Glass

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified Computer Consultants--Reconsideration

File: B-241764.2

Date: October 3, 1991

Paul G. Dembling, Esq., and Dennis A. Adelson, Esq., Schnader, Harrison, Segal & Lewis, for the protester.
Marcel N. Unger, Esq., for International Business Machines Corporation, an interested party.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Decision denying protest on ground that award of a contract for maintenance of automatic data processing equipment under a nonmandatory, General Services Administration schedule was proper where the agency had determined that the scheduled items provided the lowest overall cost alternative is reversed where information, not previously considered, demonstrates that the agency, in violation of the Federal Information Resources Management Regulation (FIRMR), compared the protester's quote to a nonexistent schedule price instead of issuing a solicitation under full and open competition.

2. Sole-source award based on determination that only the original equipment manufacturer (OEM) could perform repair and maintenance of its automatic data processing equipment because of OEM's statement to the Army that only the OEM could furnish replacement parts, is not justified where the OEM reports that its statement was misunderstood and that parts are available to third party vendors.

DECISION

Diversified Computer Consultants (DCC) requests reconsideration of our decision, Diversified Computer Consultants, B-241764, Feb. 27, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 224. In that decision, we denied DCC's protest against the award of a contract to International Business Machines Corporation (IBM) under delivery order No. DAHC35-91-F-0095, issued by the

Department of the Army for maintenance and repair of automatic data processing (ADP) equipment under IBM's nonmandatory ADP schedule contract with the General Services Administration (GSA).

We reverse our prior decision and sustain the protest.

On September 12, 1990, the agency published a notice in the Commerce Business Daily (CBD) of its intent to issue a delivery order against the IBM GSA schedule contract for maintenance of certain IBM processors and peripheral equipment. The equipment was to be maintained for 1 year, from October 1, 1990 through September 30, 1991, and maintenance and repair coverage was for 7 days a week, 24 hours a day. The notice listed the equipment to be maintained in order to allow other firms that might be interested in supplying the required items to identify themselves and submit supporting technical pricing information.

On September 18, four offerors, including IBM and DCC, submitted timely responses to the CBD notice. The Army evaluated the responses and although all firms responding initially were found not to meet agency needs, the Army also determined that DCC's overall price was not lower than IBM's quote. The Army reported that they evaluated the prices provided by DCC and IBM for 150 required line items. After evaluation, the total price for DCC was $230,382.95, while the total for IBM was $228,396.17. Since IBM's quote met the agency's needs at the lowest cost, a delivery order was issued to IBM on October 17. The Army also found that all offerors other than IBM could not meet the agency's needs for maintenance and repair of all the equipment, and executed a justification for a sole-source award to IBM.

As is relevant here, in its protest, DCC argued that its offered prices were lower than IBM's schedule prices and that the Army improperly allowed IBM to offer a discount from its schedule contract prices. DCC maintained that it offered the low price.

In our previous decision, we stated that we had no basis to conclude that the acceptance of the quote offered by IBM on September 18, was improper. At that time, based on the record before us, we believed that IBM, in its September 18 quote, had offered a reduction to its 1990 schedule prices.1/

1/ Contrary to our understanding, and explained by IBM for the first time in its reconsideration comments, the discount was not a general price reduction, but a percentage adjustment in maintenance pricing under the terms of the 1990 schedule

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Our decision stated that a contractor may institute a general price reduction in its schedule contract at any time during the contract period, provided an equivalent reduction is applied to sales to all federal agencies for the duration of the contract. See Amperif Corp., B-240884, Dec. 21, 1990, 90-2 CPD ¶ 516; National Business Sys., Inc., B-224299, Dec. 17, 1986, 86-2 CPD ¶ 677.

Based on our review of the evaluation documents, we concluded that notwithstanding the difference between the CBD notice and the award document, DCC and IBM were evaluated on the same basis. The record also showed that whether the offers were evaluated using the equipment as listed in the CBD notice or as listed in the award document, DCC's total price was not lower than IBM's revised 1990 schedule prices by a narrow margin. The record showed that the price analysis was actually performed on the items listed in the award document and DCC and IBM were evaluated for the same work. Since we found that IBM was low, we did not review DCC's challenge to the sole-source justification.

DCC on reconsideration argues that under the Federal Information Management Regulation (FIRMR), if an analysis of the responses to the CBD synopsis shows that ordering from the GSA schedule "may not result in the lowest overall cost alternative," the agency should issue a competitive solicitation. 41 C.F.R. § 201-32.206(g)(2)(iii). DCC contends that the agency violated the FIRMR and improperly determined that IBM's schedule contract provided the lowest cost for the services by comparing DCC's quote not with the IBM schedule contract then in effect, but with the quote submitted by IBM in response to the same CBD synopsis, which purportedly raised IBM's 1990 schedule prices by 10 percent. DCC maintains the FIRMR requires an agency to test the market and compare current responses to an existing schedule contract.

We find that the fact underlying our prior decision--that IBM on September 18, submitted a quote that in effect reduced its fiscal year 1990 GSA schedule prices and that it was this price DCC's quote was compared to--was incorrect. The corrected record establishes that the quote IBM submitted was an estimate of prices expected to be awarded under IBM's 1991 contract and was derived by increasing its 1990 schedule contract prices by 10 percent. At the time of the quote, IBM's 1991 contract had not been negotiated. IBM explicitly qualified its quote by stating that the quote was subject to

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contract for agencies which qualify based on criteria in the schedule contract.

change depending on the final terms of the 1991 contract. IBM contemplated a future modification of the purchase order to reflect the 1991 schedule prices which it expected would not exceed the quoted price. The 1990 contract was extended by the government on a month-to-month basis under the 1990 contract terms and conditions in order to provide necessary contract coverage. IBM's 1991 schedule contract was not awarded until March 1991.

As stated in our previous decision, the use of GSA's nonmandatory schedule to acquire ADP resources is governed by the FIRMR, 41 C.F.R. § 201 et seq., and is consistent with the requirements of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301, et seq. Under CICA, 10 U.S.C. §§ 2304(a)(1)(A) and 41 U.S.C. § 403(7) (1988), "full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." CICA further defines the term "competitive procedures" to include the GSA multiple award schedule programs if participation has been open to all responsible sources, and orders and contracts under such procedures result in the lowest overall cost meeting government needs. 10 U.S.C. § 2302(2)(c). Thus, where the goods and services on the schedule have been subject to competitive procedures to ensure that any order placed under the schedule will result in the lowest overall cost to the government, CICA and the FIRMR permit agencies to purchase from the schedule.

FIRMR § 201-32.206(g)(2)(i) states that, before the agency can award an order under a synopsized schedule contract, the contracting officer shall "Document the procurement file with analysis that indicates . . . that the synopsized schedule item(s) provides the lowest overall cost alternative . . . ." The Army performed the required FIRMR analysis using an IBM estimate of its still to be negotiated 1991 schedule contract price. FIRMR requires a cost comparison to the current schedule contract. The Army's use of an IBM estimate for comparison purposes is not permitted by the FIRMR. Effectively, the comparison was made between two nonscheduled vendors. Under such circumstances, the agency should have issued a competitive solicitation, see FIRMR § 206(g)(2)(iii); Amray, Inc., 69 Comp. Gen. 456 (1990), 90-1 CPD ¶ 480, while meeting interim needs under the 1990 schedule extensions. The Army properly could not issue an order under the 1990 schedule for maintenance covering October 1, 1990 to September 30, 1991, because that was outside the scope of the IBM's 1990 schedule contract. Not only did the Army compare DCC's quote to IBM's estimate, it also obligated itself to pay whatever the 1991 schedule prices were finally negotiated with IBM.

Under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2302(2)(c); 2304(a)(1)(A) (1988), where the goods or services have been subject to competitive procedures to ensure that any order placed under the schedule will result in the lowest overall cost to the government, CICA, as implemented by the FIRMR, permits agencies to purchase from the schedule. Here, under the FIRMR, full and open competition was required since no schedule contract existed at the time of the cost comparison, and the Army did not have a firm negotiated price for the 1991 schedule. Moreover, the Army had no way of knowing if award based on IBM's 1991 estimated price would result in the lowest overall cost to the government since IBM's final 1991 prices could have been higher than IBM's estimated prices.

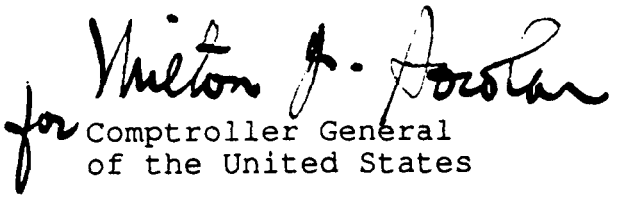
To the extent that there may have been a violation of the FIRMR, the Army and IBM maintain that there was no prejudice since DCC was not low whether its quote is compared to the 1990 schedule, the 1991 estimate or the final negotiated 1991 schedule. We do not agree. The difference between the DCC quote and the IBM 1991 estimate was approximately $2,000 or less than 1 percent. The actions taken by the Army deprived DCC of the opportunity to propose on the basis of a solicitation which stated the Army's complete requirements. DCC submitted an informational quote in response to a CBD announcement for a proposed schedule buy. A CBD announcement is not the equivalent of a formal solicitation and is only required to contain enough information to generate alternative proposals permitting the agency to determine whether buying off the schedule or preparing a solicitation will meet its needs at the lowest overall cost. Cf. Kardex Sys., Inc., B-225616, supra.

As we stated in the initial decision in this case, the differences between the CBD announcement and the contract actually awarded were so minor that we believed the agency had a reasonable basis for determining how best to meet its needs. That is not to say, however, that there was no reasonable possibility that DCC would have been successful had it submitted an offer on the agency's precise requirements. A difference of less than 1 percent may have little significance in comparing a schedule price with the price of an alternative source, since agencies may add costs, such as the projected expenses of conducting a competition, to the alternative price in determining the lowest overall cost. FIRMR § 201-39.201. On the other hand, a low, competitive offer that is less than 1 percent below the next lowest offer may not represent the most advantageous price to the government unless both offers were based on identical specifications.

Here, the Army's actual requirements included equipment models not listed in the CBD notice and maintenance for certain listed models for a shorter period of time. Since this was not a schedule buy, the issuance of a competitive solicitation containing a complete description of services was required, and DCC would have been given the opportunity to review and evaluate the Army's actual needs and might have submitted a lower offer. More significant, in view of the fact that IBM's quote was subject to change based on the results of future negotiations, we think the cost comparison between DCC's informational quote and IBM's conditional quote is not a basis to establish that, under a competitive procurement, the parties would have submitted the same prices. Consequently, DCC was prejudiced by the Army's violation of the FIRMR.

During our initial consideration, DCC also challenged the Army's determination that an award could be justified as a sole-source to IBM because all offerors other than IBM could not meet the agency's needs and that therefore the requirement was available from only one responsible source. 10 U.S.C. § 2304(c)(1) (1988). The sole-source justification was based on the Army's understanding that IBM does not provide to third party vendors parts for the newer equipment models to be maintained. We did not address this issue because at the time we believed that an award to IBM was justified by the agency's price comparison. IBM reports that the Army's determination was based on a misinterpretation of a statement made to the Army by an IBM official. IBM states that third party vendors can obtain replacement parts for new models of IBM equipment, although it may be more difficult for third party vendors. Since DCC took no exception in its quotes to any of the Army's maintenance and repair requirements, including furnishing of replacement parts, and also states that it has furnished such replacement parts previously without difficulty, we find that the Army's sole-source determination was not justified.

The prior decision is reversed and the protest is sustained. Since performance of this contract is complete, resolicitation is not possible. Accordingly, we find that DCC is entitled to recover its costs of filing and pursuing the protest and request for reconsideration. 4 C.F.R. § 21.6(d)(1). By letter of today, we are advising the Secretary of the Army of our decision.



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