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DECISION



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

FILE: B-206274.2

DATE: June 25, 1982

MATTER OF: CompuServe Data Systems, Inc.--Reconsideration

DIGEST:

Prior decision is affirmed upon reconsideration in absence of any showing that decision was based on error of fact or law.

CompuServe Data Systems, Inc. (CDS), requests reconsideration of our decision in CompuServe Data Systems, Inc., B-206274, May 20, 1982, 82-1 CPD 482. That decision denied CDS's protest of the decision of the Immigration and Naturalization Service (INS) to award a contract for teleprocessing services to National Data Corporation (NDC) under request for proposals (RFP) No. CO-13-81. We agreed with CDS and the General Services Administration (GSA), which had delegated INS authority to issue the RFP under GSA's Basic Agreement for teleprocessing services (BA), that the solicitation could reasonably be interpreted as having solicited prompt-payment discounts and indicated that the offered discounts would be evaluated. We stated CDS's offer of a 5-percent discount for prompt payment within 20 days which INS had failed to consider in evaluating CDS's offer was an eligible offer which should have been considered.

However, we also determined that, even when CDS's discount was considered and deducted from CDS's cost proposal and another \$15,000 allegedly invalidly added into CDS's proposal was deducted, NDC's offer remained the lowest cost proposal of two essentially equal technical proposals. Since the evaluation scheme did not require award to the highest scored offeror, under these circumstances we concluded that award to NDC as the low cost offeror was not unreasonable.

CDS argues that our decision was erroneous. First, it contends that, since INS failed to consider CDS's prompt-payment discount, INS acted inconsistent with the terms of GSA's BA and, therefore, the GSA delegation of procurement authority to INS was void and the contract

award to NDC illegal. Second, it states that INS never determined that CDS and NDC were technically equal and that clearly INS made its award decision on the basis of the highest evaluated score. Therefore, since we recognized CDS should have received a higher point score than NDC when its cost proposal includes consideration of its discounted price, CDS was then entitled to award of the contract on the basis of total points for technical, benchmark and cost factors.

CDS states that the GSA BA required INS to consider prompt-payment discounts. CDS contends that, since INS admittedly failed to consider CDS's prompt-payment discount, as mandated by the GSA BA, the delegation of authority under which this procurement was conducted "was and is void." Absent a valid delegation of authority from GSA, INS has no authority to acquire the services it is currently receiving from NDC. Therefore, CDS reasons, INS's "contract with NDC is null, void, and illegal." In this connection, CDS quotes a statement from the GSA report which it contends supports its argument that the contract was void. CDS concludes that our decision suggests that agencies need not adhere to the conditions of a GSA delegation of authority, permits agencies to breach their delegation agreements with impunity and is "directly contrary to the expressions of the Committee on Government Operations of the House of Representatives in its oversight of Government procurement activities."

We disagree with CDS's interpretation of GSA's report concerning this protest. GSA did not state that its delegation of authority to INS was void, only that it would be void if the BA terms and conditions were not followed. First, GSA advises that the INS solicitation incorporated by reference the BA and, "in that regard, as far as the BA is concerned, INS complied with GSA's delegation." GSA further advises that the BA included a provision for solicitation of prompt-payment discounts and consideration of these discounts in the evaluation of the price offered. GSA concludes that:

"* * * the RFP can be reasonably interpreted as having solicited for prompt-payment discounts and that offered discounts would be evaluated."

GSA further indicated:

"* * * that the failure of INS to evaluate offered prompt payment discounts was not in accordance with the INS solicitation. GSA does not view this issue as an ADP question or a delegation of authority issue. INS's acknowledged failure to evaluate in accordance with its solicitation is a procurement issue which the GAO is quite capable of dealing with. As far as GSA is concerned, the INS followed our delegation by soliciting under the BA, and the BA allows offeror to propose prompt payment discounts * * *"
(Emphasis added.)

Thus, GSA stated that, in its view, the INS solicitation provided for solicitation and evaluation of prompt-payment discounts and the RFP was not contrary to the GSA delegation. The language specifically quoted by CDS in its reconsideration request when quoted in full is nothing more than a restatement of the above analysis:

"As previously discussed, INS appears to be saying that they knowingly excluded prompt payment discounts from the solicitation's evaluation criteria and that it was an oversight that the BA was not annotated to indicate that offered discounts would not be considered. As indicated above, GSA believes that the solicitation could reasonably be interpreted to include the evaluation of prompt payment discounts. However, if the GAO should find that INS did, in fact, exclude prompt payment discounts from the solicitation's evaluation criteria, then such an act would not be in consonance with our TSP program. INS was delegated authority to procure 'under the BA of the TSP' and the BA requires the evaluation of eligible prompt payment discounts. In our judgment, 'under the BA' means in compliance with its terms and conditions. Failure to solicit under the BA's terms and conditions would not be in accordance with our delegation. Therefore, our delegation would be void."

Since we agreed with GSA that, contrary to INS's reported intent, the INS RFP provided for the solicitation

and consideration of discounts, there was no breach of the GSA delegation. As a procurement matter, we took the effect of the discount into consideration in our decision and found that even when the discount was deducted, and assuming the validity of CDS's other allegation of improper additions to its cost proposal, NDC's cost proposal remained the lower priced of two essentially equal proposals technically. Thus, award to NDC was proper under the solicitation evaluation and award provisions.

CDS also contends that there is no basis in the record for our statement that INS determined CDS and NDC to be technically equal and that, when CDS's discounted price is considered, CDS, not NDC, is the highest scored offeror.

As we stated in our decision, the record of the technical/benchmark evaluation indicated that both NDC and CDS were judged equally capable of providing the desired level of support to INS. Specifically, INS's report contained a letter of August 26, 1981 (dated approximately 3 months prior to award), from the technical evaluation team to the contracting officer stating that six firms that completed benchmark processing were considered technically qualified and that three firms, including NDC and CDS, were considered to be equally capable of performing the contract. The contracting officer's report also indicated his view that the CDS and NDC proposals were virtually equivalent.

We also determined that the solicitation evaluation and award provisions did not require that award be made automatically to the highest scored offeror and, therefore, under prior GAO decisions, where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration in making an award.

Under these circumstances, we held that even when CDS's cost discount is considered, and \$15,000 allegedly improperly added by INS to CDS's cost proposal is deducted, NDC's offer remained the lowest cost proposal of two essentially equal technical proposals and that award to NDC because it was the low cost offeror was not unreasonable. We note that the INS notice of award letter dated December 24, 1981, reported by CDS as advising that award was based on total points does not state the basis for award. The letter to CDS states both NDC's and CDS's point scores and prices and advised that CDS's proposal was

not selected for award. Therefore, this letter which was contained in the record upon which our original decision was based does not contradict our conclusion that award to NDC as the low cost offeror was proper.

Our decision is affirmed.

for Harry D. Van Cleave.
Comptroller General
of the United States