

# DECISION



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

58823  
97154

FILE: B-182576

DATE: June 25, 1975

MATTER OF: Computek Incorporated  
Ontel Corporation

## DIGEST:

1. Even where cost evaluation was conducted on basis of procurement of 100 computer terminals, when, in context of requirements contract (especially one not containing compensatory variation of quantity clause), estimated quantity becomes a contractual minimum of 100, there has been a definite and significant change in Government's requirements which should have been communicated to each prospective contractor. Change in minimum lease period from 1 to 2 years, deletion of contractor maintenance requirement, and determination to award total quantity in only one category where two categories had been set forth should have similarly been communicated to offerors.
2. Where in course of final discussion with sole offeror remaining in competitive range contract being negotiated has significantly changed from RFP under which competitive range was determined, in absence of compelling reason, contracting officer must take action to amend RFP and seek new offers.

PUBLISHED DECISION  
By Compt. Gen. ....

On December 27, 1973, request for proposals (RFP) No. NIH-74-P(62)-132-CC was issued by the National Institutes of Health (NIH) seeking offers to provide cathode-ray tube (CRT) computer terminals. As set out in the initial letter to possible offerors, the objective of the RFP was to establish sources for CRT terminals so that the NIH computer center would be able to supply its users with adequate and compatible computer terminals in a minimum amount of time. A requirements-type contract was contemplated.

The solicitation contemplated the possibility of lease, purchase and lease with option to purchase arrangements and requested that the offerors submit their offers on each basis.

With this lease possibility in mind the RFP stated that:

"This contract will be effective for one year from the date of the contract award and will be subject to two succeeding annual renewals. The total length of the contract will not exceed thirty-six (36) months (including renewal options)."

The RFP set forth that the proposals would be evaluated with the following relative points to be awarded:

Technical	maximum	250
Cost	maximum	<u>85</u>
Total		335

With regard to technical evaluation, the RFP set forth a number of (A) mandatory features, (B) mandatory optional features, and (C) desired optional features. These were broken down and scored as follows:

"MAXIMUM  
WEIGHT

"Terminal Evaluation of 'MANDATORY STANDARD FEATURES'  
and 'MANDATORY OPTIONAL FEATURES'  
(to include the following considerations)

\* \* \*

Sub-Total. \_\_\_\_\_ 150

"Desired (not required) Options to Standard Features:

\* \* \*

Sub-Total. \_\_\_\_\_ 75

**"Other Considerations:**

1. The offerors commitment on maintenance, delivery schedule, terminal discontinuance requirements and terms or conditions which exceed minimum requirements of the solicitation proposed by the offeror. \_\_\_\_\_ 25

Sub-Total. \_\_\_\_\_ 25

Total. \_\_\_\_\_ 250"

The cost evaluation, on the other hand, was conducted in accordance with the RFP only with regard to the mandatory procurement features. Purely desired optional features were not included in the evaluation of costs.

Seven proposals were received in response to the RFP. During the period from March 2 through July 11, 1974, the seven offers were evaluated. The three offerors whose proposals did not satisfy the RFP's mandatory technical requirements were not requested to perform a line demonstration and were not, therefore, evaluated beyond an initial review. See 41 C.F.R. § 101-32.402-12 (1974).

The four firms which were evaluated received the following scores:

	<u>Technical</u> <u>(250)</u>	<u>Cost</u> <u>(85)</u>	<u>Total</u> <u>(335)</u>	<u>Total</u> <u>Possible</u>
Delta Data	233	72	305	335
Megadata	218	67	285	335
Computek	205	70	275	335
Ontel	141	85	226	335

After this scoring, it was determined that further discussions with the vendors would not result in any significant changes in the point ratings. Thus, for an offeror to supplant Delta Data Systems Corp. (Delta Data), the highest technical and second low cost proposer, it would have to have been on the basis of cost. However, since the RFP assigned a much greater weight to technical scoring than to cost (250 vs. 85), Delta's lead of 15 points was seen by the agency as too great for any other offeror to overcome on the basis of cost.

Consequently, further negotiations were conducted with Delta Data, the only firm deemed in the competitive range. These discussions concentrated on the "procurement of the ideal mix of terminal

features offered and the best price therefor." A contract with Delta Data was entered into on September 19, 1974. Unsuccessful offerors were not advised of the rejection of their respective proposals until receipt of a letter from HEW dated October 11, 1974, after which a debriefing was held.

Two protests were subsequently lodged with our Office on the following grounds:

1. the agency's failure to negotiate with all offerors actually within a competitive range;
2. the agency's failure to communicate changes in the Government's requirements to all offerors;
3. the failure to communicate changes in the Government basis for evaluation; and
4. errors in technical scoring.

For reasons that will become apparent infra, our discussion will be restricted to the first three arguments.

At the outset, we note the chronology of this protest:

11/7/74	Protest of Ontel received
11/12/74	Protest of Computek received
11/14/74	Additional material for Computek received
12/10/74	Received letter from HEW saying that report would be sent to GAO no later than 1/24/75
12/11/74	GAO sent letter to HEW stating that delay until 1/24/75 was unreasonable
1/6/75	GAO advised by HEW that report would be submitted by 1/17/75
1/17/75	HEW requested 2-week extension to submit report
1/29/75	GAO contacted HEW Assistant Secretary for Administration regarding receipt of report
2/11/75	GAO received HEW report--sent out for comment

2/18/75      Computek requested additional information;  
                 additional information sent

3/10/75      Received last comments from protester

3/19/75      Received last comments from interested parties

4/7/75        Conference on protest held at GAO

Federal Procurement Regulations (FPR) § 1-3.805-1 (2nd ed., amend. 118, September 1973) provides that after receipt of initial proposal, discussions should be held with all responsible offerors within a competitive range, price and other factors considered. Our Office has not objected to the exclusion from the competitive range of those offerors with whom meaningful negotiations cannot be conducted, e.g., 50 Comp. Gen. 679, 684 (1971).

As to the exclusion of offerors from the competitive range, the agency states that:

"At first glance it might appear that Delta's lead in technical points is not overwhelming and that the other two firms remain within competitive range. On closer inspection, however, this is not the case. Delta Data leads with 233 points in the technical review, Megadata is in second place with 218, and Computek has 205. Further, the technical review, involving terminal demonstrations and discussions with technical representatives from each of the bidders, indicates that further discussion with the vendors will not result in any significant change in the point ratings. Thus, if another bidder were to gain the overall lead it would have to be on the basis of superior cost performance. Since the RFP assigned a much greater weight to technical performance than it did to cost, Delta's lead of 15 points is too great to be overcome on the basis of possible cost adjustments.

"We expect that due to the need to select a terminal with certain options, the prices will change during final contract negotiations. Since all three of the bidders would need to make substantially similar changes their final costs of each terminal can be expected to change by approximately the same proportion leaving the cost scores relatively the same. To understand what it would take for another bidder to overtake Delta Data, consider the following: Megadata is Delta's nearest competitor technically. For Megadata to draw even in overall points, Delta's cost would have to increase

56% even if we assume Megadata's costs did not increase at all. And if we assume a 25% increase in Megadata's cost (from 4100.00 to 5125.00) then Delta Data would have to increase more than 95% (from 3210.00 to 6223.00) for the two companies to be even on total points." (Emphasis added.)

The effects of the negotiations solely with Delta Data are as follows: HEW (1) changed the quantity provision of the requirements contract from an estimated quantity of 135 units to a guaranteed minimum purchase of 100 units; (2) definitized the optional features which it wanted on the units; (3) negotiated a new price with Delta; (4) increased the guaranteed rental period from 1 year to a "minimum of two years"; (5) accepted a contractor-proposed discontinuance clause whereby termination of the lease at any time before the end of 2 years would result in payment by the Government of the item's purchase price less any rental paid to that point; and (6) changed the RFP provision regarding maintenance, which was originally to be a contractor's requirement under the contract, into an item which would be included in another contract.

It is a fundamental principle of Federal procurement law that the solicitation be drafted in such a manner so as to inform all offerors of what will be required of them under the contract in order that all offerors can compete on an equal basis. DPF Incorporated, B-180292, June 5, 1974, 74-1 CPD ¶ 303, September 12, 1974, 74-2 CPD ¶ 159, and cases cited therein. See FPR § 1-3.802(c) (2nd ed., amend. 118, September 1973).

Consónant with this provision is FPR § 1-3.805-1(d) (FPR Circ. 1, 2nd ed., June 1964) which stated that:

"When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. \* \* \*"  
See 49 Comp. Gen. 402 (1969).

In this regard, we feel that HEW should have apprised other offerors of all such changes in the Government's requirements thereby ensuring the adequacy of competition.

The agency argues that there were no changes to its stated requirements. Specifically, it references the fact that the cost evaluation was done on the basis that 100 machines would be procured. This may be, but, as noted by the protester, with which we agree, that in the context of a requirements contract, especially one which does not contain a compensatory variation of quantity clause,<sup>1</sup> when an estimated quantity becomes a contractual minimum, there has been a definite and significant change in the Government's requirements. See generally Hyde & Norris/ t/a Traveler's Inn Motor Lodge, B-180360, May 20, 1974, 74-1 CPD ¶ 272. Moreover, the change of the minimum lease period from 1 year to 2 years is clearly a substantial change in requirements as is the deletion of the contractor maintenance requirement, the evaluation of which was included in scoring technical proposals. In view of these changes, the import of the other modifications made during the Delta Data negotiations need not be specifically characterized as requiring amendment of the RFP, since we have noted at least three areas which mandated such action.

Moreover, since the RFP initially sought offers on two types of terminals--teletype compatible terminals (type I) and an editing terminal (type II), we feel that it was improper for the agency not to have amended the solicitation so as to inform each of the seven original offerors that only type II terminals would be evaluated for award. The language in the RFP which the agency relies on to support its actions in this regard is as follows:

1. Contract contained following variation clause:

"2. QUANTITIES. Quantities in this schedule are only the estimated requirements for the contract period. The Contractor will be required to furnish all supplies or services ordered during the contract period at the unit prices shown in the contract. The National Institutes of Health will order from the Contractor all such supplies or services specified in the contract as required during the contract period, except emergency requirements which cannot be obtained from the contractor. In the event no need arises for the supplies or services specified in the contract, or the National Institutes of Health desires to order such supplies or services from another Government Agency, the Government shall not be held liable for failure to secure same under the contract."

"Offerors may propose to supply terminals in either or both categories and may propose as many different CRT's as he wishes in either category as long as each type proposed is substantially different from the other types proposed. A single model can satisfy both categories if it has all of the mandatory standard and mandatory optional features for both categories." (Emphasis added.)

Contrary to the interpretation of the agency, we view this provision as merely stating that an offeror may, if it chooses, propose the same basic model for each category of terminals provided it contains the features required for both categories. It does not say that the agency specifically reserves the right to select which category it will purchase. Indeed, page 4 of the RFP states "Two types of CRT terminals are required." Therefore, a firm proposing a unit containing only the features required of one type, such as Ontel's offer of type I equipment, may have been unduly prejudiced by the fact that it was determined that only type II units would be evaluated for award. Neither do we think that the agency's reliance upon clause 10(c) of standard form 33A, regarding ultimate determination to award quantities less than those specified, relieved it from its duty to advise offerors of the type unit which would be evaluated.

As our Office has held in the past, no prospective contractor can intelligently compute its offer without being informed beforehand of what will be required of it and all the factors which will materially affect the cost of the work or the ability to perform. DPF Incorporated, supra. Here, all offerors were not afforded the opportunity to propose on a common basis. Moreover, many of the changes that occurred in the Government requirements between the date of issuance of the RFP and the award of the Delta Data contract, as noted above, were clearly and unduly prejudicial to other offerors.

We recognize that the contracting officer may have believed that since there was only one firm in the competitive range, it was not prejudicial for the Government to modify its requirements to suit the demands of that offeror and, indeed, in his view, almost incumbent upon the Government to do so. This can be seen in the following statement:



"6. Regarding the discontinuance charge made a part of the contract with Delta Data, every attempt was made by the Contracting Officer and members of the negotiating team to exclude the provision. However, the contractor was adamant on the issue. It is our understanding that such provisions are common in the industry especially when the Government leases specially modified equipment. Such specially modified equipment cannot be readily re-sold by contractors as would be the case with equipment not specially modified. Also, lending institutions require such provisions before they will finance small business firms such as Delta Data when they are involved in leasing of specially modified equipment." (Emphasis added.)

This view, however, ignores the fact that all offerors must have an equal opportunity to propose to meet the Government's actual requirement. Where, in the course of final discussions, it becomes obvious that the contract requirements being negotiated with the sole offeror remaining in the competitive range have significantly changed from the RFP requirements under which the competitive range was determined, in the absence of a compelling reason, the contracting officer must take action under FPR § 1-3.805-1(d), supra, to amend the RFP and seek new offers. The failure to do so in the instant case was improper.

We thus feel that the award made to Delta Data was improper for the reasons that the agency (1) initially failed to amend the RFP with regard to the requirement for type II terminals; and (2) did not reopen negotiations upon the significant revisions of the Government's requirements. In view of the referenced discontinuance charge, we do not believe that termination of this contract for convenience would be in the Government's best interest. However, we do recommend that HEW not exercise either the purchase option or the rental option for the third year of the subject contract.

We have by separate letter of today advised HEW that in future solicitations we anticipate that the agency will afford all offerors an equal opportunity to compete for the awards and will clearly state to all offerors what its needs actually are.

  
Deputy Comptroller General  
of the United States