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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Rockwell Electronic Commerce Corporation

File: B-286201.6

Date: August 30, 2001

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DIGEST

Protest of agency's corrective action in response to a General Accounting Office decision sustaining earlier protest is sustained where the agency reopened discussions and requested proposal revisions from only one offeror in the competitive range, and where the agency's corrective action did not resolve the improprieties that were the basis for the prior decision.

DECISION

Rockwell Electronic Commerce Corporation protests the Social Security Administration's (SSA) implementation of our recommendation in Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65, aff'd, Social Sec. Admin.; MCI WorldCom Communications, Inc.—Recon., B-286201.4, B-286201.5, Apr. 19, 2001, 2001 CPD ¶ __. In that decision, we sustained Rockwell's protest of an award to MCI WorldCom Communications, Inc. under request for proposals (RFP) No. SSA RFP-00-3929, issued by SSA for network-based telephone services to handle the agency's toll free call traffic from the FTS 2001 network, as well as the agency's associated administrative call traffic.

We sustain the protest.

The RFP contemplated the award of a fixed-price contract for a base period with 6 option years. Award was to be made on a "best value" basis with price being the most important evaluation factor.

The RFP requested proposals for the best solution available in the industry to handle both the toll-free and administrative call traffic. Offerors were permitted to use the FTS 2001 network in their proposed solutions; in such cases the agency would pay the cost of using FTS 2001 services under the FTS 2001 contract[1] rather than under the solicited contract. Since those payments would be a cost to SSA associated with such a proposal regardless of which contract applied, the RFP stated that the cost of FTS 2001 services unique to a given proposal would be included in the price evaluation. As such, offerors were required to specifically identify in their proposals all unique FTS 2001 services and the associated costs.

Of the [DELETED] proposals submitted, [DELETED] proposed virtual private networks (VPN) for both toll-free and administrative call traffic, and the other [DELETED] proposed using FTS 2001 services to varying degrees. Rockwell was one of the offerors proposing a VPN-based solution, which had no FTS 2001 costs for handling administrative call traffic. MCI proposed a solution which would necessarily entail unique FTS 2001 costs for handling administrative call traffic; however, MCI's proposal did not specifically identify those unique FTS 2001 costs as was required by the RFP, and SSA did not consider such costs in the price evaluation as required by the RFP. The two proposals that relied on VPN-based solutions were higher priced than MCI's evaluated price. Under the other evaluation factors, Rockwell's proposal was rated the same as MCI's, and the other VPN proposal was rated the same as or better than MCI's proposal.

SSA awarded the contract to MCI. Rockwell's protest was filed within 5 days of receiving a required debriefing, and the agency was required by law to suspend performance under MCI's contract unless the head of the procuring activity authorized in writing the performance of the contract notwithstanding the protest. 31 U.S.C. §§ 3553(d)(3), (d)(4) (1994). SSA authorized overriding the required suspension of performance, pursuant to 31 U.S.C. § 3553(d)(3)(C)(i)(I), based on a determination that performance was in the best interests of the government. Rockwell Elec. Commerce Corp., supra, at 5 n.3.

Among other things, Rockwell protested that the evaluation was unreasonable and inconsistent with the RFP because SSA did not evaluate all of FTS 2001 costs associated with MCI's proposed solution. In the agency's report and supplemental

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[1] SSA selected MCI as its FTS 2001 contractor from the General Services Administration's available contractors.

report responding to the protest, the agency contended that the RFP did not require the agency to evaluate unique FTS 2001 costs for handling administrative call traffic. However, late in the protest process (at the hearing), the agency began to assert that, even if its evaluation did not comply with the RFP, the protester was not prejudiced because the level of administrative call traffic at issue was insignificant, such that any associated FTS 2001 costs for MCI's proposal would be immaterial.

Our decision sustained Rockwell's protest on the basis that the RFP required SSA to evaluate the FTS 2001 costs that MCI's proposed solution would incur for distribution of administrative call traffic, and SSA did not evaluate these costs. Rockwell Elec. Commerce Corp., supra, at 7-8. Indeed, we observed that since MCI had failed to provide the information required by the RFP for the price evaluation, SSA could not evaluate MCI's price. Id. at 7; Social Sec. Admin.; MCI WorldCom Communications, Inc.--Recon., supra, at 2. We determined that Rockwell was prejudiced by this improper evaluation regardless of whether the level of administrative call traffic in question and associated costs were significant or insignificant. This was so because the RFP called for the best solutions available within the industry to deal with administrative call traffic, but SSA never informed offerors that its administrative call traffic was insignificant. As indicated, Rockwell stated that its price was higher than MCI's due to the cost of the portion of its VPN solution associated with handling the administrative call traffic in question. Rockwell (and [DELETED]) never had the opportunity to submit a proposal knowing either that the agency did not intend to evaluate costs of delivering this administrative call traffic if FTS 2001 services were used, or that the level of that traffic (and thus the associated cost) were insignificant. Rockwell Elec. Commerce Corp., supra, at 8-9; Social Sec. Admin.; MCI WorldCom Communications, Inc.--Recon., supra, at 3-4. We recommended that SSA reopen the competition, amend the solicitation as may be appropriate, request and evaluate revised proposals, and make a new award decision consistent with the terms of the RFP and our decision. Rockwell Elec. Commerce Corp., supra, at 11. The agency and MCI subsequently requested reconsideration, which we denied.

Following our decisions, the agency requested proposal revisions from MCI limited to the identification of its FTS 2001 costs for handling administrative call traffic that were not previously identified in its proposal. Agency Report, Tab 1, Request for Revised Proposal. MCI's revised proposal identified those additional costs as $[DELETED][2] (a very small percentage of MCI's total evaluated cost of $[DELETED]). Agency Report, Tab 3, MCI's Revised Proposal; Tab 6, Price

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[2] The agency's price evaluation reduced this amount slightly "to reflect a 50%/50% contract overlap by year consistent with [SSA's] prior evaluation (initial award)." Agency Report, Tab 6, Price Evaluation of Revised Proposal, at 1.

Evaluation of Revised Proposal, at 1. The agency did not request or receive proposal revisions from Rockwell or any other offeror. Agency Report, Tab 8, Source Selection Recommendation for Award, at 3. The prior technical evaluations remained unchanged, and the agency again selected MCI's proposal as representing the best value to the government. Id. at 2.

Following notice of the agency's actions, Rockwell protested to our Office. Rockwell contends that the agency's actions are not consistent with applicable laws and regulations or our recommendation. The agency responds that it did act consistent with our recommendation because it corrected the problem identified by our decision, i.e., that the agency had not evaluated FTS 2001 costs consistent with the terms of the RFP.[3] Since Rockwell did not propose using FTS 2001 services for handling administrative calls, SSA claims that there was nothing to discuss with Rockwell, and there was no corresponding portion of Rockwell's proposal that could be revised. SSA states that limiting discussions and proposal revisions in this manner was justified to protect the integrity of the procurement system, given that MCI's proposed price and other information had been disclosed after award.

As a general matter, the details of implementing our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. Such discretion must be exercised reasonably and in a fashion that remedies the procurement impropriety that was the basis for our protest recommendation. The Futures Group Int'l, B-281274.5 et al., Mar. 10, 2000, 2000 CPD ¶ 148 at 8; CitiWest Properties, Inc., B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ 3 at 6. Here, the agency did not act reasonably in reopening discussions only with MCI, nor did the agency's remedy resolve all the improprieties that were the basis for our decision sustaining the prior protest.

Specifically, if a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. Federal Acquisition Regulation (FAR) § 15.306(d); International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6. Similarly, if discussions are reopened with one offeror after receipt of final revised proposals, they must be reopened with all offerors whose proposals are in the competitive range, even where the discussions are corrective action on improper awards. International Resources Group, supra; The Futures Group Int'l, supra, at 10; Patriot Contract Servs., LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 5 n.3. Moreover, where, as here, revised proposals are proper for remedying a flawed procurement, requesting proposal revisions after an offeror's price or other information has been revealed is not

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[3] The agency now concedes that this was an error.

improper.[4] RS Info. Sys., Inc., B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98 at 4; Computing Devices Int'l, B-258554.3, Oct. 25, 1994, 94-2 CPD ¶ 162 at 3-4. Since discussions were reopened with MCI to advise MCI of the defect in its proposal, and MCI was permitted to revise its proposal, SSA was required to conduct discussions with all offerors whose proposals had been found in the competitive range and allow those offerors to submit proposal revisions.

Furthermore, the agency's limitations on reopening of discussions failed to address all of the improprieties identified by our decision. The initial protest record prior to the hearing, as well as the general framework for our decision, was developed around the issue of MCI's proposal not identifying FTS 2001 costs and the agency's vigorous insistence that it did not have to evaluate them. This is the only impropriety that the agency has attempted to remedy following our decisions.

The agency, however, introduced information during and after the hearing showing that the actual conditions of this procurement are significantly different than those under which the competition was conducted. That is, the agency introduced late in the protest process evidence that the level of administrative call traffic in question was so insignificant that it could be that proposals using solutions other than FTS 2001 would be, from that fact alone, undesirable from a cost perspective. Indeed, during the protest, when this was revealed, Rockwell indicated that it would not have proposed this solution if the RFP had stated that administrative call traffic was insignificant (or that FTS 2001 costs would not be considered in the price evaluation). Since the RFP solicited the best solutions within the industry for distributing administrative call traffic, the agency's post-award revelations that it did not contemplate solutions for distributing the administrative call traffic in question using other than FTS 2001 services, and that the level of that call traffic was so insignificant as to render nominal the associated FTS 2001 costs of handling such calls, revealed another impropriety. At that point it became apparent that the RFP was misleading, such that the offerors who proposed a VPN solution did not have a fair opportunity to compete for this award.[5] We clearly identified this impropriety in our decision sustaining the initial protest and explained it in greater detail in our

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[4] In any case, there is no basis for concern that enough of MCI's information has been disclosed to justify the extraordinary measure of limiting discussions. For example, much of the information in the record was subject to a protective order and there is no suggestion that any information was improperly released outside the protective order.

[5] SSA states that if the FTS costs in question are significant, then the RFP is not misleading and Rockwell had a fair opportunity to compete. Agency Report at 26. That observation does not support the reasonableness of the agency's corrective action, since the agency itself has established that the FTS costs are, in fact, insignificant.

decision denying the requests for reconsideration. Rockwell Elec. Commerce Corp., supra, at 7-9; Social Sec. Admin.; MCI WorldCom Communications, Inc.--Recon., supra, at 2-5.

The agency's corrective action does nothing to remedy this impropriety. This impropriety can only be remedied by advising the competitive range offerors that the agency's administrative call traffic needs are insignificant--a fact which was not apparent from, and which (as detailed in our prior decisions) seemed inconsistent with, the RFP--and requesting revised proposals permitting offerors to consider this information in preparing their technical and price proposals.[6]

Finally, SSA requests that we find reasonable its actions in limiting corrective action because MCI has already activated its service solution at all of SSA's locations and SSA has incurred over $[DELETED] million in start-up costs under MCI's contract.[7] SSA essentially alleges that no recompetition can be expected to offset this expenditure for the government. Agency Report at 28.

The agency overrode the statutorily required stay of performance of this contract based on a finding that continued performance would be in the best interests of the government (rather than that urgent and compelling circumstances that significantly affect interests of the United States existed.) In such circumstances, the Competition in Contracting Act of 1984 (CICA) requires our Office to make our recommendation on a protest without regard to any cost or disruption from terminating, recompeting or reawarding the contract.[8] 31 U.S.C. § 3554(b)(2)

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[6] The present situation is different from that in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, supra (cited by the agency in support of its limitation of the discussions in taking corrective action after disclosure of prices), where we found a limitation on discussions and proposal revisions to particular areas of the proposal proper where the particular procurement impropriety could be corrected with the limited revised proposals and where the remedial discussions and opportunity to revise proposals applied to all of the competitive range offerors.

[7] We note that the contract at issue is a service contract that is still in its base period, and there are still 6 option years left to be performed. Also, Rockwell asserts that MCI's prices were front-loaded and Rockwell's first year price was substantially less, so that this problem was caused by MCI and SSA.

[8] When an agency overrides the CICA stay based upon a written finding of urgent and compelling circumstances, CICA permits our Office to consider all circumstances--including cost and disruption to the government--in fashioning the appropriate remedy under a sustained protest. See Department of the Navy--Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 at 3 n.2; 31 U.S.C. § 3554(b)(1) (1994).

(Supp. IV 1998); 4 C.F.R. § 21.8(c) (2001). The legislative history for this statute shows that Congress designed this provision of CICA to ensure that an agency's incurrence of costs in administering a contract after a stay is overridden on a "best interests" basis would not limit the range of relief measures that our Office could recommend after sustaining a protest. Department of the Navy--Modification of Remedy, supra, at 3. Specifically, the legislative history states:

> Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest, however, the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained.

H.R. Conf. Rep. No. 98-861, at 1436 (1984), reprinted in 1984 U.S.C.C.A.N. 697, 2124.

Here, the start-up costs of MCI's contract in excess of $[DELETED] million were known to the agency at the time it made the "best interests" override determination. See Agency Report at 28; Agency Report on Initial Protest, Tab 115, MCI's Final Proposal, July 31, 2000, Pricing Tables, Table G. Although we are mindful of the considerable cost to the government resulting from SSA's action, we cannot, consistent with the requirements of CICA, consider this cost in making our recommendation.

The protest is sustained.

We recommend that the agency reopen discussions with all offerors in the competitive range at the time of the initial award decision, amend the RFP as may be appropriate,[9] for example, instructing offerors as to the levels of administrative call

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[9] In our first decision, we stated the single point of failure requirement for call representatives that was stated in the RFP did not appear to represent the agency's actual needs. Testimony indicated that the RFP was never amended to reflect changes in the agency's requirements and that the agency evaluators understood that the agency's requirement was actually greater than that which was stated in the RFP. Although we found that MCI's proposal was compliant with the RFP, and therefore the agency's determination that the proposal was technically acceptable was not unreasonable, we did not find that MCI's proposal met the more restrictive terms that the evaluators believed represented the agency's actual requirements. We stated that the agency should review this and other questioned specifications, and amend the RFP, if appropriate, before it requests revised proposals. Rockwell Elec. Commerce Corp., supra, at 11 n.8. The agency incorrectly and unreasonably interpreted our decision as endorsing the agency's evaluation, and therefore the agency states that it did not reexamine this (or any other) technical requirement.

(continued...)

traffic the agency anticipates, request revised proposals in a manner that does not restrict offerors from applying this information in revising their price and technical proposals, reevaluate revised proposals, make a new source selection decision and, if a proposal other than MCI's is selected for award, terminate the contract previously awarded to that firm. In addition, we recommend that Rockwell be reimbursed the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel

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Agency Report at 11 n.6. We restate our prior recommendation that the agency review the RFP requirements to determine whether they fairly state the agency's actual requirements, and amend the RFP accordingly.