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DECISION

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

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FILE: B-185592 DATE: August 5, 1976

MATTER OF: C3, Inc., and Department of the Army
Requests for Reconsideration

DIGEST:

1. On reconsideration, decision is affirmed that successful offeror's proposed lease plan in procurement of automatic data processing equipment should have been rejected, because it failed to meet requirement for fixed or determinable prices established in request for proposals.

2. While acceptability of other offerors' lease plans was not raised as issue in protest, GAO view is that to be acceptable under RFP any plan had to offer fixed or determinable prices for systems life of estimated quantity of systems expected to be ordered. If agency in reevaluating proposals is unable to satisfy itself that such plans have been offered, GAO believes it would then have to consider letting present contracts expire and conducting resolicitation.

3. In response to agency's request for clarification, prior decision's termination for convenience recommendation was intended to apply to both continental United States and overseas contracts--though protest was filed only against continental U.S. contract--because same issue was involved and Government lacked reasonable assurance of lowest overall cost in making both awards.

4. Where contracting agency's estimate of termination for convenience costs--furnished in connection with request for reconsideration of earlier decision sustaining protest--is lower than GAO estimate which was developed prior to issuance of decision, no basis is seen to change corrective action recommendation.

5. GAO views contracting agency's request that computer systems already installed be exempted from effect of recommended termination for convenience as reasonable, since exemption would serve best interests of Government without depriving prospective awardee of meaningful protest remedy.

6. Where certain information submitted in requests for reconsideration by contractor and contracting agency is claimed to be proprietary or procurement sensitive, GAO has proceeded with decision notwithstanding pending disclosure request by protester, because circumstances of case call for prompt resolution of issues.

C3, Inc., and the Department of the Army have requested reconsideration of our decision which sustained a protest by Computer Machinery Corporation (CMC).

The decision (Computer Machinery Corporation, B-185592, June 3, 1976, 55 Comp. Gen. ____, 76-1 CPD 358) held that a portion of C3's proposal submitted in connection with an automatic data processing procurement should have been rejected by the Army. We recommended reevaluation of the proposals and "[a]ppropriate termination for convenience and reaward action, if necessary * * *."

The details of the procurement, which are rather involved, are set forth in our earlier decision and will not be repeated here. The unacceptable portion of C3's proposal was a "96 month lease plan." We found that acceptance and consideration of this plan in the evaluation of proposals was contrary to certain terms of the request for proposals (RFP) and that as a result two contracts were awarded to C3 without reasonable assurance of lowest overall costs to the Government.

The Army and C3 essentially allege errors of law in the decision. One of their major points is that C3's 96-month lease plan obviously provided fixed or determinable prices for 96 months--i.e., for both the initial contract period as well as all other periods of the entire systems life. Also, both the Army and C3 apparently read our decision as holding that lease plans had to be structured in such a way as to allow orders for systems to be placed under them over the entire 96 months' systems life. Both requesters point out that the RFP did not require this. The gist of the Army's and C3's position is that orders could be placed under the 96-month lease plan; that the prices for those systems ordered were fixed or determinable for the systems life; and, therefore, that the plan was acceptable under the terms of the RFP.

Our decision did not hold that acceptable lease plans had to be "open" for ordering systems over the systems life. It held that the

terms of the RFP required that plans eligible for evaluation had to offer fixed or determinable prices for the systems life. C3's 96-month lease plan offered fixed or determinable prices, but only for whatever systems were ordered and installed by March 31, 1976--about 4 months after the awards of the contracts.

Thus, as our earlier decision pointed out, the Army could take advantage of the prices in the 96-month lease plan by placing orders under it, but only for a very short period of time after the award of the contracts. We found nothing in the RFP to even suggest, much less demonstrate, that during this brief period of time all or substantially all of the total estimated quantity of systems (64) would or could be ordered and installed. Moreover, several RFP provisions contradict any such assumption. RFP section D.7 pointed out that the known requirements exceeded the basic contract period to be awarded; section J.22(b)(ii), discussed infra, indicated that orders for systems might be placed as late as September 1978. We note that in its report on the protest, the Army speculated that orders for possibly 18 systems could have effectively been placed under the 96-month lease plan.

In addition, RFP section E.3 provided that the evaluation of proposals was to be "based and performed" on 64 systems. Other pertinent RFP sections, discussed and analyzed in our earlier decision, required fixed or determinable prices and pointed out how offerors' proposed plans would be taken into consideration in the overall evalution process.

Considering all of these facts, the clear result is that C3's 96-month lease plan did not effectively offer fixed or determinable prices for the systems life of anything approaching the estimated quantity of systems which the Army anticipated ordering. As such, the plan was unacceptable and should not have been considered in the Army's evaluation.

C3 has contended that its proposal did not impose the March 31, 1976, limitation on its 96-month lease plan. Rather, C3 asserts, the limitation was imposed by sections J.3 and D.30 of the RFP. Section J.3 states:

"Option to Extend the Term of the Contract

"This contract is renewable, at the option of the Government, by the Contracting Officer giving written notice of renewal to the contractor by June 30 of each year or within

30 days after funds for that fiscal year become available, whichever date may be the later; provided that the Contracting Officer shall have given preliminary notice of the Government's intention to renew at least 60 days before this contract is to expire. Such a preliminary notice shall not be deemed to commit the Government to renewals. If the Government exercises this option for renewal, the contract as renewed shall be deemed to include this option provision. However, the total duration of this contract, including the exercise of any options under this clause, shall not exceed 100 months from the date of award."

Section D.30 states that the anticipated system life from date of installation for the equipment and services required is 96 months.

C3's argument is that these provisions necessarily limited the ordering availability for all long-term lease plans. Thus, an 8-year lease (96 months) would be available for ordering only for 4 months (100 months minus 96 months); presumably, a 7-year lease (84 months) would be available for ordering only for 16 months (100 months minus 84 months); a 6-year lease plan would be available for ordering for 28 months, and so on. Moreover, C3 points out that the RFP did not place any limitation on the number of years that could be proposed for a long-term lease. In this regard, RFP section D.20(b) defined "long term lease plan" as a form of leasing whereby the Government guarantees to lease equipment for longer than one fiscal year.

A related argument by C3 is that the RFP merely required long-term lease plans to be open for ordering "at some point" between the date of the award and the end of the ordering period as established in RFP section J.22. Section J.22 stated in pertinent part:

"DELIVERY ORDER LIMITATIONS (1965 Aug)

* * * * *

"(b) Maximum Order: The Government is not obligated to order and the contractor is not obligated to honor:

* * * * *

"(ii) Any order for a complete system issued after 30 September 1978 subject to the provisions of J.3, J.16, and J.21."

C3 points out that if the Army had intended that all long-term lease plans be available for ordering during the entire ordering period, it would have specifically so provided in section J.3 by stating that systems life would be a certain number of months from the end of the ordering period.

Reading all of the RFP terms together, as we believe they must be, it is not clear to us how the 96-month systems life was intended to limit the availability of ordering when considered in relation to the 100 months' maximum duration of the contract. RFP section J.22(b)(ii), supra, contemplates the possibility that orders might be placed as late as about the 34th month of the resulting contract (September 1978). Moreover, to use one of the examples cited in C3's analysis, supra, a 7-year lease plan would be available for ordering until the 16th month. But following C3's reasoning, a system ordered in the 16th month of the contract, and having a 96-month systems life, would exceed the maximum 100 months' duration of the contract.

We do not believe the terms of the RFP were intended to create this result. Systems life means a forecast or projection of the period of time running from the installation of the systems to the time when the need for such systems has terminated. See Federal Property Management Regulations § 101-32.402-11. Since the RFP contemplated that orders would be placed and systems installed at various points in time under the resulting contracts, perhaps for as long as 34 months, we think it follows that the "96 months" systems life referred to in the RFP is a maximum. The maximum duration of the contract was 100 months (section J.3); see, also, RFP section J.21d which provided that lease of equipment would not continue beyond the expiration of the contract.

Aside from systems life considerations, the fact that the RFP did not contain a provision expressly limiting the duration of long-term lease plans does not mean that a particular long-term lease plan of a given duration could not be rendered unacceptable in light of all of the pertinent terms of the RFP. With a maximum contract duration of 100 months, a 96-month lease plan would appear to be limited to equipment furnished not later than the fourth month of the contract. As already indicated, the ordering availability under such a plan would be restricted to the extent that the total estimated quantity of systems could not be ordered, and thus the plan would not offer fixed or

determinable prices for the systems life of the total estimated quantity of systems. The provisions of the RFP requiring fixed or determinable prices for the estimated quantity of systems would thereby have a limiting effect on lease plan duration, and an offer departing from the terms of the RFP in this respect would be unacceptable. In other words, we see no necessary conflict between the RFP's definition of long-term lease plans and the other terms of the RFP. Rather, we think that when all of the RFP provisions are considered together, the result is that C3's 96-month lease plan was unacceptable.

A related contention raised by C3 is that because the March 31, 1976, limitation was cited not in its proposal but in the contracts, and because the pertinent question is the acceptability of the proposal, it was improper for our Office to look to the contractual language in deciding the acceptability of the proposal.

We see no merit in this argument. If, as C3 contends, the terms of the RFP imposed the limitation, then the limitation was an implied condition of its proposal. If, on the other hand, the RFP did not create the limitation, then its presence in the C3 contracts would constitute a constructive amendment to the terms of the RFP without notice to other offerors, an apparent violation of ASPR § 3-805.4 (1975 ed.).

C3 has also raised a number of other allegations of error, premised on an intricate analysis of various sections of the RFP which the contractor contends were not properly considered or interpreted in our decision. We have reviewed these allegations and find nothing to demonstrate errors of fact or law in our prior decision.

In addition, C3 contends that our Office erred in substituting our judgment for the Army's, rather than reviewing the Army's determinations to decide if they were reasonable or not. In this regard, our decision stated that we believed our interpretation of the RFP to be the only consistent and reasonable one. A fortiori, we thereby found upon review that the Army's interpretation of the RFP and resulting determinations lacked a reasonable basis.

C3 has also raised a question as to the acceptability of offerors' long-term lease plans. C3 contends that all offerors apparently proposed a 3-year lease plan and questions whether the Army should have rejected these as well.

In this regard, the acceptability of other offerors' lease plans was not raised as an issue in the protest, and in any event it is not our function to independently evaluate proposals and render our own determinations as to their acceptability. However, some general comments may be in order. We believe that in judging the acceptability of any lease plan under the RFP, the contracting officer would have to satisfy himself that the plan offered fixed or determinable prices for the systems life of the estimated quantity of systems expected to be ordered. In other words, we believe the acceptability of any plan would depend upon whether (1) it was open or available for ordering for a sufficient period of time so that it could reasonably be anticipated that all of the estimated quantity of systems could conceivably be ordered under the plan, and (2) it offered fixed or determinable prices for the systems life of those systems.

C3's 96-month lease plan clearly did not meet these requirements. Whether other proposed lease plans are acceptable is a matter primarily for the sound judgment and discretion of the contracting agency. If, in conducting its reevaluation, the Army is unable to satisfy itself that such plans have been offered, we believe the contracting agency would then have to determine--taking into consideration its needs which remain to be fulfilled--whether it is necessary to allow C3's contracts to expire on September 30, 1976 (without exercising the Government's option to renew) and conduct a resolicitation.

The Army has also asked for clarification of our recommendation, based on the following facts. CMC was the only protester. Its protest was directed at the two award groups involved in the continental United States (CONUS) contract. CMC did not submit a proposal and did not protest against the separate contract covering the two overseas award groups. Two interested parties (Inforex, Inc., and Four-Phase Systems, Inc.) actively participated in the protest proceedings. Both had submitted proposals. Neither protested against the CONUS award or the overseas award. The Army asks whether our recommendation applies only to the CONUS contract or to both contracts.

The foregoing facts were a matter of record during the protest proceedings and were taken into consideration by our Office in reaching our prior decision. We believe the decision indicates that the recommendation is intended to apply to both contracts--since the discussion of the issues is with reference to the four award groups and the total estimated quantity of systems (64) for both contracts. We think this was and is appropriate, because the 96-month lease

plan issue applies in both contracts, as does the resulting lack of reasonable assurance of lowest overall cost to the Government in making the two awards.

In addition, the Army has asked that we explain the effect of our recommendation in the event the reevaluation of proposals reveals that some offeror other than C3, CMC, Inforex or Four-Phase is in line for an award. The Army notes that only the aforementioned offerors were actively involved in the protest.

We see no reason why the effect of our recommendation should not extend to such an offeror, provided that (1) it is willing to reactivate and renew the same best and final offer it submitted in response to the RFP; (2) the offer is acceptable, and (3) the offeror is responsible and otherwise qualified for award.

The Army has also furnished us with an estimated amount of discontinuance charges and termination for convenience costs which would result from carrying out our recommendation.

We have indicated that in deciding whether to recommend termination for convenience of an improperly awarded contract, it is pertinent to consider whether the costs would be so substantial that termination would not be in the Government's best interest. See, for example, Propper International, Inc., et al., B-185302, June 23, 1976, 55 Comp. Gen. ____, 76-1 CPD 400. Prior to issuing our earlier decision, our Office developed an estimate of costs which the Government might incur because of our corrective action recommendation. The estimate was based upon information in the record on the number of systems which had been ordered and information in the C3 contracts. We then compared our estimate with the total amounts of the contracts. We concluded that probable termination costs were not so substantial as to be detrimental to the best interests of the Government. The estimate now furnished by the Army is lower than our own, and, therefore, we cannot see that it affords any basis for a change in our recommendation.

The Army also requests that seven small systems and associated key-stations which have already been installed be exempted from any termination for convenience of C3's contracts. The agency points out that it would be disruptive and costly to remove and replace the installed systems.

We note that it is estimated that 49 small systems will be ordered under the CONUS contract. Thus, any offeror which is in

line for award of this award group after reevaluation would obtain a contract for an estimated 42 systems if the seven installed systems are exempted. Our earlier decision recommended "appropriate" termination for convenience and reaward action--recognizing that the precise actions to be taken call for the exercise of informed judgment and discretion by responsible agency officials. We believe that exempting the installed systems from a new award would take into account the best interests of the Government without depriving the affected offeror of a substantial and meaningful remedy. Accordingly, the Army's position appears reasonable and we have no objection to it.

Finlly, we note that some information submitted by C3 and the Army has not been disclosed to the other parties because of its claimed proprietary or procurement sensitive nature. Notwithstanding CMC's pending request for disclosure of this information, we have proceeded with this decision because we believe that the interests of all the parties and the current procurement situation call for a prompt resolution of the issues.

In view of the foregoing, we do not believe that C3 or the Army has demonstrated any errors of fact or law in our earlier decision, and that decision is accordingly affirmed.

Deputy Comptroller General
of the United States