P. Jannelli
Proc I

DECISION

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

12374

FILE: B-190983 DATE:

MATTER OF: KET, Inc. C2368 December 21, 1979

DIGEST:

1. Whether proposal is included in competitive range is matter of administrative discretion which will not be disturbed unless inclusion was unreasonable.

2. Request for proposals (RFP) for computer system contained mandatory requirement for hardware to detect and automatically recover from power failure. Contract was awarded to offeror proposing rapid recovery but requiring operator intervention. Because awardee's technical proposal did not contain automatic recovery feature in hardware, agency's acceptance of proposal represented relaxation in agency's minimum needs and should have been communicated to other offerors.

3. Contentions that (1) awardee proposed computer system which did not meet RFP's mandatory minimum acceptable message instruction capability, and (2) awardee proposed to develop key components of system in spite of fact that RFP was for firm, fixed-price contract and sought commercially available items only are denied, since GAO cannot conclude that there was no reasonable basis for agency's determination that proposal was technically acceptable, type of contract is matter of agency discretion and RFP was amended to eliminate commercial item requirement.

4. Neither possibility of buy-in nor allegation of excessively low offer provides basis upon which award may be challenged. Rejection of offer for too-low price requires determination of nonresponsibility, which in this case has not been made by procuring activity.

[Protest of Contract Award] ~~008140~~

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5. GAO will not consider allegations of possible anti-trust violations, since such matters are appropriately for consideration by Department of Justice.

6. EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338, requires that risks to Government inherent in accepting unreasonably low offer be considered in evaluation and selection process, but does not require analysis of alleged possible anti-competitive effects on future competition. Although agency does not agree that awardee's offer was unreasonably low, record shows that agency officials weighed the risks associated with acceptance of awardee's proposal. Accordingly, EPSCO standard has been met.

7. Aside from fact that there was no clause in RFP applying requirements of Cost Accounting Standards Board to procurement, record contains no evidence that awardee has not complied with Cost Accounting Standard 402 requirement that similar costs be allocated similarly.

8. Contention that awardee will not be able to perform within required contract schedule because of great amount of development work offered is basically a matter of offeror's responsibility. GAO no longer reviews affirmative determinations of responsibility, except in certain circumstances which are not present here.

9. Protest that automated data processing award was unauthorized because delegation of procurement authority from GSA had expired is dismissed as untimely where protester filed protest more than 10 working days after basis of protest was known.

KET, Inc., protests the award of Internal Revenue Service (IRS) contract No. TIR 78-16 to Sperry-Univac under request for proposals (RFP) No. 77-28 for the procurement of 11 Data Communications Processing Systems (DCPS) for installation at the IRS National Office Computer Facility and at each of the 10 IRS regional service centers.

At KET's request, we have obtained for our in camera review the proprietary Sperry-Univac technical and pricing information and the system operational capacity test results which IRS denied to KET under its Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), request. Due to the confidential nature of the material, our discussion of the facts is necessarily limited.

COMPETITIVE RANGE DETERMINATION

KET contends that the initial Sperry-Univac proposal was substantially deficient and technically unacceptable because: (1) the proposal did not meet the RFP's mandatory requirements regarding detection and automatic recovery from a power failure; (2) the proposal did not meet the mandatory requirements of the RFP regarding the minimum acceptable message processing capability; and (3) the proposal offered a system requiring a large amount of developmental effort on what was meant to be a nondevelopmental contract. Accordingly, KET believes that the proposal should have been rejected as outside the competitive range and that the IRS should not have allowed Sperry-Univac to revise it in an effort to make it acceptable.

A contracting officer's decision to include a proposal in the competitive range is a matter of administrative discretion which will not be disturbed by this Office unless the decision is arbitrary or unreasonable. Amperif Corporation, B-193294, March 19, 1979, 79-1 CPD 191. A proposal should not be rejected as outside the competitive range if there is a reasonable chance that it will be selected for award. ERA Industries, Inc., B-187406, May 3, 1977, 77-1 CPD 300. One of the fundamental purposes of negotiated procurements is to determine whether deficient proposals are reasonably subject to being made acceptable through discussions. TM Systems, Inc., 56 Comp. Gen. 300, 306 (1977), 77-1 CPD 61. Moreover, the present procurement was conducted pursuant to a delegation of procurement authority issued by the General Services Administration (GSA), and GSA's procedure is to conduct negotiations with all offerors whose proposals are capable of being brought within the competitive range.

41 C.F.R. § 1-4.1105-2(k) (1978). Although Sperry-Univac's initial proposal may have been deficient in several areas, the IRS evaluators believed that it could be revised to meet the mandatory requirements of the solicitation. We find nothing in the record to indicate that the determination to include it within the competitive range was unreasonable.

TECHNICAL ACCEPTABILITY OF REVISED PROPOSAL

It is neither our function nor practice to conduct a de novo review of technical proposals and make an independent determination of their acceptability or relative merit. The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192.

KET contends that the proposal revisions submitted by Sperry-Univac failed to cure the deficiencies in the initial proposal. KET argues that the evaluation of Sperry-Univac's technical proposal and subsequent award to Sperry-Univac were improper because material deficiencies remained in the proposal. KET alleges that the Sperry-Univac 90/30 processors proposed for use in the data communication processing system required under the RFP will not comply with the mandatory RFP requirements for detection and automatic recovery from a power failure.

Section F, "MANDATORY REQUIREMENTS--DATA COMMUNICATION PROCESSING SYSTEM," contains three relevant mandatory requirements:

(1) The hardware must detect a power failure and provide for automatic recovery (section F.4).

(2) The executive program (software) must preserve the data and information in the system in case of a power failure and provide for recovery capability (sections F.4 and F.5).

(3) The contractor must perform both a system operational capability test and an acceptance test of the hardware and software to perform the mandatory requirement of the data communication processor system before installing the system.

The IRS report on the protest shows that the technical review group was concerned about the failure of the initial Sperry-Univac proposal to provide the hardware capability for saving the system environment and automatically recovering from a power failure. After extensive discussions between members of the technical review group and Sperry-Univac representatives, Sperry-Univac amended its proposal and agreed to provide a system requiring operator intervention to meet the requirement for detection and automatic recovery from a power failure. The technical evaluation shows that the technical review group recognized that Sperry-Univac's best and final proposal did not provide the hardware required for automatic restart in the event of a power failure while KET's system did. Even though Sperry-Univac's proposed system required manual intervention in order to detect and recover from a power failure, the technical review group considered the Sperry-Univac proposal to be acceptable. However, the technical review group awarded more evaluation points to KET than to Sperry-Univac in the area of "Ease of Operation" because of the automatic feature included in KET's system.

The contracting officer's initial report on the protest stated that the RFP required the detection and automatic recovery feature in order to avoid excessive time lost as a result of recovery and initialization of the system environment after a power failure. The

contracting officer admitted that while "KET has a sophisticated capability for saving the system environment and automatically recovering from a power loss * * * the Univac system does not." However, the contracting officer rationalized that: "In the event of power loss, operator intervention would be required, but recovery would amount to a simple and quick recall from disk." Not until a supplemental report did the contracting officer defend the acceptability determination on Sperry-Univac's proposal on the basis that: "While it is true operator intervention is necessary, it is of such a minor degree that it is still considered automatic by IRS." It is apparent to us that, until the supplemental report, neither the technical review group nor the contracting officer considered that the Sperry-Univac system was automatic as required by the RFP.

It is evident from the above statements and from the fact that award was made to Sperry-Univac knowing its proposed system did not meet the mandatory requirement for detection and automatic recovery from a power failure that what IRS was really looking for was a system which would provide a fast detection and recovery process rather than an automatic process. Although the RFP never defined "automatic," the term has a connotation which suggests that a self-initiating system without operator intervention is required. In fact, that is the meaning the technical review team and the contracting officer originally attributed to the term. Once IRS contracting officials decided that what they wanted was a rapid recovery system which need not be automatic, the contracting officer should have issued an amendment to the RFP. If a technical proposal represents a basic change from the specification requirements, then before it can be accepted, the contracting agency must issue an amendment to the RFP informing the other offerors of the change. See Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435; see, also, 41 C.F.R. § 1-3.805-1(d) (1978).

KET also alleges that the Sperry-Univac 90/30 processor will not meet the mandatory message instruction capability required under the RFP by section F.3.3,

section F.B.5.2, table F.B.1 and figure F.B.5, which set forth the throughput requirements of the data communication processing system.

In its report on the protest, the IRS states that the technical review group recognized that Sperry-Univac's 90/30 processor by itself would not be capable of meeting the message instruction capacities required under the RFP. After discussions, Sperry-Univac proposed to build special microprocessors, considered proprietary by Sperry-Univac, to interface the terminals and the host processor. According to the IRS report, the 90/30 operating system was to be extensively tailored by Sperry-Univac to meet the RFP requirements. Although KET's proposed processor was recognized to be faster and more powerful, the technical evaluation team and the contracting officer considered Sperry-Univac's revised proposal to be acceptable in meeting the mandatory message instruction capacities.

Based upon our in camera examination, we cannot determine whether the proposed Sperry-Univac system will meet the mandatory message instruction requirements of the RFP. The 90/30 processor alone would appear to be inadequate to meet these mandatory requirements. However, the two microprocessors should add power to the 90/30 processor and it may be sufficient to meet the message instruction capacity requirements. Moreover, Sperry-Univac did revise its proposal to enhance the hardware/software of its system to meet the mandatory requirements. In the circumstances, we cannot conclude that there was no reasonable basis for the IRS conclusion on this feature.

Another KET argument to show that the technical evaluation of the Sperry-Univac proposal was improper is that Sperry-Univac proposed to develop many of the critical components in its system. KET draws the conclusion that many of the key components are developmental in nature because the IRS denied much of KET's FOIA request on the basis that the information was a "trade secret" and because Sperry-Univac offered to supply these components to the IRS at no charge.

KET argues that selection of the Sperry-Univac proposal was improper because the RFP "sought proven, available items" which were commercially available rather than items to be developed. KET contends that the solicitation was for a firm, fixed-price contract and that, if extensive development work was contemplated, a cost-reimbursement-type contract should have been used by the IRS under section 1-3.405-2(b)(1) of the Federal Procurement Regulations (FPR). 41 C.F.R. § 1-3.405-2(b)(1) (1978).

The IRS reports that it was unaware at first that development work would be necessary. Therefore, the solicitation as originally issued contained a restriction that the proposed equipment and software must have been formally announced for marketing purposes on or before the closing date of the RFP and/or be capable of a demonstration as specified in the RFP. However, soon after release of the RFP, KET submitted a question regarding the use of standard, commercially available, production-line components. As a result of the question, the IRS realized that development work would be necessary and deleted the entire restriction. The IRS states:

> "* * * [KET's] argument that the degree of tailoring or modifying effort being performed by Sperry is 'extensive' is weak at best. A review of the Sperry proposal indicates the development of 4 hardware items in a total of 57, for a 7% effort, and 12 areas of software development and modification of existing hardware items for a 21% effort. Certainly, this developmental effort cannot be considered so extensive as to require the use of a cost type contract. The determination of the type of contract to be used in a procurement is one that falls solely within the discretionary authority of the agency."

We agree that the determination of the type of contract to be used in any particular procurement is primarily within the discretionary authority of the contracting agency. Furthermore, KET's reliance

on FPR § 1-3.405-2(b)(1) is misplaced since that provision is relevant to contracts for research and development work and merely suggests that such contracts be on a cost-reimbursement basis.

DEFICIENCIES IN OVERALL EVALUATION OF SPERRY-UNIVAC OFFER

KET contends that the IRS did not properly evaluate the final Sperry-Univac offer (both technical and pricing proposals) in several areas. KET argues that the IRS evaluation and acceptance of Sperry-Univac's offer were improper because:

1. Sperry-Univac's price was unreasonably low and considerably below cost. Therefore, the IRS was required to, but did not, evaluate the risks to the Government inherent in accepting an unusually low offer as required under EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338.

2. The IRS failed to analyze the "potentially long-term anti-competitive (and thus costly) aspects of selecting Sperry's below-cost offer in an already limited competitive environment." Such analysis was necessary because the competition for this contract was inadequate in view of the requirement of section 1-3.101(d) of the FPR, 41 C.F.R. § 1-3.101(d) (1978), for competition to the maximum practical extent in negotiated procurements. The IRS should have ascertained that Federal anti-trust laws (specifically, the Sherman Anti-Trust Act, 15 U.S.C. § 2 (1976), and the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13a (1976), would not be violated by award at an unreasonably low price to a large computer company for a potential 6-year contract.

3. The IRS awarded to Sperry-Univac even though Sperry-Univac's proposal exhibited an expressed intention to disregard Cost Accounting Standard 402.

4. The IRS failed to consider whether the system proposed by Sperry-Univac could be developed, tested, and performing within the specified contract performance period. Due to the developmental nature of much of the system offered by Sperry-Univac, a detailed analysis of the chances of possible contract performance within the scheduled contract performance period was required.

UNREASONABLE OFFER/ANTI-TRUST VIOLATIONS

Generally, protests against acceptance of allegedly unreasonable, below-cost proposals for fixed-price contracts imply that the allegedly too-low offeror is attempting to "buy-in" to a contract with the expectation of either (1) increasing the contract price or estimated cost during the performance period through change orders or other means or (2) receiving future follow-on contracts at prices high enough to recover any losses on the original "buy-in" contract. Acceptance of unreasonably low or even below-cost offers by the Government is not illegal and, therefore, the possibility of a "buy-in" does not provide a basis upon which an award may be challenged if the procuring activity has not made a determination of nonresponsibility. It is, however, the contracting officer's duty to see that amounts excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on contracts. Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219; Bristol Electronics, Inc., B-190341, August 16, 1978, 78-2 CPD 122. Furthermore, insofar as the protest is based on possible anti-trust violations, we will not consider such arguments since those matters are appropriately for consideration by the Department of Justice and not GAO. Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164.

ADEQUACY OF COMPETITION

Regarding the charge that competition was inadequate for this procurement, the contracting officer states in his report:

> "The requirement was advertised in the Commerce Business Daily * * * and 160 Vendors were notified from a Bidder's Mailing List supplied by the General Services Administration. As a result of this exposure, 98 firms requested and received copies of Solicitation 77-28. Three vendors submitted proposals, one of which withdrew its proposal prior to the request for best and final offers. Certainly the IRS made every attempt to foster maximum competition."

It appears to us that, although only two proposals were actually received, the IRS did try to comply with the Federal policy of attempting to secure the maximum practical competition in negotiated procurements. However, KET argues that an analysis of the risks associated with accepting an unreasonably low-priced offer and any risks of potential long-term loss of competition should have been made by the contracting activity before awarding to Sperry-Univac in light of EPSCO, supra, and especially in light of the fact that only two offers were received.

ANALYSIS OF RISKS UNDER EPSCO STANDARD

In EPSCO, supra, we stated that, within the context of a negotiated procurement, the risks to the Government inherent in accepting an unusually low-priced offer must be carefully considered by responsible procurement officials in the evaluation and selection process. We did not hold, as KET contends, that potential loss of competition in future procurements or possible violations of Federal anti-trust laws at some time in the future must be analyzed in the evaluation and selection process.

At the outset, we note that the IRS does not agree with KET that Sperry-Univac's offer was unusually low priced. The records show that the Sperry-Univac offered price (when reduced to present value) was $7,886,249 for a lease-to-ownership plan. The IRS

estimate was approximately $8,926,000 for a straight-purchase plan and approximately $10,394,000 for a straight-lease plan. The IRS states that its experience has shown that the price of a lease-to-ownership plan usually falls somewhere between the price for a straight-lease plan and an outright-purchase plan. Accordingly, Sperry-Univac's price was considerably below the IRS estimated range. However, the IRS also indicates that past experiences have shown the IRS's own estimates to be very inaccurate. Thus, the IRS was satisfied that the Sperry-Univac price was near the general range the IRS had estimated. The contracting officer believes that the Government is adequately protected against any risk of poor performance by Sperry-Univac because the initial contract is for a fixed price and all options under section E.11 of the contract will also be at a fixed price if those options are exercised by the Government. Furthermore, the IRS has protected itself against poor performance by Sperry-Univac by including in the contract requirements for both a system operational capability test and an acceptance test in section F.3.6. The contracting officer states that, in view of these built-in contract protections for the Government, he believes that any risks inherent in accepting Sperry-Univac's offer are insignificant.

In our opinion, the evaluation standard enunciated in EPSCO, supra, has been met in the instant procurement. First, the IRS did not believe that the price offered by Sperry-Univac was so far below the IRS estimates as to be considered unreasonably low and require the analysis called for by EPSCO, supra. Second, the IRS technical review group had examined Sperry-Univac's technical proposal in detail and the contracting officer had concluded, based upon this evaluation, that the minimum needs of the IRS would be met by installation of Sperry-Univac's system. Third, the RFP requirements for a system operational capability test and an acceptance test greatly reduced any risks to the Government by acceptance of Sperry-Univac's offer. Accordingly, we cannot say that agency officials failed to weigh the risks associated with acceptance of Sperry-Univac's proposal.

COST ACCOUNTING STANDARD 402

KET contends that the IRS failed to consider whether Sperry-Univac's proposal showed an intent to allocate similar costs in an inconsistent manner in disregard of Cost Accounting Standard 402 which requires that similar cost items be allocated similarly. KET argues that this is so because developmental work is generally charged as an indirect cost because of the difficulty in assigning such costs to a direct contract objective. However, KET thinks that Sperry-Univac might have assigned some of the costs associated with the developmental items to direct costs since such items are primarily devoted to direct contract objectives.

Aside from the fact that we do not find a clause in the RFP applying the requirements of the Cost Accounting Standards Board to the procurement (see 41 C.F.R. § 1-3.1203(a)(3)), we do not agree with KET's argument. We agree that costs of development are generally charged to indirect costs and we have no reason to believe that Sperry-Univac is not following this practice. Cost Accounting Standard 402 requires that Sperry-Univac charge all development costs incurred for the same purpose under this contract either as direct costs only or as indirect costs only and the record contains no evidence that Sperry-Univac has not complied with this requirement.

CONTRACT PERFORMANCE BY SPERRY-UNIVAC

KET's argument that Sperry-Univac will not be able to perform within the required contract schedule is basically a matter of Sperry-Univac's responsibility. Our Office has discontinued the practice of reviewing protests involving a contracting officer's affirmative determination of the responsibility of a contractor, except in cases alleging fraudulent actions by procurement officials or where the solicitation contained definitive responsibility criteria which have allegedly not been applied. Systems & Programming Resources Inc., B-192190, August 16, 1978, 78-2 CPD 124. Since KET has alleged neither fraud nor failure to follow definitive responsibility criteria in awarding to Sperry-Univac, we will consider this issue no further.

DELEGATION OF PROCUREMENT AUTHORITY

The delegation of procurement authority (DPA) issued to the IRS by GSA for this procurement stated, "This DPA is valid until, and must be exercised before, June 30, 1977." Since the DPA was never extended by GSA, KET argues that the award to Sperry-Univac on December 23, 1977, was unauthorized. The IRS contends that the DPA did not mean that the contract had to be awarded before the DPA expired, but only that the solicitation had to be issued and the procurement actively progressing towards award before the expiration of the DPA. The IRS points out that GSA changed the language used in DPA's in mid-1978 to state that the DPA "must be consummated" within a stipulated time limitation. The IRS believes that this language change supports the IRS interpretation of the meaning of the DPA in the present procurement.

The record shows that KET received a copy of the DPA with the IRS protest report on July 6, 1978, but the alleged impropriety was not protested by KET until July 24, 1978, or more than 10 working days after the basis for protest was known. Accordingly, this protest issue was untimely filed under section 20.2(b)(2) of our Bid Protest Procedures. Moreover, we do not consider this issue to be significant because our decision would be based upon an interpretation of language which is no longer used in DPA's and which would therefore no longer have a widespread effect on computer procurements. Accordingly, this protest issue will not be considered on the merits by our Office.

CONCLUSION

We agree with KET that the IRS improperly accepted the Sperry-Univac proposal because the proposal did not meet the mandatory RFP requirement for detection and automatic recovery from a power failure. In spite of this, we do not recommend that Sperry-Univac's contract be terminated. As previously discussed at page 6, it appears that the system proposed by Sperry-Univac will meet the actual needs of the IRS. Further. KET's protest is based on the fact that Sperry-Univac did not comply with the RFP, not that KET would have

offered something else if it had known of the changed requirement. Since our examination shows that the Sperry-Univac price was millions of dollars less than the price offered by KET, it does not appear that KET would have been the successful offeror even if it had been informed of the change in the recovery requirement. In that connection, we note that the proposals were evaluated 70 percent on price and that the points Sperry-Univac received for price alone far exceeded KET's total score on the price and technical proposal.

Accordingly, the protest is denied.

Milton J. Socolar

For The Comptroller General
of the United States