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DECISION

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

FILE: B-206881, B-206881.2 DATE: May 14, 1982

MATTER OF: C3, Inc.; M/A-COM Sigma Data, Inc.

DIGEST:

1. The General Accounting Office will consider a protest, even though it is also before a court of competent jurisdiction, where the court expressly requested a decision in the matter.

2. Protest that cost evaluation of proposal was improper is denied where agency performed reevaluation taking protester's objections into account, reevaluation was reasonable, and awardee's offer was still found to be the lowest in cost.

3. An offeror proposing a systems price that is less than its total hardware components price list is not a prohibited discount dependent on when the system is ordered or the quantity being ordered.

4. An agency may contact offerors to clarify minor uncertainties and irregularities in proposals so long as no offeror is given an opportunity to modify or revise its proposal.

5. After award selection has been made, acceptance of voluntary submissions from awardee, consisting of a price list for optional equipment, maintenance and installation and how the equipment can be added to proposed system configurations, which is not essential to the acceptability of the offeror's proposal, does not constitute discussions and may be accepted by the Government.

6. A change, permitted under the RFP, in the type of contract proposed, i.e., firm, fixed price to cost-plus-fixed-fee and attendant downward reduction based solely on the change, where an offeror's costs were evaluated at the same time and using the same criteria applied to the other offerors, the costs were not reevaluated and there was no substantive change to the proposal, does not warrant another round of best and final offers since it did not affect the acceptability of offeror's proposal.

C3, Inc. (C3), and M/A-COM Sigma Data, Inc. (Sigma Data), protest the award of two contracts (Nos. MDA903-820D-0014 (0014) and MDA903-82-C-0200 (0200)) to Federal Data Systems Corporation (Federal Data) by the Department of the Army, Defense Supply Service-Washington (DSSW), pursuant to request for proposals (RFP) No. MDA903-81-R-0024.

Contract 0014, a firm, fixed-price contract, is to supply at least seven and as many as 220 minicomputer systems, related peripherals, software, documentation and support services to support "automated source data collection" for the Uniform Chart of Accounts at worldwide medical treatment facilities of the Department of Defense. Contract 0200, a cost-plus-fixed-fee contract, is to design, develop, test and implement five subsystems to support the United States Army Personnel Utilization System.

C3 also has filed suit in the United States District Court for the Eastern District of Virginia seeking to enjoin DSSW from taking further action with respect to the contracts awarded to Federal Data. C3, Inc. v. Caspar W. Weinberger, et al., Civil Action No. 82-302-A, filed March 31, 1982. The court has scheduled a May 18, 1982, hearing on the merits of C3's motion for a temporary restraining order and has requested that our Office render a decision on C3's protest by May 14, 1982.

A conference was held in our Office on April 26, 1982, with representatives of the protesters, DSSW, Federal Data, and the Department of Justice. The parties were given until April 30 to submit comments to the conference and any rebuttal comments; thereafter, our record was closed.

Briefly, C3 argues that DSSW (1) improperly evaluated C3's pricing proposal; (2) should not have evaluated a discount offered by Federal Data in light of the prohibition in the RFP; (3) conducted negotiations after receipt of best and final offers in that it permitted Federal Data the opportunity to modify its proposal; and (4) applied evaluation criteria to the C3 and Federal Data proposals which were not set forth in the RFP. With respect to issue No. 4, since it is raised in connection with issues Nos. 1 and 2, we will address it at the time we discuss those issues. Sigma Data's protest is limited solely to issue No. 3, above, and will be considered at the time we consider that issue.

Although it is the ordinary practice of our Office not to render a decision where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction, we will consider C3's protest since the court has expressly requested our decision. See GAO Bid Protest Procedures, 4 C.F.R. § 21.10 (1981); Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

We deny the protests.

Background

DSSW issued the RFP on February 10, 1981, and a preproposal conference was held on March 10, 1981. Each attendee had the opportunity to submit questions to DSSW concerning the RFP. Modification No. 0001, which included all the questions, their answers and whether the RFP was changed due to the questions, was issued on March 26, 1981.

Seven companies responded to the RFP by submitting separate technical and cost proposals by the closing date of July 6, 1981. The technical evaluation was divided into two phases. During Phase 1, called the

Validation Phase, DSSW reviewed (a) the technical proposals to confirm that each met all of the mandatory requirements and (b) the Operational Capabilities Demonstration (OCD) to determine that the technical proposal was in accordance with section "M" (Evaluation Factors for Award) of the RFP, paragraph M-5. During Phase II, the Evaluation Phase, the proposals were given point scores which corresponded to the stated criteria of section "M," paragraph M-4.

The Source Selection Evaluation Board (SSEB) performed the Validation Phase evaluations in July 1981, and all but one company's proposal were found to be susceptible of being made acceptable. The SSEB drafted a report specifying the areas where additional information concerning each of the remaining six companies was needed.

Subsequently, the companies were apprised of the areas where additional information or clarification was needed. Technical discussions were conducted and all the companies were found to have met the mandatory requirements. Also, the OCD's were conducted and all successfully completed their respective demonstrations. Accordingly, each company was included in Phase II and all were asked to conduct negotiations.

When the negotiations were conducted, from November 17 to December 3, 1981, each company was given a cost workbook and instructions on how to complete the book. Best and final offers were requested by December 22, 1981. In the interim, modification 0005, covering issues raised during negotiations, was issued.

After best and final offers were submitted, the technical proposals were evaluated and the scores revised by the SSEB; and a cost analysis, conducted under the Bid Analysis Reporting System (BARS), was performed on each company's cost proposal using the cost workbook as an aid. During this analysis, DSSW found areas which required clarification and, consequently, contacted each company. At the conclusion of this analysis, DSSW concluded that, while there were some errors in the analysis, correction was inappropriate since the errors were minor and a review of the cost proposals and certifications indicated that the ranking of the companies would remain the same. The SSEB's findings, recommending award to

Federal Data, were submitted to the Source Selection Advisory Council (SSAC) on February 4, 1982, and, on February 5, the SSAC approved the award selection.

At that time, the Defense Contract Audit Agency (DCAA) conducted an examination of the cost proposals submitted by Federal Data with the results given orally to DSSW on February 25, 1982, and a written report on March 3, 1982. Essentially, DCAA questioned the accounting system, and these questions resulted in Federal Data's shifting certain expenses from the originally-specified category to the one specified by DCAA.

Federal Data, on March 8, 1982, submitted a letter "to provide clarification of [its] proposal." In addition, Federal Data submitted a price list, dated March 8, 1982, for optional equipment. Award was made on March 12, 1982.

Evaluation of C3 Proposal

It is C3's position that DSSW improperly evaluated its cost proposal, which resulted in an increase in the proposed billings of $9,911,077 over the 129-month total contract life. When reduced to present value, it results in an increase of $5,769,841 in the evaluated price. C3 objects to $5,541,298, which it breaks down as follows:

a. DSSW failed to evaluate C3's prompt-payment discount ($924,974);

b. DSSW improperly evaluated C3's proposal for escalation of on-call maintenance service ($1,195,672); and

c. DSSW incorrectly disregarded C3's no-charge bid for 2 hours of outside principal period of maintenance ($3,420,652).

With respect to the prompt-payment discount, DSSW admits that it failed to apply the discount to the maintenance, but, when C3's evaluated present value cost is reduced by the applicable amount, its cost is still greater than that of Federal Data.

In regard to the escalation of on-call maintenance service, C3 contends that its proposal stated that a 10 percent annual compound escalation factor would be applied to its maintenance charge beginning in October 1984. The maintenance charge referred to is the basic monthly maintenance charge which gives the Government 9 consecutive hours of maintenance between 8 a.m. and 9 p.m., the principal period of maintenance. C3 explains that its escalation factor was to begin with the 34th month of system life. The RFP, section "M," paragraph M-3(f), states:

> "For the purpose of evaluation, the installation date of the first system will be month one (January, 1982) of the system life."

C3 argues that DSSW did not apply the proposed escalation factor to the 34th month, but applied it to the 25th month. C3 submits that this occurred because DSSW, instead of using January as month one of the system life, used October 1982. It is C3's contention that this change was not communicated to C3 nor did DSSW issue a written amendment. C3 submitted two affidavits to support its contention that no communication was made to C3 concerning the use of October 1982 as month one.

DSSW argues that its evaluation was proper since it used the date specified by C3 in RFP section "B," paragraph B-11 (Pricing Questionnaire), subparagraph "L" (Maintenance). Specifically, C3's best and final cost proposal, December 22, 1981, stated:

> "System Life Month or Calendar date of 1st escalation October 1984."

However, DSSW states that it determined that the use of the January 1982 date as month one of the system life was unrealistic since the first system would be installed in October 1982. Also, we note that the RFP was not amended to reflect this determination. Notwithstanding, DSSW submits that during negotiations it was agreed that January 1982 would be used as month one of the contract life, not system life. DSSW points to page 6 of the cost workbook, which was given to all offerors during negotiations, to support its position. The workbook provides

that the month of installation would be month 10. DSSW states that "all offerors were evaluated using the same criteria." Also, DSSW contends that an explanation of each element of the cost workbook was given to each offeror during negotiations.

The literal reading of C3's best and final offer is that C3's escalation factor will commence in October 1984. C3's offer did not characterize October 1984 as the 34th month of the systems life. We only have C3's protest statement that it intended to have its maintenance escalation factor commence on the 34th month. DSSW argues that it evaluated this aspect of the C3 proposal as specified in the proposal.

We accept the agency's position that October 1982 was to be month one of systems life. Furthermore, since C3's proposal did not condition October 1984 as the 34th month of systems life, we find that DSSW's evaluation using October 1984 as the commencement date for C3's maintenance escalation factor was reasonable. Moreover, even conceding C3's argument that it was not advised directly of the change, we find the workbook was sufficient to advise C3.

In any event, we note that DSSW, in response to this protest, reevaluated C3's proposal following C3's arguments and, while this does decrease C3's evaluated costs, it does not affect the relative standing of C3 and Federal Data.

C3's final argument concerns the evaluation of its cost proposal in regard to charges for maintenance to be performed outside the principal period of maintenance, i.e., maintenance performed before or after the 9-consecutive-hour principal period. The RFP section M-3 (Evaluation Criteria/Instructions), paragraph h(c), states:

> "Offeror must provide per-call maintenance prices outside the [Principal Period of Maintenance] (PPOM). This price should include per diem, travel and any other applicable charges for each location. Per-call charges will be evaluated on the

basis of two (2) calls of an hour's duration per month, for each location, Monday through Friday, using the highest rates proposed for each year of the systems life."

C3 argues that since it offered to perform the initial two service calls per month, for each site, at no additional charge, "the evaluated per-call maintenance per month, per site should be '0.'" C3 contends that DSSW's use of a $75 per hour charge, which substantially increased its evaluated present value cost, was a change in the evaluation criteria and improper.

DSSW submits that the RFP does not state that the per-call maintenance charges would be evaluated using the rate proposed for the initial two service calls, but that the two calls would be evaluated "using the highest rates proposed for each year of the system life." Since the highest rate proposed by C3 was $75 per hour, DSSW used that figure in its evaluation.

We do not find C3's argument persuasive. The RFP is clear concerning the evaluation of charges for maintenance outside the principal period of maintenance. The highest rate proposed for each year of systems life will be used in the evaluation, not, as C3 argues, the rate proposed to perform the initial two service calls per month, per site. However, once again, DSSW reevaluated C3's proposal based on the arguments in C3's protest. After the calculations concerning C3's proposal were completed, DSSW reevaluated Federal Data's cost proposal, using the same criteria, since Federal Data also proposed no charge for the initial two calls. This allowed an accurate comparison of the proposals. C3's evaluated costs and, for that matter, Federal Data's costs decreased as a result of the reevaluation. However, the relative standing of C3 and Federal Data remained the same. Moreover, if we conceded all of C3's arguments considered up to this point concerning the evaluation of its cost proposal and compared C3's reevaluated proposal to Federal Data's reevaluated proposal, the relative standing would still remain unchanged. We have reviewed DSSW's evaluation of the

proposals and find the evaluation to be reasonable. See C. L. Systems, B-197123, June 30, 1980, 80-1 CPD 448.

Improper Evaluation of the Federal Data Proposal

On December 7, 1981, DSSW issued modification No. 0005, amending the RFP in certain respects. Specifically, it amended section M-2 by adding paragraph "o" (Quantity Discounts), which follows in pertinent part:

"Quantity Discounts

"The offeror may offer quantity and other discounts for systems/items ordered under this contract. Since the exact number and ordering dates of the majority of the systems to be ordered cannot be defined at this time, certain discounts will not be considered for award purposes. In general, discounts that restrict the manner in which the Government shall order or configure systems in order to receive the discount will not be evaluated.

* * * * *

"iii. Discounts will not be evaluated if they only apply to specific configuration(s) of equipment.

"iv. Discounts will not be evaluated if they only apply when the Government orders a specific mix or mixes of the configurations evaluated."

C3 argues that DSSW should not have evaluated the discount offered by Federal Data since the terms were limited to a specific configuration or specific mix or mixes of configuration(s) contrary to paragraph "o," supra. C3 points to section B-10 of Federal Data's contract to support its position:

"B-10. Ordering Information

"d. Items or units may be deleted from the proposal configuration at 29% of the listed unit price, and maintenance may be deleted at 74% of the unit maintenance price.

"e. Reconfiguration is allowed at the government's option during the first 45 days of an award. The new purchase price for adding units during this period may be determined by computing 50% of the unit price listed. After the first 45 days of an award, units may be added at 77% of the unit price listed. Maintenance may be added at the unit price listed."

In addition, C3 contends that the Federal Data pricing strategy should be recognized as a strategy of unbalanced bidding and treated accordingly.

To illustrate its position, C3 selected the component and price list for one site, National Naval Medical Center, Bethesda. The total price for the computer system is $86,008.13. Listed beneath that item were the individual prices for the hardware components, which totaled $290,536.94. C3 notes that for each site the sum of hardware components prices is greater than the computer systems price.

C3 compared the two prices and the result was that the total system price is only 29.6 percent of the total of the component prices, or 70.4 percent less than the total component price. C3 submits that these results become significant when viewed in light of section B-10, supra. C3 argues that, if one of the components (e.g., Datapoint 6600 central processor) of the computer system, which C3 calls the configuration, is removed, the price of the configuration would be reduced by 29 percent of its unit price ($40,100) (see section B-10 (d)) or $11,629. Therefore, "it is clear that the $86,008.13 price in economic terms amounts to a 71-percent discount off list." Furthermore, C3 states that, if the 6600 is replaced by the Datapoint 8800 central processor, the price of the configuration would increase by 77 percent

of its unit price ($40,100) or $30,877. The new system price would be $105,256.13 or 36.2 percent of the total hardware component price, a discount of approximately 63.77 percent. Therefore, the original 71-percent discount is only available if the original computer system is purchased.

DSSW contends that "[Federal Data] did not offer any discounts" and, therefore, "no discounts were evaluated." It is DSSW's position that Federal Data proposed a price for each computer system that computed to a 71-percent discount off the list price. The price offered applied to each of the 220 systems, which included all five equipment configurations.

We agree with DSSW's position. Federal Data's proposal did offer a fixed price for the system proposal for each site which was less than the total list price for the hardware components listed under the respective system price. However, these prices were neither contingent on when the components were ordered nor the quantity purchased. As shown by the above example, DSSW does not lose the systems price by making an addition or deletion from the configuration, but the new piece of equipment is merely substituted with appropriate pricing adjustment to the system price. Therefore, we do not find that Federal Data's pricing pattern violates the prohibitions set forth in paragraph "c" - Quantity Discounts, supra.

With respect to the possibility that hardware components could be added or deleted, a right the Government has reserved to itself (RFP Section C-12(d)), at prices listed in the proposal, we note that DSSW did not evaluate this situation since it was unclear how, if at all, the computer system would be reconfigured. We do not find this to be unreasonable.

In regard to C3's assertion that Federal Data's pricing strategy should be viewed as a strategy of unbalanced bidding, we disagree. It has not been shown that each item did not carry its share of the cost. We deny this aspect of C3's protest.

Negotiations/Discussions after Best and Final Offers were submitted

C3 and Sigma Data allege that DSSW gave Federal Data the opportunity to modify its offer after best and final offers were received on December 22, 1981. This allegation is based on DSSW's admission that after best and finals it did contact the offerors concerning their proposed costs and Federal Data submitted Attachment 3 to its price quotation, which is dated March 8, 1982, and a letter, of the same date, to the contracting specialist. In addition, C3 argues that negotiations did occur between DSSW and Federal Data in regard to contract 0200 for the development of five application systems, since the DCAA audit was conducted after Federal Data's selection and to have no resulting changes in pricing would be an unusual occurrence. C3 also contends that apparently equipment prices were negotiated and fixed for 5 years. The protesters argue that these actions warrant cancellation of Federal Data's contract and a new round of best and final offers.

DSSW denies that discussions of any sort occurred after best and final offers were submitted. DSSW, however, does admit that it contacted all offerors either prior to or during cost evaluations to eliminate uncertainties or ambiguities in order to properly evaluate each cost proposal using the BARS. Furthermore, DSSW states that no offeror was given an opportunity to make changes in the cost of an item proposed in its best and final offer. In regard to the March 8, 1982, letter and Attachment 3, above, DSSW argues that since Federal Data was already the otherwise successful offeror, the Government could, pursuant to Defense Acquisition Regulation (DAR) § 3-805.3(d) (Defense Acquisition Circular No. 76-17, September 1978) and section L-21(e) of the RFP, accept the offer. Moreover, DSSW points out that the equipment listed in Attachment 3 was "extraneous to the Systems/Configurations" and was not evaluated. Also, DSSW states that the charges for maintenance, installation and transportation were decreased, but also not evaluated. With respect to the DCAA audit, it is noted that exceptions were taken to some proposed costs due to an accounting system change. However, DSSW submits that Federal Data's proposal was

revised downward based on acceptance of some of the exceptions.

DAR § 3-805.3(d) provides:

> "At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written 'best and final' offers shall be established and all remaining participants so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include information to the effect that (i) discussions have been concluded, (ii) offerors are being given an opportunity to submit a 'best and final' offer and (iii) if any such modification is submitted it must be received by the date and time specified, and is subject to the Late Proposals and Modifications of Proposals provision of the solicitation."

Paragraph (e) of section L-21 (Late Proposals, Modifications of Proposals and Withdrawals of Proposals) states:

> "Notwithstanding the above, a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

We agree with DSSW's position on this issue. The question of what consitutes discussions has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether this opportunity resulted from actions initiated by the offeror or the Government. 51 Comp. Gen. 479, 481 (1972). Discussions also occur when the information requested and provided is essential for determining the acceptability of a proposal. John Fluke Manufacturing Company, Inc., B-195091, November 20, 1979, 79-2 CPD 367.

While the protesters cite prior decisions of our Office holding that discussions did occur after best and final offers (e.g., PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11; University of New Orleans, 56 Comp. Gen. 958 (1979), 77-2 CPD 201; John Fluke, supra), we find that they are distinguished from the facts of this case. In each of those decisions, we essentially found that discussions resulted in revisions and/or modifications to the proposals which were essential for determining whether the proposals were acceptable. This is not the case here.

The record shows that DSSW contacted the offerors concerning the cost proposal evaluations. These contacts were made after the cost proposals were compared with the final technical proposals in order to eliminate any ambiguity and insure that accurate data would be utilized in the BARS. The offerors responded to DSSW's inquiries orally and by letter. The record indicates that three written responses were received by DSSW. Two of these responses, one of which was submitted by C3, included either an extension in the time a price would be offered or change in prices. Neither one was accepted by DSSW. In this circumstance, we do not find that the conversations concerning the cost evaluation gave any offeror an opportunity to revise or modify its proposal. Rather, each offeror was given the opportunity to clarify its proposal by eliminating minor uncertainties and irregularities to assure proper evaluation under the BARS.

After the cost evaluation was completed, Federal Data was selected for award. As noted above, the date of selection was February 5, 1982. At this time, Federal Data was the winner of the competition. Thereafter, Federal Data voluntarily submitted Attachment 3, supra, and a letter to the contracting specialist, both dated March 8, 1982. While these submissions did result in changes to the final contract, the changes were within the contemplation of the contract. Essentially, they included optional equipment, maintenance and installation and how the equipment can be added to proposed system configurations as contemplated by the contract. There is nothing in the record to support the contention that the information submitted was essential to the acceptability of Federal Data's propcsal. Moreover, our review discloses that no evaluation was conducted by DSSW in

regard to the March 8 submissions. In this instance, it was permissible for DSSW to accept the submissions and incorporate them into the contract. See DAR § 3-805.3(d) and RFP § L-21(e), supra.

With respect to the DCAA audit and the events that followed as a result, we also find that the changes that were made did not affect the acceptability of Federal Data's proposal which resulted in contract 0200. Federal Data's cost proposal originally consisted of a separate cost proposal for the development of the five subsystems on a firm, fixed-price basis and separate proposals on a cost-plus-fixed-fee basis for each of the 2 years of support for the Uniform Chart of Accounts Personnel. DCAA's audit of the cost proposals questioned the placement of certain costs, totaling a minimal dollar amount, in one category and not in another. After being apprised of the audit results, Federal Data moved some of the cost into the category suggested by DCAA. In addition, Federal Data agreed with DSSW that a cost-plus-fixed-fee contract would be more appropriate for the entire 0200 contract. This resulted in a reduction of Federal Data's 15-percent profit figure under the firm, fixed-price proposal to the 10-percent maximum fee under the cost-plus-fixed-fee contract. A certificate of current cost or pricing data was submitted by Federal Data. The 0014 contract remained firm, fixed price.

In this regard, we note that the RFP, section L-24, permitted the submission of a firm, fixed-price offer which could be later changed to a cost-plus-fixed-fee contract. Section L-24 provides:

"a. It is contemplated that a combination firm fixed price indefinite delivery and cost-plus-fixed-fee type of contract will result from negotiations attending response to this solicitation. However, this does not preclude the possibility that negotiations may permit the award of a firm fixed price for all products and services. If a combination type of contract is awarded, the cost-plus-fixed-fee portion will pertain to the application software only."

Our review of the record indicates that the costs submitted by Federal Data did not change. The downward revision in the proposal was a result of the corresponding decrease from the 15-percent profit figure to the 10-percent fee which automatically occurred when the type of contract was changed. We do not find that this change was essential for award, thereby warranting another round of best and final offers. Federal Data's costs were evaluated at the same time and under the same criteria applied to the other offerors, Federal Data's costs were not reevaluated and there was no substantive change to its proposal.

The C3 and Sigma Data protests are denied.

for Milton J. Socolar
Comptroller General
of the United States