



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified Computer Consultants

File: B-229765.2

Date: August 1, 1988

DIGEST

Where contracting agency issues amendments in response to recommendation contained in a previous decision by the General Accounting Office (GAO), and the amendments have the effect of unreasonably excluding the protester from the competition, GAO finds the firm entitled to proposal preparation costs and the costs of filing and pursuing its protests, including reasonable attorneys' fees, as no other corrective action is appropriate.

DECISION

Diversified Computer Consultants (DCC) protests the terms of amendment Nos. 0004 and 0005 to request for proposals (RFP) No. DAJA37-87-R-0649, issued by the Army Contracting Center, Europe for maintenance of government-owned computer equipment at a location in West Germany. The amendments were issued by the Army in response to the recommendation contained in our decision, Diversified Computer Consultants, B-229765, Feb. 19, 1988, 88-1 CPD ¶ 171, sustaining DCC's protest against the previous award of a fixed-priced contract under the RFP to Planned Systems Europa, Inc. (PSE). DCC generally alleges that the Army, in issuing the amendments, deviated from the recommendation of our previous decision and has, in effect, excluded the firm from competition.

We sustain the protest.

By way of background, the RFP, issued on August 17, 1987, provided that the government would award a contract, on an all-or-none basis, to the responsible offeror whose offer conforming to the solicitation was the most advantageous to the government, cost or price and other factors considered.

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While the RFP stated that the government reserved the right to consider acceptable only those proposals submitted in accordance with all technical requirements, the RFP did not request the submission of technical proposals and did not contain technical criteria for comparative evaluation of the merits of proposals. Thus, the RFP contemplated that the competition would essentially be based on price alone. In this regard, the RFP contained 234 line items for which offerors were required to submit prices.

Initial proposals were received on September 24. DCC offered the following terms and prices for the contract line items (CLINs) put at issue by the firm in its initial protest:

<u>CLIN</u>	<u>DESCRIPTION</u>	<u>PRICE</u>
"0231	Maintenance Outside Vendor's normal working hours** . . . (There are approximately 30 calls per year)	Hourly Rate Charge: <u>\$190.00/Hour</u>
"0231A	** Diversified Computer Consultants will provide Two (2), Four (4) hour OPPM maintenance calls [outside principal period of maintenance, i.e., outside normal working hours], per month at no charge, for every remedial maintenance call placed prior to end of PPM. [Principal period of maintenance, i.e., 6 p. m.]	Hourly Rate Charge: <u>No Charge</u>
"0232	Travel Time (Travel time is vendor's hourly wage outside the principal period of maintenance, CLIN 0219, from the customer engineer's residence to the government's installation. Travel rate must also be listed under CLIN 0232.) [For evaluation purposes, amendment 2 estimated approximately 30 calls per year for CLINS 0232, 0233, and 0234.]	Rate Per Mile/KL: 25 cents <u>Per Mile</u>
"0233	2d LEVEL TECHNICAL SUPPORT SPECIALIST	Hourly Rate Charge: <u>\$190.00/Hr.</u>
"0234	3d LEVEL TECHNICAL SUPPORT SPECIALIST	Hourly Rate Charge: <u>\$190.00/Hr.</u>

CLIN 0231A did not exist in the solicitation's schedule; rather, DCC inserted that line item to express its discount for maintenance outside normal working hours.

The Army conducted discussions with the offerors, including DCC. At no time during these discussions did the Army express any dissatisfaction with or point out as a deficiency the pricing methodology employed by DCC for these CLINs, including CLIN 0231A. Best and final offers (BAFOs) were received on October 22. Evaluation of BAFOs revealed that while the prices submitted were generally in the range of \$20,000 per month, the difference between PSE's price and DCC's price was only \$86 per month. (DCC's and PSE's prices were exposed after award.) However, the Army admitted that these evaluation results were flawed because it mistakenly failed to evaluate CLINs 0231, 0232, 0233 and 0234. Thus, the evaluated prices reflected only CLINs 1-230. Award to PSE was based on this flawed evaluation.

Further, during this flawed evaluation prior to award, the Army disqualified DCC's offer from the competition, rejecting it as unacceptable. Specifically, the Army determined that DCC's discount (CLIN 0231A) was based on a "condition subsequent," requiring the government to place maintenance calls prior to the end of normal working hours to be eligible for free calls after working hours. Since the Army did not know how many such calls could be placed prior to the end of working hours or how many such free maintenance calls it would earn, the Army determined that DCC's offer was a "qualified offer," and rejected the proposal in its entirety. The Army had preliminarily determined that DCC would have been the low offeror if its "free service calls" had been considered.

In response to complaints from offerors, the Army then reevaluated proposals after award to include the omitted line items (DCC's rejected proposal was not reevaluated). The Army stated that, excluding DCC, the same results were obtained after reevaluation so that offerors were not prejudiced by the prior faulty evaluation. However, the record showed that despite the purported reevaluation of all line items, the Army again failed to evaluate CLIN 0232 (rate per mile for travel for maintenance outside normal working hours), apparently because the Army had previously failed to require each offeror to submit information regarding the distance of its engineer's residence to the government installation. Thus, the Army did not have sufficient information to evaluate that line item.

In its initial protest, the protester objected to numerous aspects of the evaluation and the belated rejection of its proposal after BAFOs and without discussion concerning the alleged defect in its proposal.

In our prior decision, we found that the procurement was seriously flawed. While we agreed with the agency that DCC's discount was speculative and could not be evaluated, we stated that DCC nevertheless had submitted a technically acceptable proposal which complied with all material terms of the solicitation; further, the speculative discount terms did not qualify the essential terms of its offer. Therefore, we stated that, at most, the agency could have reasonably disregarded the questioned discount in its evaluation, even if discussions had failed to clarify this issue. However, we concluded that the agency could not properly reject the entire proposal because of a flaw in the discount terms and thereupon fail to evaluate the proposal to see whether it was low even without the discount. Moreover, we also stated that to the extent that the Army had questions concerning the terms of the discount contained in DCC's initial and revised proposals, the Army should have discussed the matter with DCC during negotiations.

Finally, since the record showed that the Army failed to evaluate CLIN 0232, travel costs, either during the initial evaluation or upon reevaluation (DCC offered a rate of \$.25 per mile while PSE offered \$1.40 per mile), and in view of the closeness of the prices received, we noted that evaluation of this line item alone could determine the outcome of the procurement, and that the Army should therefore obtain the necessary information and evaluate this line item properly. Accordingly, we sustained the protest and recommended "that the agency evaluate all line items, and specifically reevaluate offers with regard to the travel costs and line items previously omitted from the initial evaluation." If PSE was not the low offeror after evaluation, we further recommended that its contract should be terminated for the convenience of the government.

After receiving our decision, the Army states that the contracting officer began to evaluate CLINS 0231-0234 of DCC's proposal which previously had not been evaluated. The Army states that the contracting officer "discovered that the information it had provided [offerors] in the solicitation for the evaluation of CLINs 0231, 0233, and 0234 was not sufficient to permit an accurate evaluation of those CLINs," and that the Army's previous evaluation of these three line items therefore had been flawed for all offerors. For example, regarding CLIN 0231, the Army states that "calls" for maintenance outside the normal working hours were not defined by the solicitation and that no average time per call was stated to evaluate the requested hourly rate. For CLINs 0233 and 0234, the agency states that the solicitation failed to include any workload estimates. Accordingly, amendment Nos. 0004 and 0005 were issued which, among other things, defined each call as of 5 hours duration, specified a newly

revised number of calls for 3 line items, and also included workload estimates for CLINs 0233 and 0234 (duration and number of calls for 2nd and 3rd level technical support specialists).

However, by these amendments, the Army also requested new prices for these 4 line items only, i.e. CLINs 0231-0234. Thus, the Army reopened the competition to this limited extent and thereby "froze" the previous prices for CLINs 1-230. DCC declined to compete under these terms and instead protested the agency's implementation of our recommendation. The Army concedes that the contracting officer "may have exceeded the strictest interpretation of the recommendation . . . that all CLINs simply be evaluated on the basis of existing information and additional information obtained only for CLIN 0232 [travel costs]." Nevertheless, the Army believes that the contracting officer properly reopened the competition to obtain a proper and meaningful evaluation of all offers. To the extent necessary, the Army requests our Office to modify our previous recommendation to allow evaluation in accordance with amendment Nos. 0004 and 0005 as issued.

DCC argues that the Army should have simply reevaluated the proposals after obtaining the necessary missing information concerning travel costs, rather than seeking new offers on the 4 line items in question since the government has sufficient information to evaluate those line items and has done so in the past. DCC also complains that "PSE presumably is intelligent enough to realize that if DCC offered free service calls before, it will do so again [and that] all PSE has to do [to win the competition] is change its price to 'zero' [on these 4 line items] and it will remain \$86 lower overall." In a subsequent submission, DCC also argues that its flawed discount terms should have been the subject of discussions by the Army during the reevaluation.

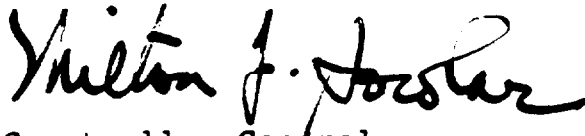
On the basis of existing prices prior to the Army's amendments, DCC potentially was in line for award as the possible low offeror, depending on the results of the reevaluation. While the Army here may arguably have had sufficient reason to further amend the solicitation and clarify the requirements for the 4 line items, the fact remains that the Army, in response to our recommendation, so structured the amendments that DCC, at the whim of PSE, had no chance to win the competition. Specifically, PSE and the Army previously knew that PSE's price for CLINs 1-230 was \$86 lower than the price of DCC. By freezing the prices for CLINs 1-230 and requesting prices only for CLINs 0231-0234, the Army, with these amendments, guaranteed PSE the contract if the firm bid "zero" for these items. While previously under the existing prices DCC was potentially in line for award regardless of

the actions taken by PSE, DCC, after the amendments, was left at the mercy of its competitor which was aware of the previous price standing of offerors.

We do not think that this arrangement is a reasonable implementation of our recommendation; neither does it promote full and open competition since it again has the effect of excluding DCC from the competition. It would have been more appropriate for the Army to have requested a new round of BAFOs for all line items following the allegedly significant changes that were effected by the amendments.

Nevertheless, we will not recommend an alternative remedy. PSE's contract expires in September 1988 (there are no options). Further, DCC's protest was filed with our Office more than 10 days after contract award, contract performance therefore was not suspended, see 4 C.F.R. § 21.6(b) (1988), and PSE has been performing since January 1988. With only a few months remaining in contract performance, we do not think that reopening the competition or disturbing the award is feasible here.^{1/} Rather, because we find that the Army did not properly implement our recommendation and has thereby denied DCC the opportunity for full and open competition, and because no other corrective action is appropriate, we find that the protester is entitled to recover its proposal preparation costs. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. We also find DCC entitled to recover the costs of filing and pursuing its two protests, including reasonable attorneys' fees. DCC should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.



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^{1/} For this same reason, we will not consider additional bases for protest by DCC such as PSE's alleged failure to meet security and facility clearance requirements of the RFP. The Army considers this basis for protest as merely a challenge to an affirmative determination of PSE's responsibility. DCC argues that definitive responsibility criteria were misapplied by the Army. In view of the advanced stage of the procurement and our determination to award costs, we do not see any useful purpose to be served by our consideration of this matter.