**DECISION**

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

61204

FILE: B-185884

DATE: July 26, 1976

98910

MATTER OF: Data 100 Corporation

DIGEST:

1. Where agency evaluates proposals on basis of lump sum monthly charges for rental and maintenance and one offeror includes all required maintenance in those charges while other offerors provide for separate charge for certain maintenance calls, proposals were not evaluated on common basis. However, award is not disturbed where record indicates protester was not prejudiced in view of wide cost differential between proposed prices.

2. Allegation that solicitation was defective for failure to provide Government estimate of anticipated maintenance calls is untimely under Bid Protest Procedures since it was not filed prior to closing date for receipt of proposals.

This protest by Data 100 Corporation concerns the propriety of the Department of Commerce's evaluation of proposed prices for the rental and maintenance of specified types and quantities of Remote Job Entry Terminals.

The dispute between the protester and the agency arises primarily from how the solicitation, request for proposals (RFP) No. 6-35119, was structured. The solicitation schedule provided for the quotation of lump sum figures, on a monthly basis, for both rental and maintenance for an anticipated 5-year systems life. The solicitation also provided that:

> "The Government requires on-call remedial maintenance during regular working hours of 7:00 a.m. to 6:00 p.m., Monday through Friday, exclusive of holidays observed at the Government location. Requirements for the maintenance of Remote Job Entry Terminals (Types I, II and V) shall be the same as above and in addition shall include on call maintenance twenty-four hours per day, seven days per week."

The protester's offer contained monthly rental and maintenance figures for the equipment it was offering, while the offer of Hetra Computer and Communications Industries, Inc. (Hetra), contained both the lump sum monthly figures and a statement indicating that it would charge $125 per call for all maintenance calls made outside regular working hours (known as non-principal period maintenance /PPM/ calls). Award was made to Hetra on the basis of its low evaluated monthly charges, without regard to the charge for non-PPM calls.

The protest is based upon the Department of Commerce's failure to evaluate proposals on an equal basis. The RFP, although requiring both PPM and non-PPM maintenance calls, provided only for submission of total monthly charges for all required equipment rental and maintenance. Therefore, states the protester, it offered monthly charges which included all required maintenance. Since Hetra's monthly charges did not include the cost of non-PPM calls, the protester asserts that proposals were not evaluated on a common basis. In addition, the protester claims that the solicitation was defective because it did not include the Government's estimate of non-PPM calls to be required under the contract.

The contracting agency reports that at the time it evaluated proposals it was not aware that all offerors had not submitted prices on the same basis. According to the agency, it has been its experience that the custom and usage in the industry is for on-call maintenance calls outside the PPM to be quoted and considered as "extra charge" items. It points to contracts for computer equipment awarded by the General Services Administration as evidence of this custom. It further states that since Hetra and three of the remaining four offerors indicated that non-PPM remedial maintenance calls would be "extra charge" items, it had no reason to suspect that the protester's offered prices were not based on the standard pricing approach. Thus, states the agency, since the protester stated in its offer that it would provide maintenance as specified in the RFP and since the RFP provided that the terms and conditions of an offeror's ADP Schedule contract would apply to the contract to be awarded, the agency evaluation team felt that all offerors correctly understood that charges for non-PPM, if not stated in proposals, would be determined on the basis of an offeror's ADP contract (one of which was held by the protester).

We think there is merit to the protester's position. The RFP set forth the Government's requirements; the protester's proposal represented an offer to meet those requirements for the prices stated in the proposal. We see nothing in the RFP requiring offerors to set forth their non-PPM call charges separately from the lump sum monthly charges; neither do we see anything in the protester's proposal which indicates that its proposed prices did not include non-PPM calls. Therefore, notwithstanding the agency's unrebutted assertion that it is standard practice in the industry for vendors to charge separately for non-PPM calls, it is clear that proposals were not evaluated on a common basis. What must be determined, then, is whether under these circumstances the award to Hetra should remain undisturbed.

In this connection, the Commerce Department has attempted to reconstruct the Hetra price proposal to include quoted non-PPM charges in Hetra's total proce so as to compare the overall Hetra price with the protester's price on the same basis. According to the Department, its operating experience indicates that terminals operated 24 hours per day, 7 days per week, require an average of one call per month for repair of totally disabled equipment failures outside the PPM (7:00 a.m. - 6:00 p.m.). Based upon one call per terminal per use month, it was calculated that the additional costs for the Hetra terminals for the 5-year systems life would be:

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| 10 Type I terminals | X 15 calls | X $125/call | = | $18,750 |
| 1 Type II terminal | X 15 calls | X $125/call | = | $ 1,875 |
| 1 Type V terminal | X 60 calls | X $125/call | = | $ 7,500 |
| | | | | $28,125 |

(The Department's computation for Types I and II was based on 15 calls rather than 60, even though 60 terminals were to be furnished for each Type, because those terminals are used on a 24-hours per day, 7 days per week schedule for only 3 months of the year. Thus, according to the Department, during the other 9 months of each year, repairs can be effected during the PPM time of 7:00 a.m. to 6:00 p.m., Monday through Friday.) Since Hetra's evaluated price without the inclusion of non-PPM costs was $1,611,929 compared to the protester's $2,051,242 which included such costs, the agency calculates that inclusion of those costs in Hetra's price /on the basis of the number of agency-estimated calls/ would still leave Hetra's price some $411,188 below the protester's price.

The protester does not disagree with the Department's estimate of one non-PPM call per terminal per month. However, it points out that it was not stipulated in the RFP that on-call maintenance outside the PPM for Types I and II would be required for only 3 months of the year, and implies that its prices for Types I and II were submitted on a 12-month per year basis. It is obvious, however, that if the agency's calculations on Hetra on Types I and II are multiplied by a factor of four, the projected Hetra price would still be $349,313 below the protester's price.

We recognize that the process by which the contracting agency has attempted to reconstruct Hetra's price after award is imperfect at best, and that it cannot be determined precisely what Hetra's price would have been had it computed non-PPM on the same basis as the protester. However, in view of the rather substantial dollar disparity between the protester's and Hetra's prices and the relatively insignificant quantum of non-PPM costs, we think it highly unlikely that Hetra's price would not have remained substantially lower than the protester's even had Hetra computed its price on inclusion of non-PPM calls. Accordingly, we cannot conclude from this record that the relative competitive standing of these two offerors has been placed into doubt by the defects in the procurement, or that the award was not made to the offeror representing the lowest overall cost to the Government.

With regard to the absence from the RFP of an estimate of required non-PPM calls, the record shows that the protester computed its price without the availability of such an estimate and without question or objection to its absence. Furthermore, this aspect of the protest is untimely under Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1976), which provides that protests based upon alleged improprieties in a solicitation which are apparent prior to closing date for receipt of initial proposals must be filed prior to such date. We note, however, that the contracting agency concedes that it "inadvertently omitted" the estimate.

We are advising the Secretary of Commerce that steps should be taken to avoid a recurrence of the deficiencies noted in this procurement.

R.F.Keller

**Deputy** Comptroller General
of the United States