

DECISION



11288 Proc I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-193703

DATE: September 4, 1979

MATTER OF: Tymshare, Inc.

CNG00368

DIGEST:

[Protest of Procurement For Teleprocessing Services]

1. Teleprocessing Services Program procurement included requirements that proposed hardware be currently operating system and that vendors' networks include "proposed basic hardware" which had been in operation for 12 months. Agency maintains vendors were not precluded from offering upgraded or enhanced version of basic hardware which had not been in operation for 12 months, and accepted successful vendor's offer of IBM 3033 in lieu of IBM 370/168. Agency interpretation is supported by language of solicitation and GAO cannot conclude it lacks reasonable basis.
2. Protester initially asserted that vendor selected to receive order under Multiple Award Schedule Contract (MASC) was nonconforming to one technical requirement. After receiving agency report, including copy of successful proposal and technical evaluation, protester asserted contractor's MASC showed nonconformity in 2 additional areas. As protester failed to diligently pursue information which would have revealed latter grounds for protest, they are untimely. Additional protest grounds are based upon contractor's publicly available MASC, contractor's proposal did not depart from MASC, and record shows no attempt by protester to obtain copy of proposal from agency.

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Tymshare, Inc., has protested concerning the issuance of an order to Boeing Computer Services Company (BCS) by the Defense Supply Service-Washington (DSS).

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I. Introduction

697-5737

The procurement, for teleprocessing services for the Federal Procurement Data Center (FPDC), was conducted pursuant to the Teleprocessing Services Program (TSP). Under this program, Tymshare, BCS and other companies hold Multiple Award Schedule Contracts (MASC's). DSS states that in 1978 FPDC reviewed the 38 MASC's to determine which contractors could meet the technical requirements, and found that BCS, Tymshare and another company did. FPDC issued to these 3 companies a "Memorandum for Teleprocessing Services Vendor," dated October 19, 1978, which described its requirements. BCS and Tymshare responded. Both companies passed benchmark tests. In the final technical evaluation, Tymshare received 652 points out of a possible 750 and BCS received 640. The estimated 2-year system life cost for BCS was evaluated as \$179,586.83 and for Tymshare, \$246,246.08. Based on an evaluation formula which weighted cost and technical factors equally, BCS received a .9250 total score (out of a possible 1.000) and Tymshare received a .8000 score. A delivery order was placed with BCS on December 13, 1978, covering services through September 30, 1979, and Tymshare protested to our Office on the same date. ID

II. Hardware Requirement

Attachment I to the October 29, 1978, memorandum to the vendors provided in pertinent part:

"A. FACILITIES REQUIREMENTS

1. The hardware proposed must be a currently operating system.
2. The proposed remote time-sharing network must be an operating, tried and proven, national full-service network. The vendor must have had at least two year's experience in providing commercial remote timesharing services and a minimum of twelve (12) months' prior operation of the proposed basic hardware and software in a teleprocessing environment. (Emphasis supplied.)

The main issue in this case involves the interpretation of the underscored sentence, particularly the reference to "proposed basic hardware." Tymshare contends the solicitation clearly established a mandatory requirement that vendors propose basic hardware which had been in operation for a minimum of 12 months, and notes that the IBM 3033 central processing unit proposed and benchmarked by BCS could not possibly meet this requirement, because it was not available from IBM until about March 1978. The protester concludes that in selecting BCS, DSS improperly waived a mandatory requirement.

DSS disagrees:

"The requirement of the FPDC was that the basic hardware be operational for twelve (12) months. The key word is basic. In the absence of a standard industry definition of basic hardware, the FPDC suggests that it would be that hardware which constitutes or serves as the starting point. In this case the IBM 370 series would constitute the starting point. Since BCS merely modified

its IBM 370/168 to an IBM 370/3033, it is reasonable to conclude that BCS did not change its basic hardware but rather merely enhanced it." (Emphasis in Original.)

The protester believes the agency's interpretation is strained. Tymshare points out that the IBM 370 line contains a wide variety of central processing units which differ substantially in performance, and maintains that the differences between the IBM 370/168 and 3033 are dramatic in terms of structure, performance and cost. The protester contends that the more reasonable interpretation is that the "basic hardware" which had to be operational for at least 12 months referred to the hardware on which each vendor relied in order to meet the technical requirements of this procurement, especially since the specification called for a "tried and proven" network of teleprocessing equipment.

To this, DSS responds:

"* * * Boeing's basic or starting point configuration of (3) 370/168's was logically upgraded to a 370/3033. Normally a vendor will upgrade a computer system with the next higher performance system in the compatible series or family of systems. As for Tymshare's comparison of the IBM 370/3033 and the IBM 370/168, this is perfectly appropriate as the two systems are an excellent illustration of a logical hardware upgrade or enhancement to the next higher performance system. It is interesting to note that the systems are almost identical in terms of memory size and price while comparing very closely in memory cycle time, machine cycle time and channels. The biggest difference in the area of relative performance and the factor of 1.8 to 1 clearly indicates that the 370/3033 is a logical upgrade or enhancement to the IBM 370/168."

We do not believe the protester has shown DSS's interpretation lacks a reasonable basis. Section A.2 of the requirements did not state that a vendor's "proposed hardware" had to have been operational for 12 months; it used the expression "proposed basic hardware." It appears to us that the pertinent requirement concerning proposed hardware was in section A.1, which merely stated: "The hardware proposed must be a currently operating system." The terms of a solicitation should be read and reasonably construed together. Computer Machinery Corporation, 55 Comp. Gen. 1151, 1155 (1976), 76-1 CPD 358, affirmed, 76-2 CPD 128. DSS's interpretation gives effect to both sections A.1 and A.2; the proposed hardware must be a currently operating system and the "proposed basic hardware"--part of an "operating * * * network"--must have been in operation for a minimum of 12 months. The protester's interpretation is less persuasive, because it raises a question whether section A.1 is mere surplusage.

It is also pertinent that the sentence in section A.2 highlighted by the protester clearly relates to the vendor's experience. It appears that the agency's primary concern in section A.2 was that the proposed network be "tried and proven," as shown by the vendor's past operation for a certain period of time of "proposed basic hardware and software." Viewed in this light, the agency's interpretation that this did not preclude a vendor from offering an upgraded type of its basic hardware, subject to the requirement of section A.1 that the proposed hardware be a currently operating system, does not appear unreasonable.

Moreover, it appears that both vendors interpreted the requirements in a manner consistent with the agency's position. DSS points out that Tymshare's proposal included an IBM 3032 which was not on its MASC and had not been in operation for 12 months. The protester responds that the IBM 3032 was one of a variety of alternative systems included in its proposal, and maintains in effect that it was included in anticipation of the possibility that FPDC might amend its requirements to allow hardware that had not been in operation for 12 months.

The agency, however, correctly points out that there is nothing in the Tymshare proposal to support this explanation. The proposal does not state that the

IBM 3032 was being offered as an alternate, nor does the record reveal any request by Tymshare that DSS amend its requirements to allow the IBM 3032 to be considered, or that the protester was told by DSS that the IBM 3032 was unacceptable. DSS's interpretation is that Tymshare offered the IBM 3032 because it well knew that the intent of the requirement was not to eliminate from consideration vendors which had recently enhanced their basic hardware, but rather to ensure that vendors' data centers included basic hardware configurations which had been in an operational environment for at least 12 months. We believe this explanation is more convincing than the protester's.

The protester has cited a number of decisions for the propositions that a specification using the word "must" creates a mandatory requirement, that a proposal to be acceptable must satisfy mandatory requirements, and that if an agency accepts a nonconforming proposal without amending the solicitation to give other competitors an opportunity to meet changed requirements, the protest should be sustained and corrective action recommended.

We believe the decisions relied on mainly involve different legal issues, and find none to be particularly similar factually. Some of the decisions cited basically deal with whether an agency erred in technically evaluating a proposal as conforming to an RFP specification, e.g., Computer Network Corporation et al., 56 Comp. Gen. 245 (1977), 77-1 CPD 31, affirmed, 56 Comp. Gen. 694, 77-1 CPD 422 (agency evaluation that ultimately successful proposal demonstrated compliance with undisputed RFP requirement for "read protection" computer security feature was found to lack reasonable basis). Other decisions cited deal with the effect of an agency's admitted acceptance of a nonconforming proposal, e.g., Annandale Service Company et al., B-181806, December 5, 1974, 74-2 CPD 313 (protester was deprived of equal opportunity to compete where agency accepted proposal for burglar alarm station which took exception to several RFP requirements, and RFP was not amended to reflect reduction in agency's requirements).

In the present case, the issue is not the reasonableness of FPDC's evaluation of BCS's proposal as conforming to a clear, undisputed requirement or the consequences of

an admitted waiver of that requirement, but the interpretation of the nature of the requirement. As previously discussed, we do not find DSS's interpretation to be unreasonable. As for the protester's citation of System Development Corporation, B-193487, May 1, 1979, 79-1 CPD 303, for the proposition that an "enhanced" computer cannot satisfy a solicitation requirement for an "operational prototype," it is sufficient to note that individual RFP requirements must be interpreted based on the facts and circumstances of the particular case. In the present case, the solicitation required merely that the hardware proposed be a currently operating system. There has been no showing that BCS's IBM 3033 did not satisfy this requirement, and we cannot say that the agency's regarding the 3033 as a logical "upgrade" of the "basic" hardware BCS had previously been operating clearly lacks a reasonable basis.

Tymshare also argues that since FPDC improperly allowed BCS to use the IBM 3033 (which is more powerful than the IBM 370/168) in its benchmark, and since the benchmark results directly affected the computation of systems life cost, the cost evaluation was defective. This argument is mooted by the above discussion. The protester further contends that there are serious questions about the cost evaluation, because over the first few months of performance by BCS costs were being incurred at a far higher rate than the cost evaluation would indicate was likely. In this regard, the question whether the selection of BCS is objectionable depends on whether improprieties have been shown in the technical and cost evaluations prior to award, not on how the order is being performed. See Computer Network Corporation, 56 Comp. Gen., supra, at 705-706. While the protester speculates about possible improprieties in the cost evaluation, it has not demonstrated in what respects the agency's evaluation clearly lacked a reasonable basis.

Finally, even assuming Tymshare's interpretation that the hardware proposed for this procurement had to have been operational for 12 months is correct, it would be difficult to find prejudice to the protester. As DSS points out, if indeed FPDC waived a mandatory requirement in accepting BCS's IBM 3033, it would follow that the same requirement was waived for the protester in that Tymshare was not eliminated from consideration for proposing an IBM 3032. In situations such as this, where

a requirement is relaxed for both offerors, neither can be said to have been prejudiced. See Elgar Corporation, B-186660, October 20, 1976, 76-2 CPD 350.

III. Alternate System and Availability Requirements

Tymshare also contends that BCS failed to satisfy portions of the following requirements:

"A.7. At least one alternate computer system must be available to supply this service to the FPDC in the event of failure of the primary system. In the event of primary system failure, the FPDC systems must be fully operational on the alternate system within an 8 hour time frame. The alternate system must be co-located in the same data center.

"A.8. System availability. The Contractor agrees to provide users continuous and uninterrupted access to the network and their data bases during the hours specified as follows: The system will be available for FPDC use a minimum of 21 hours per day, Monday through Friday, and 15 hours on Saturdays and Sundays (8 a.m. to 6 p.m.). All computers/ computer centers within the network need not be functioning throughout these periods, so long as access to the network and the users' data bases is not restricted and the fact that portions of the hardware are not functioning is transparent to the user."

The proposal submitted by BCS for this procurement addressed these requirements as follows:

"7. Alternate Computer System

The BSC Computer Center is a multimainframe computer center. Most peripheral devices are

shared and alternate systems availability within eight hours is assured. In the new BCS Computer Center an additional 370/168 CPU will be available to provide true back-up to the operating CPUs.

"8. System Availability

The BCS hours of availability TSO and CTS in our FY'79 MASC are 0700-0300 the following day Monday through Friday. Saturday hours are 0700 to 0300 the following day. Sunday hours are 1100 to 2300. Our MASC also provides that should a using agency require, additional hours of service will be made available to the agency so requesting."

The protester maintains that (1) BCS's MASC specifically shows that its second IBM 370/168 does not provide "complete" backup for its IBM 3033, and (2) the BCS MASC shows BCS provides only 20 hours of service Monday through Friday, does not have service on Sundays before 11 a.m., and does not provide any service on certain national holidays. Tymshare believes that, accordingly, FPDC should never have solicited BCS for this procurement, because under TSP procedures only those vendors whose MASC's show they satisfy the technical requirements should be solicited. The protester concludes that in soliciting and eventually selecting BCS, the agency waived portions of the mandatory requirements.

Both DSS and BCS dispute the merits of Tymshare's allegations. In addition, BCS contends that the foregoing grounds of protest (which were first raised in the protester's April 5, 1979, comments to DSC's March 12, 1979, report) are untimely, because they were not filed within 10 working days after the basis for protest was known or should have been known, as required by section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1979). BCS maintains that these grounds of protest are based on the contents of BCS's

MASC, which is in the public domain, and that when Tymshare learned in December 1978 that BCS had been selected, it should have known of these bases for protest at that time.

The protester contends its protest on these grounds is timely. Tymshare maintains that each MASC contains numerous product offerings and services, and that it would be virtually impossible for it to determine from BCS's MASC that none of the MASC offerings and services-- or any possible combination of them--could satisfy each mandatory requirement. The protester argues that these grounds of protest are not based simply on BCS's MASC but rather on BCS's decision to offer, and the agency's decision to evaluate, certain offerings from BCS's MASC which did not satisfy the mandatory requirements of this procurement. Tymshare maintains it did not have enough information to determine if BCS had satisfied mandatory requirements until it reviewed BCS's proposal and the record of the agency's evaluation, copies of which were first disclosed to it in the agency's March 15, 1979, report.

Initially, the protester's analysis is inconsistent with its argument that FPDC erred in even soliciting BCS for this procurement. Under TSP, the decision as to which contractors to solicit is based upon an examination of their MASC's. Knowledge of a basis for protest that an agency erred in soliciting a contractor for a particular procurement would therefore consist of three elements: (1) the requirements of the procurement in question; (2) the contractor's identity; and (3) the contents of the contractor's MASC.

Tymshare argues in effect that it did not know FPDC had a "definite requirement" for an alternate computer system until it received with the agency report a copy of the technical evaluation checklist, which showed that eight potential vendors were not solicited because they did not provide a backup computer. In this regard, we believe it would be presumed, in the absence of a showing to the contrary, that the solicitation issued to vendors which survive the initial scanning procedure reflects the actual requirements of the agency. The technical evaluation checklist simply shows the agency's application of a requirement the protester was informed of when it received the solicitation in October 1978. The second element--BCS's

identity--was known to Tymshare in December 1978, and the third--BCS's MASC--was publicly available information. In these circumstances, we believe Tymshare knew or reasonably should have known its basis for protest in this regard at that time.

Further, we are not persuaded by the protester's argument that it reasonably did not know of its additional grounds of protest because they relate to the contents of BCS's proposal and the record of the agency's technical evaluation of the proposal. If an offer submitted by a MASC vendor for a particular order departed from the terms of its MASC, we would agree that a protester could not know its basis for protest without access to the contents of the offer. However, the relevant portions of BCS's proposal, quoted supra, are quite general and do nothing more than summarize information set forth in greater detail in BCS's MASC. In addition, in the record of the technical evaluation (TAB K of DSS's March 15, 1979, report) the only specific mention of alternate system capability is in terms of the BCS's backup power supply, an issue not raised by the protester. The technical evaluation narrative does not mention system availability at all. We believe it is clear from Tymshare's protest correspondence that the additional grounds of protest are based upon the contents of BCS's MASC.

Tymshare's argument that its grounds of protest could not be ascertained from the multiplicity of offerings in BCS's MASC is also unpersuasive. BCS's MASC describes three types of services--MAINSTREAM-TSO, MAINSTREAM-CTS, and MAINSTREAM-EKS. For each of these, the pertinent information concerning system availability is easily locatable in section H.8 ("Hours of Operation"), and for each the pertinent information concerning alternate system capability is set forth in section H.11 ("Network Facilities Reliability"). The protester's contention is apparently that until it received the BCS proposal, it did not know which of these services were offered for this procurement (BCS offered "TSO" and "CTS"). However, there is no indication that Tymshare made any inquiries to the agency to obtain this information, or that the information was not disclosable. It is noteworthy that the protester filed its timely protest concerning the "proposed basic hardware" requirement, supra, after it inquired in December 1978 and was told by the agency that BCS had benchmarked an IBM 3033.

Our Office's Bid Protest Procedures emphasize the expeditious resolution of protests. We believe that, in general, a protester which is challenging an award or proposed award on one ground should diligently pursue information which may reveal additional grounds of protest regarding a competitor's proposal. See, in this regard, Antenna Products Division, DHV, Inc., B-192193, February 9, 1979, 79-1 CPD 87; Cardion Electronics, B-193752, June 8, 1979, 58 Comp. Gen. _____, 79-1 CPD 406. Also, as pointed out in Cardion and other decisions of our Office, separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of our Bid Protest Procedures.

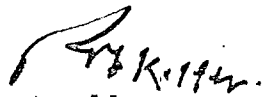
In the present case, it seems clear that rather than seeking out within a reasonable period of time available information which would have revealed certain additional, separate bases for protest, the protester simply waited several months until the agency report was furnished. The furnishing of the report then became the occasion for the protester to go back and review information about a competitor's offer which had been publicly available months earlier. In our view, the protester failed to diligently pursue the matter, and the additional grounds of protest were not filed within 10 working days after the bases for protest should have been known. See, in this regard, Guardian Electric Manufacturing Company, 58 Comp. Gen. 119, 128-130 (1978), 78-2 CPD 376.

In support of its position, Tymshare has cited Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256. That decision simply points out that we will accept a protester's reasonable statement as to when it became aware of its basis for protest concerning the contents of a competitor's proposal which had not been publicly disclosed, in the absence of evidence to the contrary. In the present case, however, BCS's MASC and proposal were publicly available. Resdel Engineering Corporation, B-191797, June 29, 1978, 78-1 CPD 465, is also distinguishable. That case dealt with the question whether the time limit for filing a protest regarding an agency's rejection of a protester's proposal is tolled by a debriefing. We held that the protester in Resdel was entitled to wait for the debriefing, because the notice of unacceptability did

not contain sufficient information regarding the reasons for the rejection of its proposal. The present case does not involve delay due to a debriefing or any request by Tymshare to receive additional information from the agency.

IV. Conclusion

The protest is denied.



Deputy Comptroller General
of the United States