

13685 PL-I

DECISION



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

FILE: B-195773
B-195773.2

DATE: May 8, 1980

MATTER OF: *DLG03194*

Interscience Systems, Inc.; Cencom *DLG04613*
Systems, Inc.

DIGEST:

[Protest Alleging RFP Was Unfair and Prejudicial to Offerors]

1. Procurement for expansion of computer system, wherein two of five items are sole source, and RFP, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted.
2. Procuring activity, in the interest of furthering competition, should review experience requirements for qualification of maintenance personnel with view toward reducing number of years of experience or accepting equivalent education and training to fulfill portion of requirement.
3. Contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determination when needs of agencies warrant comparative evaluation of those areas.
4. Protest against use of subjective evaluation factors is denied because where evaluation factors are utilized in negotiated procurement, the use of such criteria and numerical scoring is merely an attempt to quantify what is subjective judgment about merits of various proposals.

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Interscience Systems, Inc. (Interscience), and Cencom Systems, Inc. (Cencom), protested request for proposals (RFP) No. WA79-D169 issued by the Environmental Protection Agency (EPA) as being unfair and prejudicial to offerors on various grounds.

The RFP was for numerous items of automatic data processing equipment to expand EPA's National Computer Center at Research Triangle Park, North Carolina. The RFP also invited proposals for maintenance on the existing system and the newly acquired items.

The RFP requested offers on the following subsections with separate prices for each:

Subsection 2.1 - Central Processing Systems
Expansion (CPSE)

Subsection 2.2 - Disk Storage Subsystems

Subsection 2.3 - Tape Subsystems

Subsection 2.4 - Printing Subsystems

Subsection 2.5 - Maintenance on Government-Owned
Univac Equipment

Subsections 2.2, 2.3 and 2.4 are for items which are plug compatible with the Sperry Univac (Univac) CPSE and subsection 2.5 is for maintenance on currently owned Univac equipment.

On March 3, 1980, EPA made award to Univac of all subsections of the RFP, except subsection 2.4, notwithstanding the pendency of the protest because of urgency under section 1-2.407-8(b)(4) of the Federal Procurement Regulations (1964 ed. amend. 68). Subsection 2.4, which was for a laser printer, IBM Model 3800 or equal, was deleted by amendment 7 to the RFP and was awarded to IBM based on its General Services Administration (GSA) schedule contract prices.

Interscience and Cencom contend that the manner in which the RFP was structured precluded any meaningful competition because certain items included in the

solicitation were sole source to Univac and because discounts for multiple awards were permitted.

The protesters argue that subsections 2.2 and 2.3, the disk storage and tape subsystems, were and are available from numerous firms and that viable competition exists for these items. However, subsection 2.1, the CPSE, is alleged to be a sole-source item to Univac. Interscience and Cencom argue that EPA should have been aware of this fact and broken out subsection 2.1 as a sole-source item and negotiated directly with Univac for the item while competing the remainder. The same reasoning applies to subsection 2.5, the maintenance of existing Government-owned Univac equipment.

The protesters contend that by allowing offerors to quote multiple-award discounts, EPA defeated the alleged purpose of prohibiting "all or none" offers. The RFP's instructions provided as follows:

"(a) Offerors may propose on one or more subsections of the Statement of Work * * *. However, although offerors may propose a lower price if awarded two or more subsections, all-or-none offers are not acceptable and will not be evaluated."

Both Interscience and Cencom argue that a sole-source supplier can unbalance its bid by bidding high on the items which are sole source and low on the competitive items and through the use of the multiple-award discount remain low for the overall procurement. Interscience posits the following example:

"The undiscounted Univac list price for purchase and maintenance for all five subsections (with the exception of Section 2.4) is approximately \$14.5 million for a 60 month systems life without giving effect to present value calculations. The undiscounted INTERSCIENCE list price on an equivalent basis for Sections 2.2 and 2.3 is under \$4.5 million.

"Of the total Univac price of \$14.5 million, approximately \$6.0 million relates to Sections 2.2 and 2.3 and \$8.5 million relates to Sections 2.1 and 2.5.

"If Univac offered individual discounts on each section plus a discount for bidding all five sections - all such discounts totaling 42% - the net Univac bid would be \$8.4 million.

"If INTERSCIENCE bid Sections 2.2 and 2.3 ENTIRELY FREE OF CHARGE to EPA, it would have \$8.5 million (the Univac list price for the other sections of the RFP) added to its bid for EPA's cost comparison purposes and would LOSE THE AWARD by \$100,000!"

The protesters allege that the combining of the sole-source items (2.1 and 2.5) with the other sub-sections for which there is competition and the allowance of the multiple-award discounts were continuing attempts by EPA to assure that Univac won any competition. The protesters state that the factual background of the procurement reveals EPA's intent.

In June of 1978, EPA requested a Delegation of Procurement Authority (DPA) from the GSA to negotiate sole source with Univac to extend the current Univac support contract from February 1979 to September 1982. Also requested was permission to procure additional equipment necessary to expand the EPA ADP Center's capacity.

By letter of August 31, 1978, GSA summarized its position with regard to the EPA request and advised that EPA could extend the current Univac contract until February 1979, that GSA was suspending consideration of the request to extend the contract until September 1982, and that:

"You will, as soon as possible, publish a notice in the Commerce Business Daily stating your desire to acquire, subject to the availability of funds, the ADPE listed in your August 18, 1978, letter. The synopsis will list each component required by make, model number, nomenclature and quantity, and will solicit from vendors letters of interest in competing on a make/model or plug compatible equivalent basis. Those items for which no interest is expressed may then be acquired on a sole source basis. Any items which precipitate affirmative response will be acquired only after an appropriate competitive solicitation."

Notwithstanding the above condition, the protests allege, EPA included sole-source subsections 2.1 and 2.5 in the competitive RFP to the detriment of the peripheral equipment manufacturers who could have competed for the disk and tape subsystems.

In response to the protests, EPA states that it expected competition and received expressions of interest on all subsections of the RFP and that by utilizing the multiple-award-discount provision, it sought to assure the lowest system cost to the Government. By employing the discount provisions, EPA contends that it was able to take advantage of economies of scale, particularly in the area of the maintenance, required to be furnished on each subsection.

We do not know upon what EPA based its belief that competition was expected on subsections 2.1 and 2.5 prior to receipt of proposals since the agency has only made a general statement as to that expectation. However, the responses to the RFP clearly support the noncompetitive allegations of the protesters. Univac proposed on all subsections except 2.4. Cencom submitted a proposal on subsection 2.2, which was found technically unacceptable. The only other response received by EPA

was a letter prior to the closing date for receipt of proposals from a third-party broker of computer equipment. The letter requested a relaxation of the specifications so that it could propose used Univac equipment for a portion of subsection 2.1. EPA made no change in the specifications and did not respond to the letter. Moreover, the RFP required that all items offered must be new equipment of a current production model.

We believe at that point in time, it should have been clear to EPA that no competition existed for subsections 2.1 and 2.5. EPA's subsequent actions show it was aware of the situation because following the receipt of initial proposals, on October 26, 1979, EPA placed a notice in the Commerce Business Daily that subsections 2.2 and 2.3 would be competed under a new RFP. During this same timeframe, EPA made award to IBM for the laser printer as the only offeror for that item and began negotiations with Univac looking toward an award of subsections 2.1 and 2.5.

In a supplemental contracting officer's statement regarding the protest, EPA advised that "As the negotiations went forward, it became apparent that EPA could not conclude an acceptable agreement * * *." Thereafter, amendment 7 to the RFP was issued to all prospective offerors extending the due date for receipt of proposals to January 4, 1980, on the four remaining subsections. Again, only Univac responded to subsections 2.1 and 2.5.

EPA has cited numerous past decisions of our Office dealing with the acceptability of group or multiple-award discounts (e.g., Moir Ranch and Construction Company; Mulino Construction Company, Inc., B-191616, June 8, 1978, 78-1 CPD 423); however, none of those cases involve the commingling of sole-source items with items on which competition exists in the same procurement.

While EPA states that by prohibiting all or none offers it sought to make the procurement competitive, we find that including the allowability of multiple-award discounts in this case without any prohibition

against unbalanced bids could have led to the same result. Notwithstanding EPA's contention that the inclusion of the multiple-award discounts would assure the lowest cost to the Government, we have recognized that competition and lower cost can be better achieved by negotiating contracts for sole-source items and soliciting competitively for other items without any restriction concerning all or none bids or, in this case, multiple-award discounts. Martin & Turner Supply Company, 54 Comp. Gen. 395 (1974), 74-2 CPD 267, and B-153257, May 14, 1964.

Therefore, giving consideration to the prior-quoted GSA letter of August 31, 1978, and our past decisions, we believe the Univac contract was improperly awarded since it was apparent that Univac was an effective sole source for subsections 2.1 and 2.5 of the RFP. Moreover, Univac was probably aware of its sole-source position as to the two subsections. Without competition, either actual or expected, or cost and pricing data, there was no assurance that reasonable prices were obtained.

Therefore, based on our holding regarding the lack of competition for subsections 2.1 and 2.5, and the effect the multiple-award discounts had on subsections 2.2 and 2.3, we recommend that Univac's contract be terminated under Article XXV of the contract which permits the Government to discontinue rental payments on 30 days' notice. Subsections 2.2 and 2.3 should be recompeted in a separate procurement. Sole-source negotiations should be commenced with Univac for subsections 2.1 and 2.5. This action will make the procurement consistent with the intent of the GSA August 31, 1978, letter. While normally this action would render moot the additional bases of protest set forth by Cencom, we will comment on the issues as they may reoccur in any recompetition.

Cencom questions the experience requirements maintenance personnel must meet in order to be acceptable under the RFP. The RFP requires the on-site maintenance supervisor to have 10 years' experience including 2 years' supervisory experience and the hardware specialist to possess 6 years' experience.

Cencom argues that while these requirements may be necessary for the maintenance of the mainframe computer (subsection 2.1), to require the same experience qualifications for maintenance of the equipment being procured under subsections 2.2 and 2.3 is excessive and detrimental to competition. Cencom contends that an offeror for subsection 2.1 can utilize the same maintenance personnel to meet the requirements of subsections 2.2 and 2.3 at no additional cost.

Cencom further states that the use of years of experience as the sole criterion in determining the qualifications of maintenance personnel is improper as it gives no credit for education or training. Only Univac, according to Cencom, could comply with the maintenance requirements and this structuring of the RFP requirements was an attempt by EPA to assure that Univac would continue to have sole responsibility for the maintenance of all equipment (mainframe and peripherals) at the Computer Center.

EPA has responded by stating that maintenance is a critical element of the contract to insure a minimum of system downtime so that EPA can fulfill its mission requirement and meet the needs of the user community. The use of the number of years of experience was the least restrictive common denominator for specifying EPA's minimum needs regarding qualifications of maintenance personnel.

The determination of the Government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials, who are most familiar with the conditions under which the supplies or services have been or are to be used. Therefore, our Office will not question agency decisions in those respects unless clearly shown to be erroneous. Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126. While not deciding the issue, we believe, in the interest of furthering competition, EPA should review the experience requirements with a view to reducing them regarding the 2.2 and 2.3 subsections or accepting equivalent education and training to fulfill a portion of the requirement.

Finally, Cencom has protested that the evaluation criteria contained in the RFP are ambiguous and subjective and an offeror did not know how its proposal would be evaluated and the importance which EPA placed on cost versus technical in the award selection.

The RFP, as initially issued, appears to have been deficient because it only stated that award would be based on "price and other factors" without stating how price related to the determination of which proposal would be "most advantageous to the Government." However, amendment 5 to the RFP contained answers to questions posed by offerors and in response to a question regarding the evaluation criteria, EPA noted that price would be dominant in the selection of technically acceptable offerors for award. We find this to have been sufficient to advise offerors of the importance EPA placed on price vis-a-vis technical.

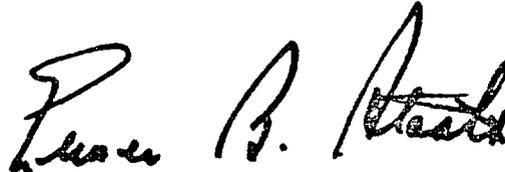
Concerning the allegation that the criteria were ambiguous, Cencom cites as an example that experience was to be point scored in the technical evaluation and also considered in determining an offeror's responsibility. We have recognized that contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determination when the needs of those agencies warrant a comparative evaluation of those areas. Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410. Accordingly, we have no objection to the use of experience factors in this manner.

With regard to the subjectiveness of the criteria, this is always the case where evaluation factors are utilized in a negotiated procurement and the use of such criteria and numerical scoring is merely an attempt to quantify what is a subjective judgment about the merits of various proposals. Interactive Sciences Corporation, B-192807, February 23, 1979, 79-1 CPD 128.

Accordingly, the joint protests are sustained and the separate Cencom protest is denied.

By letter of today, we are advising the Administrator of the Environmental Protection Agency of our recommendation.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

A handwritten signature in black ink, appearing to read "James B. Stroh". The signature is written in a cursive style with a large, prominent initial "J".

Comptroller General
of the United States