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**DECISION**



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

FILE: B-198782.4 DATE: August 11, 1981  
B-198782.5  
MATTER OF: United Computing Systems, Inc.--  
Reconsideration

**DIGEST:**

1. GAO will deny request for second reconsideration of decision regarding propriety of single procurement for teleprocessing support of two systems, one not yet in operation, and of use of benchmark based on operational system when protester has merely repeated previously considered arguments.
2. GAO will deny request for consideration on merits of issues previously found untimely when record supports agency assertions as to when protester knew of basis for protest.
3. Under GAO Bid Protest Procedures, alleged improprieties in solicitation must be protested before date for submission of initial proposals.
4. Government is not required to compensate for advantage of incumbent contractor unless it results from a preference or unfair action of the Government.
5. Conference will be held on reconsideration only when matter cannot otherwise be resolved.

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United Computing Systems, Inc. (UCS) requests a second reconsideration of our decision concerning award of a contract for support of the Army's Computer Assisted Map Maneuver System, CAMMS I, and development and support of a successor system, CAMMS II. These are war games which simulate command communications among ground forces in a tactical situation.

In addition, on the basis of correspondence recently made available to it under the Freedom of Information Act, UCS protests that the Army provided information to General Electric Information Services Company (GE) which was not made available to other offerors, giving that firm (which has since been awarded a five-year contract, including options) an unfair competitive advantage.

Our Office denied UCS's protest alleging deficiencies in the solicitation for CAMMS I and II (No. DABT19-80-R-0030), issued by the Procurement Division, Ft. Leavenworth, Kansas, in United Computing Systems Inc., B-198782, December 2, 1980, 80-2 CPD 412, and affirmed that denial in United Computing Systems, Inc., B-198782, February 19, 1981, 81-1 CPD 109.

For the reasons outlined below, we are reaffirming our prior decisions; as for the new protest, we are dismissing it in part and denying it in part.

UCS's Initial Protest:

In its initial protest, UCS argued primarily that it was improper to conduct a single procurement for both CAMMS I and II. According to UCS, the Army should not have used benchmark programs based on the types and quantities of computer resources consumed by CAMMS I to evaluate technical capability and probable costs of the systems proposed for CAMMS II, since the latter is not yet in operation and will have at least eight special features not included in CAMMS I.

During the pendency of the protest, the Army doubled its estimate of the amount of central processing unit (CPU) usage which would be required for CAMMS II, but stated that resource consumption was otherwise expected to remain the same for both systems. The Army also stated that it would

amend the solicitation to reflect its new estimate of CPU usage for CAMMS II if more than one offeror remained in the competition at the time of best and finals (although such was not the case) and agreed to have the successful contractor re-run the benchmark when CAMMS II became operational.

We concluded that the Army had adequately defined its requirements for CAMMS II and that these were accurately reflected in the solicitation; that there were enough similarities between CAMMS I and II to justify a single procurement, even though the two systems were in different stages of realization; and that UCS had not provided a basis for objection to the benchmark as an evaluation tool.

Request for Reconsideration:

1. Benchmark Issues:

Two benchmarks were conducted for this procurement, one in Hawaii and the other in West Germany. UCS successfully completed the first, but was eliminated from competition following the second due to excessive response times.

In its most recent submissions, UCS argues that the data on which the Army based its estimates of resource consumption were outdated. UCS also contends that only a benchmark which reflected the Army's revised estimates could have provided an accurate basis for determining technical capability and for projecting and comparing life cycle costs. According to UCS, re-running the benchmark when CAMMS II becomes operational is a meaningless remedy, since there will be no further competition for that portion of the procurement. A properly-constructed benchmark, UCS concludes, would have increased its own ability to meet response time requirements and would have resulted in lower evaluated costs. The firm acknowledges that these arguments were made in various earlier submissions to our Office, but believes they were not adequately considered.

UCS also argues that because it had successfully completed five out of six benchmark tests, its elimination from competition following the West German benchmark was inconsistent with our decisions criticizing "pass/fail" benchmarks (The Computer Company, B-198876, October 3, 1980, 80-2 CPD

240; Id. -- Reconsideration, B-198876, January 2, 1981, 60 Comp. Gen. \_\_\_\_\_, 81-1 CPD 1) and approving substantial compliance with solicitation requirements (The Computer Network Corp., 56 Comp. Gen. 145 (1977), 77-1 CPD 31).

## 2. GAO Analysis of Benchmark Issues:

Our Bid Protest Procedures, 4 C.F.R. 21.9 (1981), require that requests for reconsideration be based on errors of law or facts not previously considered. Cummins-Allison Corporation--Request for Reconsideration, B-195832.2, March 17, 1981, 81-1 CPD 198. UCS's arguments that the benchmark is an inadequate evaluation tool for CAMMS II were previously considered--not once but twice--by our Office. Since UCS has neither identified errors of law nor presented any new facts, but has merely repeated its arguments with regard to the unrepresentational nature of the benchmark, there is no reason for us to review this basis of protest further. See generally KET, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17.

As for UCS's elimination from competition following the West German benchmark, the record indicates that on August 19, 1980, the firm successfully completed one of three tests, but experienced excessive response times on the other two. UCS was advised of this problem and given an opportunity to repeat the tests, one in identical form and the other modified slightly, the following day. At that time, the firm "marginally passed" one, the Army's contemporaneous records indicate, and failed the other. The Army argues that it is inappropriate to view UCS's performance as passing five of six tests and states that it viewed the West German benchmark as a separate exercise from that conducted in Hawaii. The Army therefore considered UCS to have failed three out of five tests.

We do not find the Army's decision to consider the West German benchmark as a separate exercise to be unreasonable, since it was testing offerors' ability to support CAMMS in that country. Moreover, UCS's elimination from competition is entirely different from the one which our Office criticized in The Computer Company, supra. In that case the offeror was not advised of failures during or immediately after the benchmark or given an opportunity to re-run the only one of

more than 30 exercises which it had failed, until directed to do so by our Office. UCS, on the other hand, was both advised of its errors and given a second chance to demonstrate its response time capability.

The Computer Network Corp., supra, also is distinguishable. In that case the procuring agency found the offeror had exceeded response times in only three out of 135 tasks, and concluded that this was a minor discrepancy. UCS's failure in three out of five tries appears to have been considerably more serious.

### 3. Untimely Issues:

UCS further objects to our finding of its protest untimely (a) with regard to the adequacy of information on how response time would be measured and (b) on the use of local communications in Germany. UCS asks that we consider these issues on the merits.

With regard to the alleged lack of information on or definition of response time, in our February decision we found that the Army had orally advised UCS representatives at both benchmarks as to which transactions would be counted in measuring response time. UCS did not protest until after it had failed the second benchmark. We held that any objections regarding adequacy of information on response time should have been made within 10 days of the first, i.e. Hawaiian benchmark, and did not consider the question on the merits.

UCS complains because we accepted the Army's version of what offerors had been told regarding response time, rather than its own conflicting but unsupported version. However, as noted in our decision, the record supports the Army's statement that UCS had notice of this basis of protest during the first benchmark, and we see no reason to reverse our finding of untimeliness.

UCS further argues that it timely protested the requirement for use of local communications for the second benchmark in a letter to our Office dated September 3, 1980, when it contended that the benchmark failed to duplicate actual CAMMS operating conditions because, for example,

use of a mini-concentrator was prohibited. UCS later amplified this basis of protest, arguing that it was not permitted advance access to the benchmark site and that it had no opportunity to test local communications with which GE, as the European incumbent, was familiar. GE therefore was able to anticipate problems and had an undue advantage, UCS contends.

4. GAO Response re Untimely Issues:

Although the issue was not addressed in our prior decisions, we note that the solicitation specifically stated that the Government would furnish local communications. (According to the Army, these were merely telephones which the Government furnished to avoid the problem of individual offerors having to negotiate for these services.) In addition, the solicitation stated that access to the benchmark site would be permitted at 8 a.m. on the day of the test. Any protest of these alleged improprieties therefore should have been filed before the date for submission of initial proposals, June 25, 1980. The record also indicates that UCS was told in Hawaii in July 1980 that it would not be allowed to use a mini-concentrator in West Germany; it therefore should have protested this restriction within 10 days thereafter. These bases of protest are clearly untimely. See 4 C.F.R. 21.2 (1981).

USC also states that it learned during a conference at our Office in late January 1981 and timely protested the fact that GE had furnished the local communications. The Army responds that GE acted as agent for payment of Deutches Bundespost, which in turn was solely responsible for installation and maintenance of the lines. Even if true and timely, UCS's protest on the basis of GE's providing or being familiar with local communications is without merit, since the Government is not required to compensate for the advantage of an incumbent contractor unless it results from preference or unfair action by the Government. Colorado Research and Prediction Laboratory, Inc., B-199755, March 5, 1981, 81-1 CPD 179; Id., Reconsideration, May 11, 1981, 81-1 CPD 369.

Alleged Improper Communications:

As evidence of its newly-discovered basis of protest, alleged improper communications between the Army and GE, UCS has submitted copies of letters to the Army dated May 1

and July 2, 1980, in which GE asked various questions about response time and evaluation criteria. UCS states that it was unable to obtain satisfactory answers to similar questions; however, it has no actual knowledge of the Army's responses to GE, except that a handwritten note on the July 2 letter indicates that answers had been reviewed and found satisfactory.

The Army argues that this new protest is untimely in part, since a copy of the May 1 letter was provided to UCS on or about May 20, 1980, but UCS first raised the issue in a submission to our Office dated February 6, 1981. As for the July 2 letter, the Army states that its responses were either taken directly from the request for proposals, without modification or correction, or were answered during the pre-benchmark conference. All vendors were given an opportunity for such a conference, the Army states, with GE electing to have a personal meeting and UCS to confer by telephone. The Army argues that since no new information was presented in its response to the July 2 letter, and since all offerors had pre-benchmark conferences, written amendment of the solicitation was unnecessary.

We agree that the protest of the May 1 letter is untimely. Since UCS itself received a copy of the letter 17 months earlier, the fact that counsel for UCS did not receive a copy until filing a Freedom of Information Act request does not toll the 10-day period which UCS had for protesting to our Office. See Dow Corning Corporation, B-180219, May 23, 1974, 74-1 CPD 281. As for the July 2 letter, although the Army has submitted a summary of questions and answers to us, it is not clear whether the response was made in writing or orally at the pre-benchmark conference; the record consists of mere speculation by UCS as to what the response covered and a conclusionary statement by the Army that it could not have given GE a competitive advantage. In this context, UCS urges that since the Army contravened Defense Acquisition Regulation § 3-505 (1976 ed.), which requires written amendment of a solicitation, on this and numerous other occasions, we should sustain the protest.

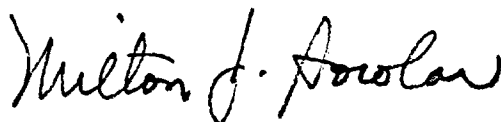
In our February decision, we stated that the Army's listing of transactions which would be counted in measuring response time constituted an oral modification of the solicitation, and we reminded the Army of its obligation to reduce such changes to writing promptly. We also believe such problems could be avoided if all prospective offerors were invited to attend the same pre-benchmark conference and a transcript of questions and answers was provided. However, in view of our finding that the protest of the May 1 letter is untimely and that the exact nature and content of the Army's response to the July 2 letter is unclear, we do not believe these communications provide a basis for sustaining the protest.

Conference Request:

Finally, UCS has offered to participate in an administrative conference on its request for reconsideration. It is our policy to hold a conference on reconsideration only where the matter cannot otherwise be resolved. In the present case, UCS had a conference on the merits of its protest before our prior decisions were issued and, in our opinion, another would not serve any useful purpose. See KET, Inc., supra.

Conclusion:

On the issues for which a second reconsideration was requested, our prior decision is affirmed. With regard to the new issues, the untimely portion of the protest is dismissed and the remainder is denied.



Acting Comptroller General  
of the United States