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DECISION

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

FILE: B-206556 DATE: May 14, 1982

MATTER OF: McAuto Systems Group, Inc.

DIGEST:

1. Grantee's determination that the required services be performed in a particular location is reasonable because the determination is based on the grantee's need to enhance control, cost savings and operational efficiency.

2. GAO has no basis to conclude that the grantee violated certain grant conditions because (1) the RFP requested detailed information concerning various relevant aspects of offerors' qualifications and the RFP adequately advised offerors of the relative importance of low price and qualifications, (2) whether the grantee will conduct discussions with all offerors in the competitive range is, at best, a premature complaint, and (3) the complaint against the RFP's price evaluation scheme is presented here too late to be considered on the merits.

3. GAO finds no violation of grant conditions where the grantee released certain data pertaining to the incumbent contractor's operating expenses because the complainant has not shown that it has been materially prejudiced by the grantee's action.

4. GAO has no basis to conclude that grant conditions were violated where the complainant has not made a persuasive showing that RFP's projected workload data is not based on the best available information and, therefore, does not accurately reflect the grantee's reasonably anticipated needs.

5. GAO finds that the RFP's plan to select the successful offeror possibly based on factors other than low price alone does not violate Federal law. Further, the complainant has not convincingly shown that the RFP's evaluation plan violates State law.

McAuto Systems Group, Inc. (McAuto), complains against the terms of the request for proposals (RFP) issued by the State of New York for the services of a fiscal agent to operate New York's Medicaid Management Information System. The project is funded substantially by a grant administered by the Health Care Financing Administration, Department of Health and Human Services (HHS).

McAuto principally contends that (1) the RFP unreasonably restricts the performance site to Albany, (2) the RFP improperly disclosed McAuto's detailed operating cost data, damaging its competitive position, (3) the RFP does not adequately disclose the basis for selecting the successful offeror, (4) the RFP's incorrect projections on the amount of work involved encourage offerors to submit unrealistically low prices, and (5) award to any firm other than the low bidder would violate New York law. New York, with HHS's concurrence, explains why Albany was selected, why McAuto's cost data is not germane, how the successful offeror will be selected (as disclosed in the RFP), why the work projections are correct, and why award based on factors in addition to low price does not violate New York law. We deny the complaint in part and dismiss the complaint in part.

The RFP sought fixed-price proposals from firms to operate New York's Medicaid Management Information System, a mechanized claims processing and information retrieval system, handling billions of dollars in Medicaid vendor claims annually ($4.5 billion in 1981). New York prepared the RFP with the assistance of HHS and an independent consultant, Touche Ross and Company. The RFP issued in November 1981, initially called for proposals based on the successful offeror taking over the facility in New York City used by the then-incumbent contractor, Bradford National Corporation (Bradford). In December 1981, McDonnell Douglas Corporation, pursuant to an agreement with Bradford, began performing as the incumbent contractor, through its wholly owned

McAuto subsidiary. Apparently, there was no novation agreement for the transfer of contractors and New York states it has not agreed to the substitution of McAuto for Bradford. In January 1982, New York amended the RFP to request alternate proposals based on performance in Albany. Later, New York amended the RFP, notifying offerors that only the Albany option would be evaluated because New York could not be assured that the successful offer could have access to the New York City facility.

McAuto first contends that New York violated the applicable grant conditions--requiring that procurements be conducted to provide maximum open and free competition--by requiring performance in Albany. McAuto explains that New York's determination precludes McAuto from proposing based on the use of its existing facilities, equipment and personnel in New York City; thus, McAuto states that it is precluded from competing on its most favorable basis and that New York is precluded from obtaining the best possible arrangement. In that regard, McAuto states that a proposal based on the use of its New York City facility might produce the best technical and cost results and minimize risks associated with turnover to the successful offeror. McAuto argues that New York is attempting to improperly equalize the competition in a manner constituting a violation of the requirement for maximizing competition. McAuto concludes that New York's Albany-only determination is improper because (1) it was made only after New York was unable to coerce the incumbent into abandoning its facility in New York City and (2) New York recognizes the problems associated with an abrupt transition from New York City to Albany.

In response, New York explains that the RFP initially contemplated performing the required services in New York City, primarily because New York thought that it had a right to permit successor contractors to use the incumbent contractor's facility. New York states that, in view of possible problems associated with the incumbent's asserted rights to deny a successor contractor the use of the New York City facility, New York reassessed its needs. New York explains that the determination to have the services performed in Albany, the State capital, was made because New York's ultimate or long-range goal is to consolidate the function in Albany to enhance the degree of control and supervision over the contractor and the system; the Albany location will be one step closer to the New York objective of New York's own operation of the system. New York also explains that the Albany-only option (1) eliminated possible performance problems associated

with a disputed takeover of the New York City facility by a successor contractor, (2) assured continuity of operations, and (3) fostered maximum open and free competition by eliminating McAuto's perceived cost advantage. New York, with HHS's concurrence, concludes that the Albany-only option was rationally based and permitted an adequate number of firms, including McAuto, to actually compete.

In our decision in the matter of Pentech Division, Houdaille Industries, Inc., B-192453, June 18, 1980, 80-1 CPD 427, we stated that, in the course of our review of direct Federal procurements, we consistently recognize that agencies have great discretion in determining their needs and how to satisfy them. There, we also recognized that Federal grantees, not grantors like HHS, are charged with the responsibility of determining how to satisfy their requirements; accordingly, when an interested contractor complains of exclusionary specifications by a Federal grantee, GAO will not question the grantee's determination unless it is shown to be unreasonable. The complainant bears a very heavy burden to show that the grantee's determination is unreasonable. See Pentech Division, Houdaille Industries, Inc., supra; Integrated Forest Management, B-200127, March 2, 1982, 82-1 CPD 182.

Regarding the enhancement of control aspect of New York's explanation for selecting the Albany site, we note that there is a pattern of development of this system; the system was first available only in the New York City District and, later, expanded incrementally to districts outside New York City to the point where the entire State system is currently run from New York City. While the work has been performed in New York City and while New York initially contemplated having the work performed in New York City, to enhance its control over this system, New York reasonably explains that it needs to have the function performed in Albany.

In direct Federal procurements, site restrictions are proper where the selection is not shown to be unreasonable and adequate competition would be available. See, e.g., CompuServe, B-188990, September 9, 1977, 77-2 CPD 182. For example, our decision in Coalition of Higher Education Assistance Organizations; American Collectors Association, Inc., B-203996, B-203996.2, December 23, 1981, 81-2 CPD 490, considered a protest against a

solicitation provision requiring an office within a certain city. The protesters argued that the work could be accomplished without having an office in the required city. We held that the requirement for an office within the designated city was reasonable based on the contracting agency's explanation that the required office would enhance the efficiency and effectiveness of the operations. We noted that, while there may be other methods to accomplish the desired result, we did not find that this alone rendered the requirement unreasonable.

The record before us shows that New York's initial stated preference for contract performance in New York City was based on its assumption that performance would continue at the New York City facility. Continued performance at the same location would serve to assure uninterrupted and undelayed service. New York was concerned that any need to relocate the site of contract performance might result in delays and interruption of service.

When in discussions with McAuto the State realized that the New York City facility would not automatically become avaliable to any successor contractor, the underlying desirability of performance in Albany became of controlling importance. New York believed that its control of the operation would be enhanced if the operation were located in the capital. In this regard, we note that New York planned to move the operation eventually to Albany; thus, this became an opportune time to make the move.

In sum, once New York lost the assurance that any successor contractor in New York City could move into the New York City facility--and, thus, transfer of the location of contract performance became an evident possibility--then New York decided to give effect to its long-term preference for contract performance in Albany.

In our view, while McAuto may believe that New York has adequate control with performance in New York City, McAuto has not made a convincing presentation that the next step in New York's plan--the Albany location--will not enhance New York's control over the system.

Regarding New York's long-term plan to operate the system without a contractor, we note that McAuto contends that current New York law prohibits the State from operating the system. We have no need to decide

the correctness of McAuto's interpretation of the State law since for the next 3 years, at least, the State does not plan to operate the system and, thereafter, we cannot predict with certainty what the State law will provide. In our view, McAuto has not persuaded us that New York's long-range plan to operate the system--to enhance cost savings and operational efficiency--does not support the Albany site selection.

Moreover, we find that New York's justification for selecting Albany is grounded primarily on its long-term objectives; only the timing of the site selection was affected by New York's disagreement with McAuto. Thus, McAuto has not shown that the Albany site selection was unreasonable.

Second, McAuto contends that the RFP does not adequately disclose the relative importance of price and technical excellence and the RFP does not adequately disclose the basis upon which the successful offeror will be selected. McAuto notes that the RFP requested substantial nonprice information but the RFP does not advise offerors which aspects of the information are more important to the State. When McAuto asked the State for clarification, it was advised that all the requested information is significant. McAuto concludes, citing 49 Comp. Gen. 229 (1969) and other decisions, that New York violated applicable grant conditions by not adequately disclosing the evaluation factors and their relative importance.

The Selection Methodology section of the RFP, as amended, provides that the technical proposal evaluation will be on a pass/fail basis; where the acceptable proposal's prices vary significantly, qualifications would not affect selection of the low priced offeror but, where those prices were close, the offeror's qualifications will be the basis for selection. HHS approved the amended selection scheme and, citing our decisions, New York and HHS contend that the RFP disclosed enough about the selection scheme so that offerors could propose intelligently and on an equal basis. The three other offerors in the competition support New York's view.

The grant conditions required that the RFP identify all significant evaluation factors, including price or cost, and their relative importance. 45 C.F.R. part 74, App. G (1980). Here, more than 100 pages of the RFP

requested detailed information concerning various relevant aspects of each offeror's qualifications. From the RFP's specific information requests, we find that offerors were on notice of the significant factors to be used in evaluating each offeror's qualifications. Although the RFP did not disclose whether New York viewed any particular subelements of an offeror's qualifications (like corporate experience, proposed personnel, financial capability) as being more important than other subelements, we find no legal requirement for New York to do so here. See Price Waterhouse & Co. B-203642, February 8, 1982, 82-1 CPD 103. Further, we find that the RFP adequately advised offerors of the relative importance of low price to an offeror's qualifications. See Complete Irrigation, Inc., B-187423, November 21, 1977, 77-2 CPD 387 (a reasonably clear indication is all that is required).

Our decisions, B-167175, October 13, 1969, 49 Comp. Gen. 229 (1969), and others, cited by McAuto, state that the relative importance of evaluation factors need not be reduced to a precise mathematical formula; the RFP must contain a clear indication of what minimum information offerors are expected to include in their proposals as well as reasonably definite information about the relative importance of evaluation factors. In our view, what New York wanted--an acceptable level of proposed technical excellence (or qualifications) and then low price would be determinative, unless prices were close, then the best qualified would be selected--was adequately communciated to offerors in the RFP. Accordingly, we find this aspect of McAuto's protest to be without merit.

Third, McAuto contends that New York may not conduct discussions with all offerors in the competitive range, which would be violative of the grant conditions and GAO decisions.

The grant conditions state that (1) discussions are normally conducted with more than one of the sources submitting offers and (2) the grantee shall evaluate proposals technically for purposes of written and oral discussions. 45 C.F.R. part 74, App. G (1980). If we assume that, as McAuto contends, discussions with all offerors in the competitive range are required, at this point we have no basis to conclude that New York will not satisfy (or has not already satisfied) the requirement. All offerors were present at GAO's informal conference on April 28, 1982, all had the opportunity to comment by

May 4, 1982, all offerors know that award is planned on May 14, 1982, and none, including McAuto, has advised our Office that New York improperly neglected to conduct discussions with it.

Since the offerors, including McAuto, have not stated that New York failed to conduct discussions, this aspect of McAuto's complaint is, at best, premature and will not be considered further.

Fourth, McAuto contends--for the first time in its May 4, 1982, submission--that New York's plan to evaluate only two of the four price aspects of the work to be performed denies McAuto the opportunity to compete on all aspects of the procurement, thus violating well-recognized competitive principles. The four aspects of the work to be priced by offerors are takeover, operations, evolution (system enhancements which could be made during the contract term), and turnover (to the entity that would perform the work at the expiration of the contract); only the takeover and operations prices are to be included in the price ranking of proposals and evolution and turnover prices are to be evaluated for reasonableness; the exact turnover price is to be negotiated between New York and the successful offeror.

We note that the original RFP contemplated only operating prices in ranking price proposals; the other aspects were to be evaluated for reasonableness. The March 2, 1982, amendment to the RFP announced the current price evaluation plan. The closing date for receipt of initial proposals was March 12, 1982.

In our view, this aspect of McAuto's complaint has been presented too late for our Office to consider it on the merits. As McAuto notes in its initial complaint filed on February 25, 1982, our decision in Caravelle Industries, Inc., B-202099, April 24, 1981, 81-1 CPD 317, announced our policy to no longer review complaints which are not filed within a reasonable time; in order to be considered filed within a reasonable time, a complaint based on an alleged apparent impropriety in an RFP, like this one, must be filed prior to the closing date for receipt of initial proposals. See W.T. Pengelly Corp., B-203606, September 14, 1981, 81-2 CPD 215. Thus, this aspect of McAuto's complaint is untimely and will not be considered on the merits.

Fifth, McAuto contends that New York improperly disclosed proprietary and confidential data relating to McAuto's operation of the system in New York City to

the substantial prejudice of McAuto. McAuto explains that, in response to requests by other offerors for a breakdown regarding projections of salary, fringe benefits, overtime, and shift pay disclosed by New York in the RFP, New York released Bradford's detailed expenses through November 1981; in response to similar requests for actual expenditure information for certain supplies, mailings, printing, and utilities, New York released Bradford's expense reports containing much of the requested information. McAuto argues that this data can be used to determine McAuto's labor rates, labor skill mix, overhead rate and administrative expense rate. McAuto states that the expense information was given to New York's auditors, who should have treated it as confidential to be used only for audit purposes. McAuto concludes that now other offerors know, with a high degree of confidence, the price that McAuto will submit for operating the system.

In response, New York reports that none of the released Bradford data was designated as being restricted and no information was provided to the State in confidence. New York explains that, under the terms of its contract with Bradford, Bradford was required to supply New York with fiscal records of contract expenses for purposes of contract administration; as required, Bradford routinely and regularly turned over monthly statements detailing contract expenses; this information was required by offerors in order to prepare realistic, competitive proposals. New York also states that the information released could have been obtained under the New York Freedom of Information Law.

New York argues that, in any event, Bradford's expenses in the New York City location are no longer germane to the costs of operating the system in Albany. New York states that the released information served to enhance the competition by providing offerors with better information on the scope of work, without prejudicing McAuto. HHS supports New York's position, finds no violation of the grant conditions, and states that New York's disclosure of information regarding what the Government paid under an ordinary contract is a cost of doing business with the Government.

One offeror states that the released financial data is incomplete, misleading, and unusable. The offeror points to (1) the utility item, which shows a credit, (2) a subcontract expense, which does not indicate

whether that labor, if any, was included in the personnel count, and (3) substantial bank charges, legal fees and home office expenses are not explained. The offeror also notes that the current cost-type contract contains no incentive to reduce costs, unlike the fixed-price contract contemplated in the instant procurement.

In reply, McAuto states that the information about supplies, mailings and utilities was not provided to New York under the contract with Bradford. McAuto states that the Bradford contract requires only summary cost information and the detailed expense information was provided to a State official to assist him in performing his duty of monitoring the contract. McAuto further states--the first time in its May 4, 1982, submission--that one of its employees expressly advised (orally) a certain State official that the data was confidential and released only for the limited purpose of assisting him. McAuto argues that (1) the New York City data is germane to performance in Albany because the essential operation remains unchanged, (2) it is wrong to disclose confidential data for the purpose of enhancing competition, (3) New York would not have been required to release the information under New York law.

We note that McAuto's rebuttal deleted any reply regarding the projections of salary, fringe benefits, etc., but reasserted its rights with respect to the data regarding supplies, utilities, etc., leading us to conclude that McAuto's initial complaint regarding New York's release of the former information has been adequately answered by New York's and HHS's responses. Second, the propriety of New York's release of the disputed data (presumably including both the former and latter groups of data) concerns New York's rights under the Bradford contract. While we do not decide what New York's contractual rights are, there is, at least, an arguable right in New York to obtain and release such cost data in that cost-type contract. Regarding McAuto's contention that the data was provided to New York outside the contract and conditioned on a pledge of confidentiality, the record contains only McAuto's assertion and New York's denial. There is no written evidence to support McAuto's position.

We also note that the released data is not fully explained and pertains to expenses in New York City and not Albany. While the essential operation may well be the same at the new site, McAuto has not convinced us that its competitors could know, with confidence, McAuto's

likely operating price in the instant competition. In the first place, the operating-price component is only one of the four price components to be evaluated. Second, the expense data is not fully explained. Third, the cost of performing in Albany may vary significantly from the cost of performance in New York City. We further note that New York's release of the data served to improve the nonincumbent offeror's knowledge of the scope of the work.

Accordingly, we find no violation of the grant conditions in New York's releasing of the disputed information.

Sixth, McAuto states that, unlike the Bradford contract, New York contemplates a firm-fixed price for the operation of the system, requiring the successful offeror to perform at the offer price irrespective of claims volume. McAuto notes that workforce, equipment, and facilities are sensitive to claims volume. The RFP sets forth statistics on claims volume and related data; the RFP states that New York has a high degree of confidence in the data, which is historically based and projected by New York through the contract term, October 31, 1985; the RFP requires offerors to use the data to prepare their proposals. McAuto contends that New York understates the scope of the work (by about 16 percent) and mischaracterizes the meaning of the data, which could cause other offerors to price their proposals too low. Specifically, McAuto asserts that the projected workloads are not based on current data and the factor used to project historical data is inaccurate.

In response, New York explains that the RFP's projections are based on the firmest available data obtained through actual experience and the projections have proven to be accurate; for example, New York projected a total active monthly recipient file of 1,904,000 at commencement of the new contract. The February 1932 data for such a file is 1,912,011, a variance of less than 1 percent. New York explains that monthly claimline volume is determined by multiplying the recipient file figure by a factor (3.9) developed through processing experience. New York reports that the variance (here an overestimate) between the projected and actual volume for September through December 1981 was less than 1 percent.

HHS reports that HHS is satisfied that New York used the best information available in making its workload estimates.

One offeror comments that the nonincumbent offerors are very experienced in this type of work (more so than McAuto) and they are not likely to be misled by the RFP's projections.

We note that in the context of questions and answers concerning the RFP, McAuto's concerns about the accuracy of the RFP's projections were communicated to the other offerors while they were preparing their proposals; further, New York refined the degree of confidence it has in the data by indicating a possible underestimate of 2.4 to 3.2 percent for the period November 1981 through October 1982. All offerors know this information and presumably considered it in preparing their initial and revised proposals.

In reviewing protests concerning usage estimates in solicitations related to direct Federal procurements, we are concerned with whether the estimates are based on the best information available and, thus, are a reasonably accurate representation of actual anticipated needs. See, e.g., Technology/Scientific Services, Inc., B-198252, November 28, 1980, 80-2 CPD 397, and cases cited therein. If we employ that standard in our work in the contracts-under-grants area, we are persuaded that the New York RFP's projections are based on the best available information and reasonably represent actual anticipated needs.

Seventh, McAuto contends that the grant conditions require New York to award contracts in accord with State law but New York's awardee selection plan may result in a violation of a State statute requiring award to the low priced bidder. The statute provides that contracts shall be let to the lowest responsible bidder taking into consideration the qualities of the articles proposed to be supplied and their conformity with the specifications. The statute also provides certain rules for procurement of materials, supplies and equipment and the statute mentions that phrase six times. We note that the word services is not mentioned in the statute. McAuto contends, citing several State court decisions, that the statute also applies to the procurement of services, as in the instant procurement, and, consequently, New York must substantially revise the RFP's price-evaluation and awardee-selection plan.

In response, New York reports that the referenced statute does not apply to services, but applies to procurement of articles, materials, supplies or equipment using formal advertising. New York reports that none of the cases cited by McAuto holds that the statute applies to services; instead, one decision (Wickham v. Trapani[1]) expressly states that the statute does not apply to services and the court cited a 1936 Opinion of the New York Attorney General. Further, the New York Attorney General's Office, in response to McAuto's complaint, opined, relying on the 1936 opinion, that the statute was not applicable in this instance. HHS concurs in New York's response.

In reply, McAuto states that New York case law specifically holds that the statute applies to contracts for services and McAuto contends that Wickham is irrelevant because it was decided on other grounds by the appellate court. McAuto argues that the recent view of the Attorney General's Office is not an official Attorney General's Opinion and should be ignored.

We begin our analysis on this point by noting that the policy reflected in the applicable grant conditions and our decisions in the area recognize that procurements like this one generally should be in accordance with State law as long as State requirements are consistent with the usually imposed Federal requirement for full and free competition consistent with the nature of the goods or services being procured. See, e.g., Xcavators, Inc., B-198297, September 29, 1980, 80-2 CPD 229, and the cases cited therein. Here, our review of the complaint has revealed no violation of the grant conditions (or Federal requirement) for full and free competition. Further, considering the nature of the services being procured, we perceive no strong Federal interest in having the selection made based solely on low price through either competitive sealed bidding or competitive negotiation. Here, the grantee is in the best position to know how its needs can best be satisfied and the grantee's highly discretionary determination to select the successful offeror through the RFP's announced selection plan has

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[1] 41 Misc. 2d 749, 246 N.Y.S. 2d 137 (Sup. Ct. Albany Cty. (1964), aff'd, 26 A.D. 2d 216, 272 N.Y.S. 2d 6 (3d Dept. 1966).

not been shown to be an abuse of the grantee's discretion in this matter. Absent a showing of abuse of discretion, GAO does not interfere in these types of matters. See, e.g., Cardion Electronics, A Division of General Signal Corporation, B-193610, July 22, 1980, 80-2 CPD 56.

Regarding the applicability of the statute, we are not convinced that the statute applies to this type of service contract, since (1) the statute does not mention services, (2) the parties have not cited a case from the State's highest court (or any lower State court) conclusively interpreting the statute as applying in these circumstances, and (3) the most persuasive evidence is the 1936 Opinion of the State Attorney General indicating that the statute would not be applicable here.

Accordingly, since the grant conditions do not require award based only on low price, since we are aware of no overriding Federal interest that requires that basis of award here, and since the complainant has not demonstrated that State law is being violated, we deny this aspect of the complaint.

The complaint is denied in part and dismissed in part.

Milton J. Socolar

for Comptroller General
of the United States