenance for 16 hours per day, 5 days per week, with provision to extend coverage by 8-hour increments for Saturdays and Sundays.
4. The Government has abrogated its authority to determine the prime shift for each location.
5. Preventive maintenance is permitted during prime time in violation of the requirement that such maintenance be performed during a period other than prime time.

However, in view of the fact that all five of the above allegations concern the optional alternative "on-call, per-call" maintenance program, and since we agree with Data 100's position on allegation No. 2, only it will be discussed below.

Data 100 states it is mandatory that an offeror propose an optional alternative on-call, per-call remedial maintenance plan and that this plan must meet the mandatory requirements set forth in the RFP. In particular, the optional alternative maintenance plan must meet the mandatory requirements of attachment II, Chapter 5, section 5.2.5c (1), (2) and (3), which requires maintenance support 24 hours per day, 7 days per week, with a 4-hour response time in CONUS and a 16-hour response time outside CONUS. The HIS contract, Data 100 contends, in attachment 4, table 3, item (a) violates this mandatory requirement for 4-hour response time by providing optional "on-call, per-call" remedial maintenance on an "as available" basis.

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The Air Force, in responding to this allegation, has acknowledged that:

"* * * the phrase 'on as available basis' included as a footnote to table 3 of attachment 4 to the contract is inconsistent with the requirements of the solicitation pertaining to mandatory maintenance response times of four hours within the CONUS and 16 hours outside the CONUS. * * *" (Underscoring supplied.)

and

"* * * [that] the alternate on call per call maintenance plan violates the mandatory 4 hour response time requirement by providing maintenance on an as available basis is essentially correct.* * *" (Underscoring supplied.)

However, the Air Force is of the opinion that even with this inconsistency, the award should not be disturbed.

The Air Force believes that the HIS proposal, in accordance with the written instructions contained in section "C," paragraph 49 of the RFP, designated the on-call maintenance plan as the one to be used in the evaluation process. Therefore, the on-call, per-call optional maintenance plan was not a factor in the award of the contract since it was not part of the evaluation criteria. Since the optional on-call, per-call plan was not a factor in the evaluation process, all offerors were submitting proposals on essentially the same requirement and award was made to the offeror who met the designated Air Force requirement at the lowest price, and therefore, the integrity of the competitive procurement system was in no way compromised. Additionally, the Air Force contends that the on-call, per-call plan is an unexercised option in the contract, to invoke the option would require a justification in accordance with Armed Services Procurement Regulation § 1-1505 (1974 ed.), and that after reviewing the option it appears clear that invoking the option could not be justified from the perspective of cost effectiveness. Consequently, neither the Government nor the contractor has either gained or lost from the existing inconsistency. And finally, the Air Force states that:

"* * * Honeywell indicated its specific consent to the mandatory response time in at least three other

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sections of the contract. (See (1) Section F, para. 1 item 0004-0004AB and incorporated documents, (2) Section H, para. 3, and (3) Section J, para. 23.b.) As a matter of contract interpretation, these more specific statements take precedence over the more general statement in Attachment 4, para. 1.b.(1)(a). * * *

This being the case, the Air Force argues that HIS's intent as manifested by the contract document was to fully comply with the mandatory response time requirement of the RFP.

In our opinion, the HIS contract, as executed, does not lend itself to the interpretation that should the optional on-call, per-call maintenance plan be selected, HIS would be bound to provide the remedial maintenance as required by the RFP on other than an "as available" basis.

It is correct that the optional on-call, per-call maintenance plan was not chosen by HIS for evaluation, and therefore, was not a factor in the award of the subject contract. Since all offerors did, in fact, submit proposals on the same requirements, and since award was made to the offeror who met these requirements at the lowest price, the integrity of the competitive procurement system does not appear to have been compromised. While Data 100 contends that HIS was able to offer a lower price in view of the allegedly relaxed optional maintenance plan offered, we do not find the argument to be persuasive. There is no guarantee in the RFP that the optional plan will ever be selected and any price reduction based upon the hope of such selection is a normal risk assumed by all offerors in the preparation of their proposals.

We cannot agree, however, that in reading the contract in its entirety, HIS has manifested an intent to be bound by the mandatory maintenance requirements of the RFP. The decision cited by the Air Force for this proposition, Hol-Gar Manufacturing Corp. v. United States, 169 Ct. Cl. 384 (1965), states in pertinent part as follows:

"* * * the language of a contract must be given that meaning that would be derived from the

contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.

* * * * *

"* * * the intention of the parties must be gathered from the whole instrument. * * *

"Also, an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible. * * *"

Our review of the RFP and contract documents leads us to the conclusion that there was no meeting of the minds between HIS and the Air Force as concerns the mandatory remedial maintenance provisions contained in the optional alternative "on-call, per-call" maintenance program. Whereas amendment 0012 to the RFP, paragraph 3a(4) states:

"(4) Offerors shall submit a separate 'on-call, per-call' remedial maintenance plan * * *. This plan should be in accordance with the mandatory requirements specified in subparagraphs (1)-(3) above. * * *" (Underscoring supplied.)

and subparagraph (3) referred to states:

"Remedial Maintenance. All on-call remedial maintenance support provided within CONUS will be restricted to a four-hour * * * response time, including travel time. * * *" (Underscoring supplied.)

the optional on-call, per-call maintenance plan offered by HIS and incorporated into the contract at attachment 4, table 3, (a) stated:

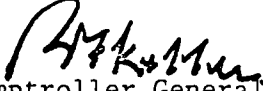
"On-Call, per call remedial maintenance for occasional calls made outside of the ordered maintenance periods * * * shall be provided on an as available basis. * * *" (Underscoring supplied.)

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In our opinion, HIS has clearly offered an optional remedial maintenance response time other than that requested by the Air Force, and no reading of the pertinent documents convinces us otherwise.

However, the question now for resolution is what corrective action, if any, is required by this failure to reach a meeting of the minds as concerns the optional remedial maintenance response time. As already stated, the optional maintenance plan was neither evaluated for award purposes nor can it be said that the offering of this alternative plan enabled HIS to underprice Data 100. Therefore, there exists no compelling reason warranting termination of the HIS contract. On the other hand, allowing the alternative plan to be selected would enable HIS to perform in violation of the mandatory provisions of the RFP and contract. Therefore, to eliminate the possibility of any future violation, which is the gravamen of Data 100's protest, we agree with the Air Force's statement that it would not be in the best interest of the Government to exercise its option in this area and by separate letter of today we have indicated to the Secretary of the Air Force that the optional maintenance plan should not be selected for the duration of the contracted for maintenance period.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States