

**DECISION**



28004  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-213396 **DATE:** April 17, 1984  
**MATTER OF:** Delta Data Systems Corporation

**DIGEST:**

1. An offeror's financial condition primarily is to be considered as a matter of responsibility and may not be comparatively evaluated under technical criteria unless the procuring agency demonstrates that special circumstances justify a comparative evaluation.
2. Solicitation was ambiguous and offerors did not compete on an equal basis where protester proposed in accordance with reasonable specification requirement yet awardee was permitted to propose on a different basis.
3. Unsubstantiated allegations of bad faith on the part of agency procurement personnel do not meet the judicially established standard of "well high irrefragable proof."

Introduction

Delta Data Systems Corporation protests the Federal Bureau of Investigation's award of a contract for Tempest-qualified<sup>1</sup> computer terminals, disc devices and printers to Systems Development Corporation (SDC), a subsidiary of Burroughs Corporation, under solicitation No. 2591. Delta Data contends that the FBI should not have down-scored

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<sup>1</sup> That is, equipment protected against electronic emissions that could disclose the information contained in it; such secure devices are popularly described as "bug-proof."

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Delta Data's technical proposal during evaluation to reflect its financial status and that SDC's equipment does not satisfy the mandatory requirements of the solicitation as those requirements should be interpreted.

We sustain the protest.

While the protest was pending with our Office, Delta Data filed suit against the government in the United States District Court for the District of Columbia (Civil Action No. 83-3051). The bases for the suit are substantially the same as those presented in the protest to our Office. The court, by order of December 19, 1983, denied Delta Data's motion for a preliminary injunction with prejudice; denied the government's motion for summary judgment without prejudice; and directed discovery limited to government and FBI procurement practices in examining the financial soundness of offerors.

The court also stated, in a footnote, that it would take into account any decision of this Office on Delta Data's protest rendered in the interim. The court subsequently advised us it was interested in our advisory opinion regarding all of the issues raised in Delta Data's protest<sup>2</sup>. Due to the extensive factual record developed during the litigation and the need to satisfy the court's schedule, we did not conduct a conference in this case. Further, we have not considered submissions filed with this Office after the agreed-upon deadline of February 12, 1984. See N. V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD 467.

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<sup>2</sup> The parties to the protest did not agree as to the extent of the court's interest in our opinion. To remove any doubt, we called the court and were orally advised that our opinion was welcomed on all the issues raised. While the FBI and SDC suggest that we should not have contacted the court ourselves, our purpose was to obtain clarification of what the court desires so that we could be responsive to the court's wishes. As stated in our Bid Protest Procedures, when the matter being protested is also the subject of litigation, we will render a decision only at the court's request. See 4 C.F.R. § 21.10. Our role in such situations is to aid the court, and obviously there should be no misunderstanding as to what the court is seeking from us.

The RFP was issued on September 9, 1982 for the delivery of 6,216 Tempest-qualified computer terminals over an 8-year period, with initial deliveries beginning 60 days after award. The RFP advised that all offers meeting the mandatory requirements would be evaluated on the basis of life cycle cost, vendor considerations, live test demonstration (LTD) and desirable features and that proposals would be point-scored. The criterion at issue in this protest--vendor considerations--was worth 20 percent of the total point score available and consisted of five subcriteria: past performance; soundness of approach (i.e., risk factor); operational reliability; vendor support; and technological evolution.

Four offers were received by the May 2, 1983 date set for submission of initial proposals. Three firms, Delta Data, SDC, and International Business Machines submitted proposals that satisfied the mandatory requirements of the RFP (including an optional proposal from Delta Data). The FBI then conducted live test demonstrations with the equipment offered by each of these firms and invited best and final offers, which were received on August 25, 1983. Shortly thereafter, the FBI's technical evaluation committee evaluated each offeror under the five subcriteria within "vendor considerations" and assigned scores as follows:

<u>"Vendor Considerations" Subcriterion</u>	<u>VENDOR</u>			
	<u>SDC</u>	<u>IBM</u>	<u>DD#1</u>	<u>DD#2</u>
Past Performance	7	4	3	8
Soundness of Approach ( <u>i.e.</u> , risk factor)	8	0	0	9
Operational Reliability	8	4	5	8
Vendor Support	8	6	2	10
Technological Evolution	10	2	0	10

This score was combined with the other technical factors, resulting in scores, exclusive of cost, as follows:

<u>Item</u>	<u>SDC</u>	<u>IBM</u>	<u>DD#1</u>	<u>DD#2</u>
Vendor				
Considerations	18.0723	7.7547	4.7755	20.0000
LTD	14.0789	12.1075	12.6419	14.8552
Desirables	10.0000	8.0306	6.8562	9.7211
Total (45 max)	<u>42.1512</u>	<u>27.8928</u>	<u>24.2736</u>	<u>44.5763</u>

Because of further technical concerns, the FBI requested another round of best and final offers, which were received on September 15. Shortly thereafter, as a prelude to its making a responsibility determination, the FBI requested Dun and Bradstreet reports on the two firms, Delta Data and SDC, that had the best chance of receiving award. Dun and Bradstreet reported favorably on SDC but advised that "Delta Data was in an unbalanced condition as of 8/83. D&B will not rate companies in an unbalanced condition."

Due to Dun and Bradstreet's unwillingness to rate Delta Data, the FBI asked the firm to provide financial information directly. In reply, Delta Data provided its 1983 annual report, a quarterly report, Securities & Exchange Commission filings and a letter from its major investors. This information was turned over to a certified public accountant employed by the FBI, who reported that Delta Data (1) was in default to preferred shareholders; (2) had furnished the FBI with an unaudited financial statement; (3) was in the process of renegotiating long term debts to meet current obligations; and (4) had made sizable loans to its corporate officers at low or no interest for stock purchases.

The contracting officer then met with the technical evaluation committee, advised the committee of these conclusions regarding Delta Data's financial status, and provided the financial documents for inspection during the meeting. The technical evaluation committee reconvened and reevaluated the vendor considerations factor in light of this new information and, to a lesser extent, the information obtained in the second round of best and final offers. The committee then lowered the score for Delta Data's proposal as follows:

<u>"Vendor Considerations" Subcriterion</u>	<u>Initial Evaluation</u>	<u>Final Evaluation</u>
Past Performance	8	7
Soundness of Approach (i.e., risk factor)	9	6
Operational Reliability	8	4
Vendor Support	10	4
Technological Evolution	10	4

This rescoring led to nearly a 9 point reduction in Delta Data's overall technical score, so that the final technical scores were:

<u>Item</u>	<u>SDC</u>	<u>IBM</u>	<u>DD#1</u>	<u>DD#2</u>
Vendor				
Considerations	20.0000	8.5818	4.6303	11.1273
LTD	14.0789	12.1075	12.6419	14.8552
Desirables	10.0000	8.0306	6.8562	9.7211
Total (45 max)	<u>44.0789</u>	<u>28.7199</u>	<u>24.1284</u>	<u>35.7036</u>

When cost considerations were taken into account, SDC received the highest total score, 92.96, and Delta Data the next highest score, 90.71.

The contracting officer presented this information to the FBI Contract Review Board for approval. This presentation included an analysis of Delta Data's financial condition substantially similar to that outlined previously. Based on this and the other information presented, the Board approved the selection and SDC was awarded a contract with an evaluated cost of \$32,715,272.

#### Evaluation of Financial Condition

Delta Data contends that financial concerns such as those evaluated by the FBI under the factor vendor considerations can only be considered in determining whether an offeror is responsible, and not for comparatively evaluating the merits of competing proposals. According to Delta Data, the FBI's belated attempt here to rescore vendor considerations failed to achieve its purpose because it was inconsistent with both the fundamental notion of what constitutes responsibility in federal procurements and the FBI's course of conduct throughout this procurement.

The FBI argues that consideration of the offerors' financial condition was inherent in the evaluation of vendor considerations and that therefore the FBI was not precluded from comparatively evaluating this factor during technical evaluation, particularly when the FBI discovered that Delta Data's financial condition was such that its ability to satisfy the criteria under vendor considerations was questionable.

An offerors' financial condition is ordinarily considered a matter of contractor responsibility. Federal Procurement Regulations, § 1-1.1203-1(a). Responsibility determinations are made after proposal evaluation and concern whether an offeror has the capacity to perform the contract work; in contrast, evaluation criteria are

utilized to make relative assessments of the merits of individual proposals. Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410. While in proper circumstances procuring agencies may consider certain responsibility-related factors when evaluating proposals, Anderson Engineering and Testing Co., B-208632, January 13, 1983, 83-1 CPD 99, those factors generally are limited to such areas as experience, available facilities, and personnel qualifications, all of which, when evaluated on a comparative basis, can produce an appropriate basis for selection of an offeror that would be "in the best interest of the government."

We do not view financial capability as such an area in most cases, however. In Andover Data Systems, Inc., B-209243, May 2, 1983, 83-1 CPD 465, we stated that:

" . . . agencies should not need, generally speaking, to make a comparative evaluation of competing offerors' financial condition. It therefore should continue, in most cases, to be an element in determining responsibility, its use as a technical evaluation factor is to be discouraged, and any future use for other than responsibility determination should be fully justified by the contracting agency."

We do not believe that the FBI has justified its comparative evaluation of the offerors' finances in this case. Essentially, the FBI argues that the offeror's financial condition was inherent in the evaluation criteria under the factor vendor considerations. Although we recognize that an offeror's ability to obtain financing arguably affects its ability to satisfy these criteria, and perhaps every other aspect of performance for that matter, the consideration of an offeror's finances and how they affect its ability to perform the contract is what a determination of responsibility concerns. Thus, the inherency argument is simply another way of expressing the fundamental rationale for reviewing an offeror's responsibility, and is not a justification for avoiding that review. The argument certainly doesn't establish any special justification for treating financial condition as a technical evaluation factor.

Moreover, we note that the FBI initially conducted the procurement without viewing financial condition as anything other than a matter of responsibility, since it neither called for financial information from the offerors

nor received such information during the earlier evaluation and discussion phases of the procurement. Even when the FBI first requested financial information on the two most likely awardees, it did so for the admitted purpose of determining financial responsibility not for making a further comparative evaluation. Thus, it does not appear that the FBI itself considered this procurement as warranting any special treatment of financial consideration, at least until the time Delta Data's apparent financial difficulties were discovered. This discovery, we believe, does not justify a sudden decision to comparatively evaluate financial factors; the discovery of questionable financial condition is a possibility in every procurement, and the fact that it happens cannot itself convert a pure responsibility matter into something else.

Further, given our holding in Andover that comparative evaluation of financial matters is permitted only in limited circumstances, offerors have the right to expect that the procuring agency will make it clear that financial condition will be treated as part of the technical evaluation. Here, both the solicitation language and the FBI's course of conduct throughout the procurement were consistent only with this factor's being treated as a matter of responsibility. Consequently, Delta Data had no notice of the FBI's concerns or an opportunity to explain or cure its condition during negotiations.

Finally, we note that Delta Data is a small business. Thus, if financial condition had been properly considered as part of the contracting officer's responsibility determination, and if Delta Data had been found nonresponsible, the matter would have had to be referred to the Small Business Administration under 15 U.S.C. § 637(b)(7)(A) (1982) for a final determination. The FBI's approach here allowed it to circumvent that requirement.

#### Acceptability of SDC's Proposal

For its second major basis of protest, Delta Data contends that the FBI should not have accepted SDC's proposal to provide centralized disc memory storage for each group of terminals. Delta Data argues that the specification required separate disc devices for each terminal in the manner Delta Data proposed. In this respect, the specification distinguished between two types of terminals, a simpler one described as the baseline terminal, of which 240 were to be furnished, and 5,976, enhanced terminals, of which 1,244 were to have word processing capability. According to Delta Data, each of

the enhanced terminals must have its own, separate device for storing additional data, each device consisting of two drives capable of using floppy discs. Such an independent memory capability, Delat Data contends, is required both by the specificaion itself and the stated concept of a stand-alone terminal, i.e., only a terminal capable of performing all of the specified functions can be considered a stand-alone unit.

Rather than having a separate disc device for each enhanced terminal as Delta Data would have it, SDC's best and final offer proposed a single device, containing one hard disc<sup>3</sup> and one floppy disc,<sup>4</sup> for each grouping of up to 16 terminals.

SDC proposed that for each group of terminals, one terminal, termed the master terminal, would be connected directly to the central disc device. The other terminals in the group, termed slave or cluster terminals, would be connected to the master terminal and through it, to the central disc device. Under this arrangement, the master terminal controls and coordinates access to the central disc device, since all terminals in a particular group share the same disc device. Thus, SDC was able to organize its terminals into three categories: (1) stand-alone, which of necessity had its own separate disc device; (2) master terminals; and, (3) for each master terminal, up to 16 slave or cluster terminals. While SDC's master terminals are somewhat higher-priced than its stand-alone terminals, the great bulk of its terminals were cluster type, priced appreciably lower.

Although the FBI does not argue the point, solicitation amendment Nos. 3 and 5 provide some support for SDC's proposed use of hard discs, at least in the case of enhanced terminals equipped for word processing. The

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<sup>3</sup> A single hard disc has many times the memory capacity of a floppy disc, and the devices that operate hard discs work more quickly. Thus, it is technically feasible in many applications to substitute one hard disc device to service a number of terminals on a shared basis, as a substitute for separate floppy disc devices.

<sup>4</sup> SDC's standard commercial device uses two hard discs, but it will be modified by substituting one floppy disc drive for one of the hard disc drives, apparently to conform with the specification requirement for floppy discs.



amendments state that enhanced terminals equipped for word processing should have disc storage of at least 1 MB and that this disc storage should be expandable to at least 5 MB by an in-place upgrading of the installed disc unit or by the installation of a replacement disc unit. Given current industry practice, 5 MB of disc capacity would normally require the use of a hard disc. Consequently, to the extent that this expansion to 5 MB may be accomplished through upgrading the existing disc unit, rather than through replacement of the entire disc unit, the specification may be read as implying that the use of one hard disc drive per enhanced word processing terminal is permissible. However, this implication does not apply to the 4,732 terminals which are not equipped for word processing.

In any event, we do not believe that SDC's proposed centralized hard disc arrangement satisfies the requirements of the mandatory specification. Specification paragraph F.1.1 describes the enhanced terminal as one that "can function as a stand-alone work station." The terminal specification, paragraph F.2.1.1.2.5, envisions disc devices mounted either within the individual terminal or external to it. If the disc device is not within the terminal, paragraph F.2.1.1.2.6 requires "a parallel I/O interface port to a device (which is also supplied by the offeror) with at least two drives." These provisions, when read together, require the use of a separate disc device with each enhanced terminal, rather than the shared disc device such as SDC proposed.

Finally, paragraph F.2.1.3.1.2 provides that the disc device must utilize either 5-1/4 inch or 8 inch industry standard floppy discs. We believe that this language is unequivocal; it simply requires the use of floppy discs. And while one can argue that word processing terminals may use hard discs, no such argument can be made for terminals used for data processing, which are the bulk of the terminals.

In summary, the mandatory specification envisions a separate disc device for each enhanced terminal; it envisions that the disc drives may be within the individual terminal; if external, it calls for connecting the terminal directly to the disc device; and it describes the terminal as stand-alone. Nothing in the specification even suggests that a central, shared disc device would have had satisfied the FBI's stated requirements. Further, with the possible exception of word processing terminals, which are a minority, it requires the use of floppy discs, not hard discs.

The FBI argues that a letter of August 1, 1983, which it provided to the offerors after all formal solicitation amendments had been issued and prior to the September 15 date for receipt of best and final offers, amended the mandatory requirements in this regard. According to the FBI, this letter provides a basis for accepting SDC's proposal because the letter clearly called for the clustering of terminals. The pertinent part of this letter provides:

- "8. Has the FBI established a site configuration per location?

The FBI has established a site configuration per location through Fiscal year 1984 and a tentative configuration for the remaining years. This configuration is attached as enclosure 1. The vendor may suggest configuration setups within this framework as long as the functionality as specified in the RFP is clearly met and may be subject, within 60 days notification, to reconfigure equipments to meet configuration changes as needed."

Attached to the letter was a document titled "Technical specifications for probable clustering of the FBI Standard Terminals," which provided that "(t)hese clusters were developed based on equipment distribution and network considerations" and listed equipment configurations by month of installation and the number of such installations desired. For example, for December 1983, the list identified a need for 8 groups of equipment set up for data processing with two enhanced terminals and one printer in each group, as well as 11 other types of arrangements.

The FBI argues that its use of the word "cluster" indicates that all the equipment in the grouping is to be assembled in a manner that achieves the FBI's operational requirements in the most efficient manner possible, and that this can mean more efficient, shared disc devices such as SDC proposed. Put another way, the FBI argues that the word "cluster" implies electronic interconnection and an integrated design of the system, not simply placing different pieces of equipment in close proximity.

We would agree with the FBI's interpretation of the term "cluster" to a certain extent. For example, it would appear to indicate that where the number of terminals in a grouping outnumber the number of printers, which is most frequently the case, the use of the printers should be shared through electronic connection and control, as SDC proposed.

We cannot agree, however, that this language unambiguously advised offerors that they could ignore the mandatory specification requirement for a separate, dual drive, floppy disc device for each enhanced terminal, and substitute for that requirement a single disc device, utilizing both a floppy disc and a hard disc, serving up to 16 slave terminals through a master terminal.

Specifically, the answer to question 8 describes how the specified equipment is to be grouped, or configured, for operating purposes. In such groupings, the various items of equipment are electronically connected so that the overall design of the operating system is integrated and makes efficient use of the equipment. However, the arrangement of the equipment in any particular configuration does not imply that the specifications have been revised. Unless the specifications themselves are revised, the offeror is still required to provide conforming equipment.

Further, the configurations were limited to those where "the functionality as specified in the RFP is clearly met." Since the RFP didn't specify in sufficient detail the precise uses intended, offerors could have had at least a serious question whether a single device, with one hard disc and one floppy disc, serving up to 16 terminals, is the functional equivalent of up to 16 terminals each with its own separate device containing two floppy disc drives. The selection of SDC suggests that its proposed arrangement satisfies the FBI's actual functional needs, but according to the record this fact was not conveyed to Delta Data at any time during the course of discussions.

Moreover, the record shows that Delta Data communicated with its best and final offer its interpretation that each terminal was required to have a separate disc device, and not a shared disc device. Its letter of August 25 accompanying its best and final offer stated that Delta Data marketed a number of other features that would enhance the performance of its terminals, including a hard disc device that could be shared by a number of terminals, but

that they "were not bid as you instructed since they were not called for in the RFP." Accordingly, we believe that the FBI should have known that Delta Data still believed that the specification required a separate disc device with each terminal and that a shared disc device was not an acceptable substitute.

In summary, we believe that the specification, as clarified by the FBI's letter of August 1, may well preclude the acceptance of SDC's shared disc device. We need not settle that question, however, because, it is clear that the solicitation, together with its amendments and the FBI's letter of August 1, was ambiguous in this regard and that Delta Data's best and final offer reasonably communicated that ambiguity to the FBI.

It is a basic principle of federal procurement law that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. An ambiguity exists if specifications are subject to more than one reasonable interpretation. Amdahl Corporation; ViON Corporation, B-212018, B-212018.2, July 1, 1983, 83-2 CPD 51. As stated, we believe that Delta Data's interpretation of the solicitation as clarified by the FBI in its August 1 letter, as requiring separate floppy disc drives for each terminal, was reasonable and that the interpretation the FBI urges to the contrary was communicated in an ambiguous manner at best. Consequently, we believe competition was not conducted on a common basis as required.

However, in light of our conclusion that Delta Data's financial condition should not have been reflected in the technical evaluation, we cannot conclude that Delta Data was prejudiced by this deficiency since under a proper point-scoring Delta Data received the high score and thus was in line for award notwithstanding that its offer was based on furnishing more terminals than were offered by SDC.

#### Other Issues

Delta Data also raised certain issues that were not pursued in its final submissions, such as its allegations that the FBI had not penalized SDC for the late delivery of Tempest-qualified terminals, and that SDC's proposed rate for replacing its initial non-qualified terminals with qualified terminals exceeded the specified maximum installation rate. Our review indicates that the FBI in

fact properly penalized SDC for the late delivery of Tempest-qualified terminals. Further, SDC proposed to replace the non-qualified terminals itself, so that the stated limitation--which concerned the FBI's ability to install the equipment--was not a consideration. In any event, because Delta Data is no longer pursuing these issues, we see no need for treating them further.

Finally, Delta Data has made numerous statements either implying bad faith on the FBI's part or directly accusing the FBI of favoritism, dishonesty and the like. Most of these accusations have to do with the FBI's rescoring of Delta Data's proposal to reflect the financial information received. Given Dun and Bradstreet's refusal to rate Delta Data because of its reported unbalanced condition, we see no reason to question the FBI's good faith in being concerned about Delta Data's financial status or in evaluating the financial information Delta Data supplied. In any event, the record must show "well-nigh irrefragable proof" that the agency had a malicious and specific intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976); Power Energy Industries, B-209705, July 5, 1983, 83-2 CPD 52. Nothing submitted by Delta Data approaches this substantial burden of proof.

#### Conclusion

We recommend that Delta Data's proposal be considered, with consideration of its financial condition limited to a responsibility determination. If the FBI finds that Delta Data is a responsible offeror, the FBI should terminate the existing contract with SDC and make award to Delta Data. If the FBI finds Delta Data to be nonresponsible, it should refer the matter to SBA. If corrective action of this type is no longer feasible due to mission needs and termination costs, Delta Data should be paid its proposal preparation costs.

The protest is sustained.

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