



Comptroller General  
of the United States

Washington, D.C. 20548

22035

## Decision

**Matter of:** Control Corporation; Control Data Systems, Inc.--Protest and Entitlement to Costs

**File:** B-251224.2; B-251224.3; B-251224.4

**Date:** May 3, 1993

Charles D. Ablard, Esq., G. Daniel Miller, Esq., and Jeff H. Eckland, Esq., Faegre & Benson, for Control Corporation; and Joseph J. Petrillo, Esq., Laurel A. Heneghan, Esq., and Jessica C. Abrahams, Esq., Petrillo & Hordell, for Control Data Systems, Inc., the protesters.  
Capt. Gerald P. Kohns, Esq., and Richard Hoffman, Esq. Department of the Army, for the agency.  
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency had compelling reason to cancel a procurement for computer equipment maintenance services after bid opening where the solicitation overstated the agency's needs with respect to service call response time.

2. Protester is entitled to the award of its costs of filing and pursuing its earlier protest where the agency unduly delayed cancelling the solicitation because it overstated the government's minimum needs. Cancellation came only after first awarding to the second low bidder; terminating that award after a protest to the General Services Administration Board of Contract Appeals and awarding to the low bidder; defending a protest filed by the terminated awardee with GAO; and permitting the protester to file its comments on the agency report. Each of the agency reviews--both in the earlier protest by the low bidder and in the protest to our Office by the second low bidder--involved the same requirement now found overly restrictive.

### DECISION

Control Corporation and Control Data Systems, Inc. (CDS) protest the actions of the Department of the Army in regard to invitation for bids (IFB) No. DABT63-92-B-0016, issued for regular and as-needed maintenance for certain computer

equipment installed at Fort Huachuca, Arizona. Both protesters contest the cancellation of the procurement and both contend they should be awarded the contract. In addition, CDS argues it should be reimbursed for the costs it incurred in connection with a previous protest of award to Control, which ultimately was rendered academic by the agency's decision to cancel the underlying procurement.

We deny the protests, but find that CDS is entitled to the costs of filing and pursuing its earlier protest against award to Control.

#### BACKGROUND

The Army's decision to cancel this IFB was the final act in a much-contested and troubled procurement. After facing earlier protests by both parties--brought in our forum and at the General Services Administration Board of Contract Appeals (GSBCA)--and after making award to first one and then the other of these parties, the Army concluded that the IFB was significantly flawed and should be canceled. The events set forth below led to that decision.

On August 25, 1992, the Army issued the IFB seeking repair and maintenance services for computer equipment originally purchased from CDS. Paragraph B.3 of the IFB required bidders to submit a certification attesting to prior experience performing such maintenance and a list of government or commercial organizations for whom the bidder performed the services. Paragraph M.4 of the IFB advised that "[a]ward will be made to the lowest responsive, responsible bidder, price, verifiable experience as requested in [s]ection B and other factors considered."

In addition, the IFB contained a brief statement of work (SOW), totaling six pages. Among other things, the SOW prescribed a Principal Period of Maintenance--from 7 a.m. to 6 p.m. each weekday--during which the contractor would be required to keep maintenance engineers on, or near, the site. In addition, the SOW required the contractor's personnel to arrive in response to a maintenance call within 2 hours of the time the call was made, or the time the government attempted to reach the contractor. Finally, bidders were advised that if maintenance personnel failed to arrive within the 2-hour response time, the government reserved the right to contact the original manufacturer of the equipment, CDS, for the maintenance.

On September 12, the Army amended the IFB, including the SOW. The Army explains that the purpose of the amendment was to delete the 2-hour response time and replace it with a 4-hour response time; however, despite the Army's stated intent, the amendment did not relax the IFB's response time.

Instead, the amendment added a new 4-hour response time for what the amendment describes as "per-call maintenance."

Specifically, amendment No. 0001 deleted pages 1, 2 and 4 of the 6-page SOW, provided replacements for those pages, and left pages 3, 5 and 6 intact. The new pages 1 and 2 added a new response category for "per call maintenance," defined as unscheduled maintenance outside the Principal Period of Maintenance, and established a 4-hour response time for such maintenance. Since the amendment left page 3 intact, no change was made to the 2-hour response time required for maintenance within the Principal Period of Maintenance.

When bids were opened on September 29, Control and CDS were the only bidders, and the prices were as follows:

Control	\$ 273,168.40
CDS	310,600.00

The responsiveness of the Control bid was immediately in question, however, since Control submitted a technical proposal along with its bid, and placed a marking on every page of the proposal advising that it contained privileged and confidential information not to be disclosed outside the government. In addition, although the cover letter appended to Control's technical proposal stated that Control "concur[red] with all terms and conditions listed in the solicitation," the technical proposal itself stated that Control's maintenance engineers would respond to requests for maintenance within 4 hours of receiving a request. The technical proposal makes no mention of the requirement to respond during the Principal Period of Maintenance within 2 hours. Also included within Control's technical proposal was the experience information required by paragraph B.

On September 30, the Army awarded the contract to CDS, and by letter dated October 6, notified Control that its bid had been rejected because the restrictive legend on the technical proposal submitted with the bid prevented its public disclosure. According to Control, it was also advised that its bid was rejected because it changed the response time from 2 hours to 4 hours.

On October 13, Control filed a protest with the GSBGA alleging that the Army acted improperly in rejecting its bid and awarding to CDS. One week later, the Army field attorney advised the contracting officer to terminate CDS' contract and award to Control based on a conclusion that Control's bid was responsive, and its rejection was improper. The Army took corrective action in response to the protest before the GSBGA and terminated CDS' award on October 23. On October 28, the Army awarded to Control, and on November 4, CDS filed a protest with our Office.

Our Office granted an express option in the CDS protest pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.8 (1993), in response to requests from both CDS and Control. But after submitting an agency report on November 24 and receiving comments from the protester and the interested party, the Army advised our Office that it was canceling the procurement. According to a memorandum from the contracting officer attached to the Army's December 11 letter:

"[T]he current controversy stems from the fact that in this solicitation the [g]overnment overstated its needs for the response time and created a significant ambiguity in its solicitation.

"The [g]overnment also failed to distinguish, in the solicitation, those items that were questions of responsibility and those bid items that had to be open and available at the public bid opening."

Because the agency canceled the underlying procurement, our Office dismissed CDS' protest on December 14. In response, both CDS and Control filed protests asserting that the Army's decision to cancel the procurement after bid opening was improper. In addition, CDS filed a request for a declaration of entitlement to costs related to its protest against award to Control at the time of the Army's decision to cancel the procurement.

#### DISCUSSION

Both Control and CDS argue that the Army lacks a compelling reason to cancel this procurement after bid opening, as required by the Federal Acquisition Regulation (FAR). Control argues that the bid it submitted meets the agency's actual needs; CDS argues that Control's bid was nonresponsive, and that CDS' bid meets the agency's needs and should be accepted.

In response, the Army argues that the IFB here is so severely flawed that it should be canceled. According to the Army, its failed attempt to amend the IFB and relax the 2-hour response time for maintenance calls has resulted in a two-tiered requirement that is both ambiguous and overstates the agency's needs. In addition, the Army claims that the evaluation provisions in section M of the IFB were confusing to bidders. The Army states that by canceling and reissuing the IFB, it will clarify the performance requirements, remove the aspects of the IFB more appropriately included in a request for proposals, and amend performance requirements thought impossible to enforce.

Because of the potential adverse impact on the competitive bidding system of canceling an IFB after prices have been exposed, any cancellation after bid opening must be based on a compelling reason. FAR § 14.404-1(a)(1);<sup>1</sup> Pavel Enters., Inc., B-249332, Nov. 9, 1992, 92-2 CPD ¶ 330. A compelling reason for cancellation exists when it is determined that an IFB overstates the agency's minimum needs or fails to express them properly. Deere & Co., B-241413, 2. Mar. 1, 1991, 91-1 CPD ¶ 231. Here, we conclude that the agency had a compelling reason to cancel the solicitation because the specifications on response time overstated the government's minimum needs.

The Army states that it issued amendment No. 0001 to the IFB intending to double the allowable response time for maintenance calls from 2 hours to 4 hours. While CDS presents evidence that the Army needs a 2-hour response time--specifically, the opinion of two of the Army's technical personnel, and CDS' prior contract including a 2-hour response time--we generally consider agencies to be the best judges of their own minimum needs, especially when an agency concludes that its needs may be relaxed. See Sea Containers Am., Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45. In addition, while CDS once performed this work with a 2-hour response time, both the Army and Control have informed our Office that the agency is using a 4-hour response time in the interim contract in place to provide these services. As a result, regardless of the views of the technical personnel contacted by CDS, the contract in place affirms the Army's claims to our Office that the agency's minimum needs are met with a 4-hour response time.<sup>2</sup>

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<sup>1</sup>Relying on the reference in FAR § 14.404-1(a)(1) to cancellation "before award," Control argues that the cancellation of an IFB after award has been made is not authorized. We see no basis to interpret the cited FAR provision as barring termination of a contract and cancellation of the underlying IFB based on a defect in the award process. See Digitize, Inc., B-235206.3, Oct. 5, 1989, 90-1 CPD ¶ 403.

<sup>2</sup>For the record, we note that CDS also complains that the Army is meeting its needs for these services with an interim time and materials contract between it and Control that was awarded without competition. This issue is untimely since it is first raised in CDS' comments on the agency report on the protest, even though Control has been performing the services at issue since November of 1992, and we have no reason to believe CDS was unaware of the arrangement. See Trilicon, Inc., 71 Comp. Gen. 41 (1991), 91-2 CPD ¶ 375.

We find unpersuasive CDS' contention that relaxing the required response time from 2 to 4 hours does not constitute a material change to the IFB which justifies canceling the procurement. On its face, doubling the amount of time the contractor has to respond to a service call suggests that bidders may be able to reduce their price to the government as a result of the change in the government's requirements. See Aero-Executive Helicopters, B-227133, Aug. 17, 1987, 87-2 CPD ¶ 167 (relaxing start-up time for performance from 10 to 20 days was a compelling reason to cancel an IFB after bid opening).

Control argues that cancellation of the IFB is improper since award to it would meet the actual needs of the agency. Even if we assume that Control's bid was otherwise responsive--a matter we need not resolve here--awarding to Control would permit the agency to solicit its needs under one set of specifications--i.e., 2-hour and 4-hour response times depending on when the maintenance call occurs--with the intention of significantly modifying the terms of the contract after award. Specifically, after award Control would be allowed to respond to all maintenance calls within 4 hours. Such a procedure is improper since it would be prejudicial to other bidders under the invitation and would have the effect of circumventing the competitive procurement statutes. A & S Mfg. Co., 53 Comp. Gen. 838 (1974), 74-1 CPD ¶ 240; Adrian Supply Co., B-246207.2; B-246207.3, Mar. 13, 1992, 92-1 CPD ¶ 282.

#### REQUEST FOR ENTITLEMENT TO COSTS

With respect to CDS' request for a declaration of entitlement to costs, section 21.6(e) of our Regulations provides that if the contracting agency takes corrective action in response to a protest, we may declare the protester to be entitled to recover the reasonable costs of filing and pursuing the protest. This provision was intended to allow the award of costs where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

In our view, the Army's corrective action was at least in part in response to CDS' protest to this Office. CDS argued in its protest that the Control bid was nonresponsive--and hence could not be accepted for award--because, among other things, the technical proposal submitted with the bid included a 4-hour response time, as opposed to the two-tiered response time set forth in the amended IFB. In responding to whether the Control bid could properly be considered for award, the Army had to consider the threshold issue of whether Control had taken exception to the solicitation's response time in the

technical proposal submitted with the bid. Making that determination required reviewing the SOW and ascertaining the response time requirements in the SOW after the issuance of amendment No. 0001. Thus, the issue raised by CDS required reviewing the response time requirements, and should have led to the realization that those requirements were overstated.<sup>3</sup> See David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91.

With regard to the timing of the agency's corrective action, as noted above, the decision to cancel was not made until after the protester had filed its comments on the agency report on the protest. The effect of the delay in the agency's decision to cancel the solicitation was to require the protester to expend unnecessarily the costs involved in responding to the agency report. In light of our conclusion that the agency should have been alerted to the problem with the response time provisions from the time the protest was filed here, we think that not canceling the solicitation until after the record was complete constituted undue delay in taking corrective action.

The Army's decision to cancel this procurement came after protests to two forums challenging the same requirement now found overstated and after the Army took corrective action in response to the protest before GSBGA. The delay in reaching this decision had the obvious effect of circumventing the goal of economic and expeditious resolution of bid protests established by 31 U.S.C. §§ 3551 et seq. (1988). Consequently, we find that CDS is entitled to reimbursement of the costs of filing and pursuing its earlier protest of award to Control. See 31 U.S.C. § 3554; Commercial Energies, Inc.--Recon. and Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499.

#### CONCLUSION

For the reasons stated above, we find that the Army's decision to cancel the underlying procurement was proper, but that CDS is entitled to the costs of filing and pursuing its earlier protest, including reasonable attorneys' fees.<sup>4</sup>

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<sup>3</sup>In addition, resolving the issue of the required response time in the solicitation should have been a crucial aspect of the Army's decision to take corrective action in response to Control's protest to GSBGA.

<sup>4</sup>The award of protest costs to CDS does not include the costs of filing and pursuing this challenge to the cancellation of the solicitation, since that protest was denied. See Commercial Energies, Inc.--Recon. and Entitlement to Costs, supra.

CDS should submit its certified claim for its costs directly to the agency within 60 working days of receipt of this decision.

A handwritten signature in cursive script, reading "Milton J. Forster".

**Acting** Comptroller General  
of the United States