Spangenberg

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified Computer Consultants

File: B-230313; B-230313.2

Date: July 5, 1988

DIGEST

1. New protest contentions based on information in report on initial protest are considered timely under Bid Protest Regulations, if filed at the General Accounting Office within 10 working days of receipt of the report.

2. Where an offeror states in detail in its proposal that it meets solicitation requirements and the agency confirms the offeror's compliance during discussions, the agency had a reasonable basis for determining the proposal was acceptable.

3. The General Accounting Office will not review an affirmative determination of responsibility by the contracting officer, absent a showing of fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria.

4. A cardinal change to a contract requiring resolicitation of the requirement occurs where the essential purpose of the contract has been changed. A potential ambiguity concerning whether the contract covers one item that may lead to a contract modification, but which does not change the contract's essential purpose, is not a cardinal change.

5. Where circumstances indicate that small business offeror may not comply with statutorily-mandated requirement to incur on a small business set-aside solicitation for services at least 50 percent of the cost of personnel for employees of the small business concern, contracting officer has a duty to inquire into the likelihood of compliance. Contracting officer satisfies this duty when he receives explanation and assurances from offeror reasonably indicating that the offeror will comply.

6. An offeror's use of an equipment manufacturer as a subcontractor on a maintenance contract that includes the manufacturer's equipment does not constitute an organizational conflict of interest, where the contract does not

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provide for technical advice on replacing or upgrading the system.

7. Without reopening discussions and after receipt of best and final offers, an agency can delete from the award 18 subline items that constitute 1.21 percent of the protester's high total cost and 5.4 percent of the awardee's low total cost, where there is a substantial cost difference between these offerors and a stated urgency, since the protester is not prejudiced by this change in requirements.

8. Where a price proposal under a RFP is not mathematically unbalanced there is no basis to reject it as materially unbalanced.

DECISION

Diversified Computer Consultants (DCC) protests the decision to award a contract to CCL, Inc., by the United States Army Systems Selection and Acquisition Activity, for the "Corps/ Theatre Automatic Data Processing Service Center-I Maintenance Program" (CTASC-M). The CTASC-M program includes maintenance of 12 van-mounted computer systems located in the United States and Germany.

We deny the protest in part and dismiss it in part.

The request for proposals (RFP) was set aside for small business concerns and requested fixed prices to maintain the 12 units and to supply the required documentation and spare/repair kits. Additionally, the RFP required offerors to submit technical proposals addressing each paragraph of the statement of work sufficiently to permit a thorough evaluation. A maintenance plan and customer references were also to be included in the technical proposal. Under the RFP, award was to be made to the acceptable offeror whose offer represents the lowest evaluated system life cost.

Only CCL and DCC submitted offers. A significant portion of CCL's proposal was to be satisfied by its subcontractor, International Business Machines Corporation (IBM). Both offers were found within the competitive range, discussions conducted, and best and final offers (BAFO's) submitted. CCL's proposal was found acceptable with an evaluated cost of $5,333,135 while DCC's acceptable proposal had an evaluated cost of $7,519,974.

After receipt of BAFO's, but before award, the Army found it no longer needed 18 subline items listed in the RFP schedule. Consequently, these subline items, representing six parts included in each of three line items for spare/repair part kits, were deleted for purposes of award. Since CCL had the lowest acceptable offer and received a positive preaward survey, it was selected for award.

Before award was made on February 26, 1988, DCC protested that: (1) CCL lacks the required experience in the repair of mobile van computer equipment; (2) CCL may not have the requisite security-cleared personnel and facility clearances needed to perform this contract; (3) the Army may have failed to evaluate all RFP line items for purposes of award selection; and (4) the Army lacked the discretion to delete the 18 subline items from the award without requesting the offerors in the competitive range for revised prices. 1/

On March 16, after making the requisite finding, the Army made award to CCL. The Army submitted its report on the protest to our Office on April 4.

On April 21, DCC commented on the agency's response to its initial protest and submitted a number of additional protest bases: (1) that CCL's IBM subcontract is "illegal" because this arrangement violates the statutory requirement that at least 50 percent of the cost of a small business concern's contract performance on a procurement set aside for small business be expended for its own employees; (2) that the use of IBM constitutes an improper organizational conflict of interest; (3) that CCL and IBM will not meet the RFP "response time" requirements; (4) that CCL and IBM will not meet the RFP wartime operations requirements; (5) that CCL's price is unbalanced; and (6) that after award, CCL refused to meet certain requirements involving the repair of the air conditioning in the vans and that a modification of the contract to pay for these requirements would constitute an illegal cardinal change. DCC states that only after it read the Army report on its initial protest did it first learn that CCL had a substantial subcontract with IBM on which much of this supplementary protest is based. The Army does not dispute this statement. Our Office requested the Army to submit responses to these additional protest grounds, which it did on May 20 (received by DCC on May 23).

1/ DCC also protested that CCL does not comply with the Walsh-Healey Act, 41 U.S.C. § 35 et seq. (1982), and that the CCL award violates DCC's rights under another mobile van computer equipment maintenance contract. Upon receipt of the agency report, DCC withdrew these two protest bases.

Finally, in its June 7 comments on the supplemental Army report, DCC contended that its and CCL's prices were not evaluated on the same basis, since DCC's price may have been evaluated including logistics support while CCL's cost evaluation may not include logistics support. This protest ground was based upon a statement made in a source selection document included in the May 20 Army report and is considered timely filed under our Bid Protest Regulations.

The Army argues, however, that the protest bases in DCC's April 21 letter are untimely under our Bid Protest Regulations, since DCC must have received the initial report on April 5 and its April 21 letter was filed more than 10 working days later. The Army states that since CCL, which is located in Falls Church, Virginia, in the Washington, D.C., metropolitan area, received the report on April 5, DCC's counsel, who is located in Washington, D.C., should have received the report on the same day, inasmuch as the report was mailed to both parties at the same time on April 4.

DCC states that it received the report on April 7, in which case its April 21 letter was filed with our Office within 10 working days. Not only has DCC furnished a date-stamped copy of the front page of the report to show its receipt on April 7, but our records indicate that on April 6, the protester's counsel advised our Office that it had not yet received the report. Under the circumstances, we find that these protest bases were timely filed. 4 C.F.R. § 21(a)(2) (1988).

Much of DCC's protest questions CCL's ability to meet certain RFP statement of work requirements; specifically, that the contractor have security-cleared personnel and facilities; that it respond to the Army calls for maintenance within specified time limits; and that it furnish maintenance service in wartime. With regard to the latter two requirements, DCC contends that IBM's schedule contract with the General Services Administration, which encompasses maintenance services supplied the government, contains conditions at variance with the RFP requirements.

However, DCC's proposal specifically addressed each of these three statement of work requirements in detail, and indicated that the firm would and could comply with them. The record also shows that during discussions the Army asked CCL follow-up questions in each of these areas and received further details on how CCL would meet these requirements. CCL also stated during discussions that its proposal took precedence over varying terms that exist in the IBM schedule contract.

DCC contends that given the importance of the security requirements, the contracting officer was obligated to do more than merely accept CCL's assurances that it had the requisite cleared personnel and facilities. We disagree. CCL identified the source of its clearances in its proposal and stated that both it and IBM had on board sufficient cleared personnel to perform the contract work. Therefore, we find that the Army had a reasonable basis for determining that CCL's proposal was acceptable in these areas. To the extent that DCC protests that CCL will not do what it promised in its proposal, this is a matter of contract administration not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1).

DCC also contends that CCL lacks experience. However, as noted by the Army, the RFP only requires that the contract personnel be qualified and contains no minimum experience requirements for offerors. Therefore, DCC's challenge is of the affirmative determination by the contracting officer that CCL is responsible. Because of the considerable business judgment involved, our Office will not review an affirmative determination of bidder or offeror responsibility, absent a showing of possible fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria. John Crowe & Associates, Inc., B-227846, Aug. 21, 1987, 87-2 CPD ¶ 194. Since neither of these exceptions applies here, this protest basis is dismissed.

DCC also protests that "it came to [its] attention" that CCL has refused to maintain the air conditioning units in the vans as required by the contract and that the Army is planning to modify the contract to cover this work. DCC alleges that since these costs were included in its proposed maintenance costs, such a modification would be improper and would constitute a cardinal change requiring resolicitation of this requirement.

The Army contends that this, too, is a contract administration matter not for consideration under our Bid Protest Regulations. However, our Office will consider protests that a contract modification is beyond the scope of the contract, such that it constitutes a cardinal change, which should be the subject of a new procurement. Cray Research, Inc., 62 Comp. Gen. 22 (1982), 82-2 CPD ¶ 376.

The basic standard for determining if a cardinal change has occurred is whether the modified work is essentially the

same as the work for which the parties contracted. Shihadeh Carpets and Interface Flooring Systems, Inc., B-225489, Mar. 17, 1987, 87-1 CPD ¶ 295. Although the Army does not confirm that any contract modification to maintain air conditioning units is planned, it does argue that the air conditioning units are not required to be maintained under the contract, noting that they are not on the equipment configuration list appended to the contract. DCC disputes this interpretation and responds that since it included the maintenance of the air conditioning units in its price, the RFP must be ambiguous such that resolicitation is required.

Whether or not the specification requirements are ambiguous on this point, which we do not decide, it is clear that the essential purpose of the contract is the same, that is, to maintain the van-mounted computer systems. Shihadeh Carpets and Interface Flooring Systems, Inc., B-225489, supra at 3. Consequently, no "cardinal change" is involved and we deny DCC's protest on this point.

DCC protests that the CCL subcontract with IBM is "illegal" because IBM, a large business, will perform more than 50 percent of the contract work on this procurement set-aside for small business in violation of 15 U.S.C. § 644(o) (Supp. IV 1986). In this regard, DCC contends that CCL is a very small business with few employees so it must rely on IBM to perform the maintenance work.

15 U.S.C. § 644(o) is implemented by Federal Acquisition Regulation (FAR) § 52.219-14 (FAC 84-31), which was incorporated into this RFP since it was set aside for small business concerns. FAR § 52.219-14, which essentially mirrors the statutory language, states:

> "By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--
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> (a) Services (except Construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."

The clear purpose of this requirement is to prevent small business concerns from subcontracting to large business(es) the bulk of a contract set aside for small business.

The Army argues that this is also a matter of contract administration or affirmative responsibility not cognizable under our Bid Protest Regulations, 4 C.F.R. §§ 21.3(m)(1) and 21.3(m)(5). It is true that a contracting officer's judgment that an offeror will comply with contract

provisions is a matter of responsibility and that the contractor's actual compliance with the provision is a matter of contract administration. However, just as we review circumstances where it appears a contracting officer had a duty to inquire into the likelihood of an offeror's compliance with other statutorily-mandated requests, see Bryant Organization Inc., B-228204.2, Jan. 7, 1988, 88-1 CPD ¶ 10 and Yale Materials Handling Corp.--Reconsideration, B-226985.2, June 17, 1987, 87-1 CPD ¶ 607 (compliance with the Buy American Act clause); Creativision, Inc., B-225829, July 24, 1987, 66 Comp. Gen ____, 87-2 CPD ¶ 78 (validity of a bidder's/offeror's self certification that it is small business concern), we think it appropriate to review situations where it appears the contracting officer has reason to question whether a small business offeror will comply with the statutory subcontracting limitation.

In this case, the contracting officer had doubts whether CCL could comply with this limitation. In this regard, not only did CCL's proposal show that a substantial amount of the work would be subcontracted to IBM, but the preaward survey reported that CCL was a small business and that "IBM will be performing approximately 70 percent of the contract."

The record shows that the contracting officer did question CCL on this point--she specifically brought this issue to CCL's attention during discussions and advised it that compliance with the subcontracting limitation was mandatory. The record further shows that CCL responded that it was not certain that "[its] current methodology for contract performance was in compliance," but it "would revise [its] proposed solution to become compliant." The contracting officer told CCL to document its compliance. Based upon these assurances, the contracting officer selected CCL for award.

A contracting officer's responsibility determination must be based on fact and reached in good faith. National Health Laboratories, Inc., B-228402, Dec. 10, 1987, 87-2 CPD ¶ 576. However, our Office has consistently held that the determination of a prospective contractor's responsibility, which includes that firm's ability and willingness to meet contract requirements, involves a wide degree of discretion and business judgment. Id.; Newport Offshore Ltd.--Request for Reconsideration, B-225653.2, Apr. 3, 1987, 87-1 CPD ¶ 377. Here, the contracting officer did not ignore the potential that CCL may not comply with the limitation on subcontracting. Rather, she brought this matter to CCL's attention and received assurances that there would be compliance. In this regard, as noted by the contracting officer, the subcontracting provision does not require CCL to perform at least 50 percent of the work, but rather

requires "at least 50 percent of the cost of contract performance incurred for personnel [to] be expended for employees of the concern." Consequently, while the preaward survey report focused on IBM's share of total contract performance, compliance with this provision is not measured by totality of the work, but by reference only to personnel costs. The record indicates that in addition to personnel costs, there will also be costs for such things as spare parts. Moreover, personnel working on this contract will be involved in more activities than direct maintenance, for which IBM is primarily responsible. For example, CCL reports that it is involved in management, administration and the manufacture of non-automatic data processing equipment (ADPE) parts, as well as repairing communications equipment and assisting and backing up IBM technicians in repairing or replacing non-ADPE equipment. Under the circumstances, we cannot say the contracting officer acted unreasonably in accepting CCL's assurances that it would comply with the subcontracting limitation. However, we expect that the Army will monitor the contract to assure that CCL does in fact meet this requirement.

DCC also claims that the use of IBM creates a serious organizational conflict of interest. DCC claims that since IBM equipment is part of that maintained under this contract and because the Army is considering upgrading the equipment, IBM, as CCL's subcontractor, will be in a perfect position to recommend its own system.

FAR § 9.501 (FAC 89-12), states:

> "An 'organizational conflict of interest' exists when the nature of the work to be performed under a proposed Government contract may, without some restriction of future activities, (a) result in an unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work."

This contract only covers the maintenance of van computer systems, and does not have a line item or contract requirement to provide advice on how the van computer systems could or should be upgraded. Therefore, IBM's objectivity is irrelevant and it neither achieves nor has any unfair competitive advantage in simply maintaining the van computer systems. Consequently, DCC's argument that the IBM subcontract constitutes an organizational conflict of interest has no merit.

DCC also protests the deletion of the 18 subline items from the award. First, DCC speculates that because of this deletion the Army may not have evaluated the cost of all

line items as required by the RFP in making award selection. However, the record shows that CCL's evaluated cost is considerably lower than DCC's evaluated cost whether or not the 18 line items are included in the evaluation. Consequently, this protest basis has no merit.

Second, DCC contends that the Army did not have the discretion to delete the 18 line items from the award, but rather was required by FAR § 15.606 (FAC 84-16) to reopen discussions and obtain new prices for the revised requirement. DCC contends that this change in the kind of equipment being procured affects its bidding strategy, inasmuch as various items have differing costs and profitability.

In this case, the RFP incorporated FAR § 52.215-16 (FAC 84-17), which permits the government to "accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations." CCL did not limit its offer, so an award of less than all line items was authorized.

It is true that when, either before or after receipt of proposals or BAFO's, the government changes its requirements, it must issue a written amendment to notify all offerors of the changed requirements and to afford them an opportunity to respond to the revised requirements. FAR § 15-606; Allied Mathematics, Inc., B-227930, Oct. 26, 1987, 67 Comp. Gen. ____, 87-2 CPD ¶ 395. Nevertheless, we will only sustain a protest for the agency's failure to issue a written amendment notifying offerors of a change in RFP requirements, if the protester was prejudiced by this failure. Applied Mathematics, Inc., 67 Comp. Gen. supra; Neurodiagnostics of Mobile, Inc., B-223862, Dec. 1, 1986.

The Army asserts that it did not reopen negotiations to delete these subline items because of the urgency of the procurement and the apparent lack of impact the deletion would have on the competition. The 18 subline items represented 6 parts in 3 line items for spare/repair kits, which consist of as many as 60 parts. In addition to the spare/repair kit line items, the RFP also had line items for basic maintenance and documentation. The deleted items represented only 1.21 percent of DCC's proposal cost and 5.4 percent of CCL's proposal cost, while there was a $2,186,839 difference in evaluated cost between CCL and DCC. Moreover, although DCC claims that this could impact its pricing strategy, it has not elaborated on how this deletion would have materially affected its price. See Hughes Aircraft Co., B-222152, June 19, 1986, 86-1 CPD ¶ 564. Under the circumstances, we discern no prejudice to DCC as a result of deleting these 18 subline items from the award.

DCC also alleges that CCL's price is unbalanced in that it is considerably understated for the maintenance line items and overstated for the documentation and spare/repair kit line items. The RFP states that unbalanced offers, that is, proposed prices which are significantly less than cost for some systems and/or items, and prices which are significantly overstated for other systems and/or items, may be rejected. In support of this protest basis, DCC analyzes the maintenance prices charged in IBM's schedule contract, which DCC alleges are higher than those offered by CCL. DCC states that under IBM's schedule contract, it must offer its lowest costs to the government or match any lower costs it offers other customers. DCC also references CCL's prices for documentation and repair/spare part line items, which DCC states are considerably higher than what DCC charged for these items and which DCC alleges are "artificially high."

Our in camera review of CCL's cost proposal, the IBM subcontract, and IBM's schedule contract indicates that CCL's maintenance costs are apparently not understated and that DCC has made a number of erroneous assumptions in the analysis of CCL's cost proposal.2/ Moreover, the Army determined that CCL's prices for documentation and repair/spare part line items were fair and reasonable. Since our review does not indicate that CCL's price is mathematically unbalanced, there is no basis to find CCL's offer materially unbalanced and thus unacceptable. tg Bauer Associates, Inc., B-228485, Dec. 22, 1987, 87-2 CPD ¶ 618.

Finally, DCC claims that its price proposal may have been evaluated on a different basis than CCL's proposal, since a factor for logistics support may have been added in the evaluation of DCC's proposal, even though it did not want such support from the government, while no such factor was added to CCL's price.3/

Our review, however, indicates that DCC's and CCL's price proposals were evaluated on the same basis; both were compared on the basis of not accepting government furnished logistics support. The statement in the business clearance memorandum on which DCC bases this contention merely notes that one reason that may account for CCL's lower overall cost is that its subcontractor, IBM, already has logistics

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2/ We will not disclose the specifics of our analysis because of the proprietary nature of CCL's price proposal.

3/ Logistics support under this RFP are certain government furnished services, such as commissary and banking facilities, and schools for contractor employees and their dependents.

support for personnel located in Germany while DCC had to account for some cost for logistics support for its maintenance personnel to be located in Germany.

Accordingly, DCC's protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel