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DECISION



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

FILE: B-205360

DATE: April 27, 1982

MATTER OF: SMS Data Products Group

DIGEST:

Estimate of value of membership in computer software user groups which does not weigh costs of membership and participation against the direct, identifiable and quantifiable benefits of membership is overvalued and exclusionary. Since GAO recomputation of agency's comparative evaluation used to justify sole-source lease of a computer from schedule contract indicates that a competitive acquisition would be in the best interests of the Government, agency should prepare a solicitation and conduct a competitive procurement in accordance with the Federal Procurement Regulations prior to exercise of any option in the contract.

SMS Data Products Group (SMS) has filed a protest against the award of a contract by the Department of Justice (DOJ) to the IBM Corporation for the lease of an IBM model 4341-L01 computer. SMS contests the criteria on which DOJ relied to justify the award of this contract. We sustain the protest.

As a threshold matter, we note that SMS's protest would be untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1981), because SMS knew of these criteria before the closing date for submission of proposals, but did not file its protest until after that date. 4 C.F.R. § 21.2(b)(1). However, because DOJ has requested that we consider SMS's protest, notwithstanding its lack of timeliness, and because we feel that DOJ's approach to valuation of membership in users groups could be abused in future procurements, we have considered SMS's protest.

On October 2, 1981, DOJ published a notice in the Commerce Business Daily (CBD) advising readers of DOJ's intent to place an order for this equipment and related software with IBM under IBM's general schedule contract with the General Services Administration. The notice solicited competing proposals from potential offerors and advised that the evaluation criteria which DOJ used to justify the use of IBM's schedule contract were "available upon request." DOJ's criteria included consideration of membership in the two IBM user groups SHARE and GUIDE. These groups provide a forum for managers, programmers, support personnel, and other users to share their ideas and concerns with their counterparts in the user community. Membership in these two groups requires that you have an IBM computer.

DOJ valued membership in the two IBM user groups at approximately \$52,500 per year, or the equivalent of "one and one-half GS 13/4 computer specialists," for the full 5 years of the lease, or approximately \$262,500. This amount was added to any competing proposal which did not provide for membership in these organizations. SMS states that this is only \$15,000 less than the purchase price of an IBM 4341-L01 under IBM's current schedule contract and points out that its own response to the CBD notice would provide comparable equipment to the Government at a lower cost than the IBM schedule contract--if this \$262,500 is not considered. The contract was awarded to IBM with an anticipated installation date for the equipment of October 31, 1981.

SMS argues that DOJ's assessment of the value of membership in the SHARE and GUIDE users' groups was arbitrary and unduly restricted competition. We agree.

DOJ based its valuation of SHARE and GUIDE membership on an estimate of prior enhancements to programmer and system effectiveness without apparently considering either the offsetting costs of membership and participation, such as fees and employee lost time and travel costs for conferences, or whether these same benefits might not have been otherwise obtainable. In this latter regard, we note particularly that IBM generally supplies SHARE and GUIDE originated software improvements to all users (members and nonmembers) with its next release (improved model) of the software;

in this case, the only benefit directly traceable to SHARE and GUIDE membership would be the benefit derived from earlier acquisition of the software--but not the software itself. Similarly, many SHARE and GUIDE publications, to which DOJ also referred, are available to the general public; since these articles and texts may be acquired without regard to membership, they should not be considered a benefit of membership, except to the extent that members might be charged lower fees.

We think that by ignoring the costs and overstating the benefits of membership, DOJ overvalued membership in these organizations to the point that they are exclusionary. In our judgment, absent a clear showing that the direct, identifiable and quantifiable benefits of membership in a user organization outweigh the attendant costs, such membership may not be considered as an evaluation factor beyond some minimal value which might be used only to discriminate between otherwise essentially equal proposals. This was not done here.

SMS's protest is sustained. Based on our recomputation of DOJ's comparative evaluation, we think a competitive acquisition would be in the best interests of the Government. Because the equipment has already been installed for several months and it takes some time to conduct a competitive procurement, we will confine our recommendation to precluding the exercise of any option for additional lease periods without a competitive procurement. DOJ therefore should prepare and issue a solicitation for the lease of this equipment in accordance with the provisions of section 1-4.1109-6(g)(2)(ii) of the Federal Procurement Regulations prior to exercising any option in its contract with IBM.

By letter of today, we are advising the Attorney General of our recommendation.

As an additional measure, we are referring this matter to the General Services Administration, the agency charged under the Brooks Act, 40 U.S.C. § 759 (1976), with coordinating and governing the acquisition

of data processing equipment by Federal agencies, for consideration of whether additional guidance or other remedial measures might be needed.

for *Milton J. Fowler*
Comptroller General
of the United States