DOCUMENT RESUME

02974 - [A2013078]

[Award of Contract for a Facilities Management Automated Document Filming, Storage, and Retrieval System]. B-188305. July 7, 1977. 19 pp. + 6 enclosures (6 pp.).

Decision re: PRC Information Sciences Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Rehab Computer, Inc.; Securities and Exchange Commission.
Authority: Freedom of Information Act (5 U.S.C. 552). Service Contract Act, 31 U.S.C. 200(a)(1). 51 Comp. Gen. 494. 53 Comp. Gen. 730. 55 Comp. Gen. 1362. 4 Comp. Gen. 1024. 29 Comp. Gen. 335. 31 Comp. Gen. 613. 15 Comp. Gen. 569. 39 Comp. Gen. 546. 43 Comp. Gen. 663. 49 Comp. Gen. 395. 51 Comp. Gen. 479. 50 Comp. Gen. 202. 51 Comp. Gen. 102. 56 Comp. Gen. 142. 49 Comp. Gen. 402. 55 Comp. Gen. 432. 55 Comp. Gen. 972.

The protester objected to the award of a contract under a request for technical and firm fixed-price proposals which gave technology 75% weight and price 25%. GAO considered the protest even though the matter was also before a court of competent jurisdiction. Since the award was based on improper postaward discussions, the contract should be terminated and the requirement resolicited even though an auction situation may be created. (Author/SC)

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Spangenberg P.L. #1

DECISION

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

FILE: B-188305 DATE: July 7, 1977

MATTER OF: PRC Information Sciences Company

DIGEST:

1. GAO will consider protest--even though also before court of competent jurisdiction--where court expressly requested decision in matter.

2. Informal oral advice given by GAO staff members to procuring agency representatives is not binding on GAO in event of bid protest.

3. Award under RFP incorporating by reference telephone conversations regarding proposed price--which had not been memorialized--does not violate 31 U.S.C. 200(a)(1). However, such incorporation is clearly inappropriate, since agreement reached in conversations should have been put in writing to avoid disputes.

4. Award should not be based on ambiguous price proposal through application of <u>contra proferentem</u> rule of contract construction that ambiguities be construed against their drafter; rather, discussions should be conducted to clarify price.

5. Where Government had been put on direct notice that offeror's intended pricing is different from Government's interpretation of clearly ambiguous proposal, Government cannot compel offeror to accept Government's interpretation in award. Consequently, award by Government varying terms of offer constitutes initiation of discussions, since offeror can either accept or reject proffered "award."

6. If post-selection discussions have been conducted with successful offeror regarding price, discussions should have been conducted with other offeror in competitive range, even where discussions did not directly

affect offeror's relative standing, because all offerors are entitled to equal treatment and opportunity to revise proposals. Debriefing does not constitute meaningful discussions, since protester was not afforded opportunity to revise proposal.

7. Award for micrographics services based on unit prices for 5 million, 6 million and 7 million images, respectively, is not "fixed" or "finitely determinable" for all periods of contract under "fixed prices" clause because if 18 million images are exceeded in three evaluated periods, there exists no applicable unit price. Also, protester's proposal did not propose "fixed" or "finitely determinable" prices for all periods because although fixed unit prices were proposed for initial contract period, subsequent options were based on same unit prices adjusted by Cost of Living Index for previous 12-month period. Clause contemplates "fixed" or "finitely determinable" prices as of time of award so proper price evaluation can be made.

8. Where award under RFP was based on improper post-award discussions, contract should be terminated and requirement resolicited, even where awardee's price was disclosed in debriefing to protester and auction situation may be created, because of primacy of statutory requirements for competition over regulatory prohibition of auction techniques. Furthermore, remedial action is in Government's best interests to protect confidence in integrity of competitive procurement system, notwithstanding adverse agency mission and cost impacts.

On March 16, 1977, PRC Information Sciences Company (PRC) protested the award by the Securities and Exchange Commission (SEC) of contract No. SE-77-D-0006, to Rehab Computer, Incorporated, d.b.a. Rehab Group, Inc. (Rehab), pursuant to request for proposals (RFP) SEC-539. The RFP solicited proposals for a contractor-operated facilities management automated document filming, storage and retrieval system.

The RFP called for technical and firm fixed-price proposals to be evaluated for the initial contract period to September 30, 1977, and two 1-year options. (There are three additional yearly options.) Under the RFP evaluation scheme, "technology" received 75-percent weight and price 25 percent. Price was the evaluated system cost for the first three terms, including equipment, software, training and maintenance, as well as the cost for filming, including processing and indexing, the SEC documents. Both offerors quoted prices per image for the

filming services. The quantity of filming was indefinite, although the RFP provided that the following image volumes would be used for evaluation purposes:

Term	Volume
1	1,500,000
2	5,000,000
3	6,000,000

Also, although the Service Contract Act (SCA) applied to this procurement, none of the required implementing provisions or applicable wage determinations were contained in the RFP.

Only Rehab and PRC submitted technical and price proposals under the RFP. After discussions were conducted with both offerors, best and final offers were submitted by January 14, 1977. The technical proposals of Rehab and PRC were found to be essentially equal. However, Rehab's evaluated price of approximately $3.6 million was lower than PRC's evaluated price of approximately $4 million. Concequently, award of contract No. SE-77-D-0005 (first award) was made to Rehab on January 17, 1977.

The SEC award letter of that date incorporated Rehab's written submissions under RFP SEC-539, as well as telephone conversations between Rehab officials and an official of SEC "on January 11 and 12, 1977, concerning a material escalation clause and image pricing."

One submission incorporated in the award was Rehab's last price proposal of January 3, 1977. This proposal contained fixed prices for hardware and maintenance, as well as two alternate groups of unit prices for supporting services. The primary quoted rates per image were $0.145, $0.138 and $0.146. The alternate image prices (without minicomputer and maintenance) were $0.139, $0.133 and $0.141 per image. Although the award document did not specify which alternative had been selected, SEC states that the lesser image prices were the basis of the award. The price submission is ambiguous regarding whether these image prices were for (1) three 1-year periods; (2) the three evaluated terms or (3) respective image quantities of 5 million, 6 million and 7 million. (The latter image quantities are estimates set forth in section F.8.B of the RFP for the first 3 years of the system.)

A debriefing conference with PRC was held on January 28, 1977, where SEC's evaluation of the proposals was summarized and the Rehab unit image prices, which SEC states were the basis for the award, were revealed.

On February 2, 1977, PRC filed with our Office a protest against the first award on 17 grounds. On that same date, SEC requested our Office for an advance decision on some of the issues raised by the protest.

Without awaiting our decision, SEC terminated Rehab's contract on February 16, 1977. On February 17, 1977, PRC withdrew the protest and SEC the request, apparently based on the understanding that SEC would solicit a new round of best and final offers from PRC and Rehab. SEC reports that it decided on this course of action because of the failure to include the applicable SCA provisions in the RFP and the problems concerning Rehab's submission of a proposal in a trade name rather than its corporate name.

Rehab protested the termination of its contract to SEC. It stated that a new round of best and final offers would be unfair to Rehab because much of its proposal had been disclosed to PRC at the debriefing. Rehab asserted that a resolicitation would essentially be a prohibited auction.

SEC employed a legal consultant to provide procurement/legal advice on this matter. The consultant attended an SEC debriefing of Rehab on February 23, 1977. It was made clear at the debriefing that the consultant was an independent expert, not a representative of SEC, and that he could not bind or obligate SEC in any way. At the debriefing, Rehab was asked to submit its views on the SCA problem. Also, at the end of the debriefing, the consultant asked Rehab representatives how it intended the image pricing portion of its final price submission to be interpreted.

By letter dated February 23, 1977, Rehab explained that it intended the respective image prices to be on a "term" basis for the contract and evaluated option terms. On February 24, 1977, Rehab advised that--

> "* * * regardless of whether the Service Contract Act or the Walsh-Healey Act applied * * * [it would] be bound by any wage determination made by the Secretary of Labor * * * [and it would] not claim, and hereby waives any right to claim, for additional costs attributable to any wage determination made by the Secretary of Labor during the life of the contract."

On February 23, 1977--while no protest was pending--SEC representatives and the legal consultant met with the General Counsel and another representative of our Office and discussed some of the problems involved in the procurement and how they could be best resolved.

SEC reevaluated the price proposals using several methods in response to the objections raised by PRC in the protest. SEC determined that the price gap between Rehab and PRC was still approximately $260,000, assuming the evaluated price most advantageous to PRC and the price least advantageous to Rehab. Also, SEC found that the SCA's application would not affect the relative price standing of the two offerors. SEC also determined that Rehab's offer in a trade name should not be cause for rejection. See 51 Comp. Gen. 494 (1972). Moreover, SEC determined that a new round of best and final offers would constitute an illegal auction. See Federal Procurement Regulations (FPR) § 1-3.805-1(b) (1964 ed. amend. 153). Consequently, SEC decided to reaward the micrographics requirement to Rehab.

On March 2, 1977, contract No. SE-77-D-0006 (second award) was made to Rehab in its corporate and trade names. This award incorporates the Rehab written submissions under RFP SEC-539 and the January 11 and 12 telephone calls between Rehab officials and the official of SEC "concerning the management fee for handling purchased equipment and image pricing." The award document also states:

> "* * * It is also understood that the Service Contract Act and all applicable wage determinations of the Department of Labor will apply to this contract without a price adjustment for any subsequent wage increases in future determinations. Additionally, consistent with the interpretation of the SEC, your firm's price proposal contemplates the following:
>
> 1) The first five million images to be produced for the SEC will cost the SEC .133 dollars per copy, regardless of the contract term in which the production takes place,
>
> 2) The next six million images produced will cost the SEC .133 dollars per copy, regardless of the contract term, and
>
> 3) For the next seven million images produced, SEC will be charged a rate of .141 dollars per copy."

On March 16, 1977, PRC protested to our Office the second award to Rehab. PRC's protest bases are summarized as follows: (1) the contract awarded differs from the contract solicited because (a) the SCA was not implemented in the RFP and (b) Rehab's image pricing violated the RFP provisions; (2) while no discussions were conducted with PRC after the termination of the first Rehab contract and prior to the award of the second contract, discussions were improperly conducted with Rehab during that period concerning (a) the identity of Rehab (trade or corporate name); (b) the price terms of the contract and; (c) the application of the SCA; (3) the contract violates 31 U.S.C. § 200 (1970) because it incorporated oral contract terms by reference; and (4) the award of the second contract to Rehab constituted a new procurement not complying with the rules requiring competition.

On March 24, 1977, PRC filed suit in the United States District Court for the District of Columbia (PRC Information Sciences Company v. Roderick M. Hills, et al., Civil Action No. 77-0527) seeking to enjoin contract performance pending our decision on the protest. On April 5, 1977, the parties stipulated to stop all work on the contract, with the exception of certain items common to both PRC's and Rehab's proposals, pending a scheduled hearing on PRC's motion for a preliminary injunction. On April 20, 1977, a hearing was held on the motion, after which the parties stipulated to stop work on the contract, except for the purchase and installation of that equipment determined by SEC to be common to both proposals, pending our decision.

Although it is the ordinary practice of our Office not to render a decision where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction, see, e.g., Nartron Corporation, 53 Comp. Gen. 730 (1974), 74-2 CPD 154, we will consider PRC's protest, since the court expressly requested our decision. See the Bid Protest Procedures, 4 C.F.R. § 20.10 (1977); Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

The SEC has stated that it relied, in part, on discussions with General Accounting Office staff members prior to the filing of this protest in deciding to reaward the contract to Rehab. SEC was informed that the advice given was informal and did not in any way bind our Office in the event of a bid protest. Furthermore, the staff members who participated in the discussions have disqualified themselves from participating in the consideration of this case.

From time to time, where no protest is pending, our staff may meet with representatives of other agencies which have requested informal advice on proposed agency procurement actions. Such views of members of our staff--

> "* * * must of necessity be regarded as personal views only, given for whatever they may be worth in the way of assisting the administrative offices in the solution of their problems. The expression of such opinions does not constitute an official action and cannot under any circumstances be recognized as controlling the action of this Office [the Comptroller General] on any matter that may come before it [him] for official determination." (E.g., a bid protest.) 4 Comp. Gen. 1024, 1025 (1925).

See also 29 Comp. Gen. 335 (1950); 31 id. 613 (1952). In any event, our decision of today is based on facts and issues which were not specifically brought to our representatives' attention during these informal discussions.

We will first consider PRC's protest concerning Rehab's image prices. As noted above, the final Rehab price submission was ambiguous regarding whether the proposed image prices were for "quantities," yearly periods or "terms." Although the first award document did not specify the interpretation on which the award was being made, the second award document expressed the agreement of the parties that the contract would be governed by the "quantity" image pricing interpretation.

SEC explains that the first award was also based on "quantity" image pricing because that interpretation was most advantageous to the Government according to the RFP evaluation criteria. (Under the cost revaluation made after the first but prior to the second award, there was a $15,000 cost differential, i.e., Rehab's evaluated image price by "term" is $3,553,792, as opposed to its evaluated price based on "quantity" of $3,538,792.) SEC states that it could choose the interpretation of Rehab's offer that was most advantageous to the Government because of the contra proferentem rule of contract construction that ambiguities in a contract are to be construed against the drafter of the ambiguous terms. SEC further states that this intended meaning of Rehab's image pricing was verified during the January 11 and 12 telephone conversations with Rehab officials which were incorporated by reference into both the first and second awards.

SEC asserts that the legal consultant's inquiry of Rehab concerning the intended image pricing did not constitute discussions, since the matter had already been clarified prior to the January 14 closing date for best and final offers, and Rehab was bound to this interpretation in any case by the contra proferentem rule of construction. Furthermore, both SEC and Rehab assert that since it was made clear that the legal consultant was not SEC's representative, his questions and Rehab's answers did not constitute discussions justifying reopening negotiations because Rehab was not afforded any opportunity to change its proposal. SEC states that this is evidenced by SEC's ignoring Rehab's "term" image pricing interpretation in the award of the second contract. SEC and Rehab deny any other communications between them regarding image pricing after the first award.

The only evidence in the record that the meaning of Rehab's intended image pricing was agreed upon prior to the January 14, 1977, closing date for best and final offers is the affidavit of the SEC official who spoke to Rehab on the telephone. In the affidavit, he states:

> "* * * During the telephone discussions with Rehab on January 11 and 12, 1977, I confirmed that prices were firm for volume, not term. * * *"

Although both award documents incorporated these telephone conversations by reference, the record does not reveal any concurrent memorialization of what was agreed upon in the conversations.

The protester has asserted that the incorporation of telephone conversations--which had not been memorialized--regarding the price of the contract violates 31 U.S.C. § 200(a)(1) (1970). This statute provides that no amount can be recorded as an obligation of the United States unless it is supported by documentary evidence of a binding agreement in writing between the parties in a manner and form authorized by law. In the present case, there was a written agreement sufficient to satisfy this statute's requirements, notwithstanding that it may involve some problems of interpretation regarding the telephone conversations incorporated by reference. In any case, the failure to have a written agreement does not, in and of itself, afford a basis for a third party, not of the contract, to object to the contract's legality. See B-184648, December 3, 1975. Contrast United States v. American Renaissance Lines, 494 F.2d 1059 (C.A. D.C. 1974), cert. denied 419 U.S. 1020 (1974), where the court found void a purely executory oral contract, on which the Government sought recovery from the defendant/contractor some 5-1/2 years after the purported award.

Nevertheless, incorporating telephone conversations--whose contents could be subject to dispute--into a contract is certainly inappropriate. See FPR § 1-1.208 (1964 ed. amend. 9); B-184648, supra. If SEC thought some understanding had been reached during the telephone conversations, it should have instructed Rehab to affirm this agreement in its best and final offer rather than relying upon a rule of contractual construction. A primary purpose of discussions in a negotiated procurement is to achieve "complete agreement of the parties on all basic issues" and "to resolve uncertainties relating to the * * * price to be paid." See FPR § 1-3.804 (1964 ed. amend. 153). If the oral clarifications are not memorialized and a disagreement later arises regarding their content, then a primary purpose of conducting discussions has been thwarted, since the rights of the parties may still be indefinite and uncertain. See B-184648, supra.

Furthermore, notwithstanding the affidavit indicating that the image pricing problem in Rehab's proposal was taken care of in these telephone conversations, there is considerable evidence in the record that there was "no meeting of the minds" regarding Rehab's image pricing prior to the first award.

The most obvious indication that no price agreement had been reached was Rehab's letter dated February 23, 1977, which states:

> "As per our original proposal and as confirmed in our letter of January 3, 1977, the following represents our explanation of cost projections associated with RFP SEC-539.
>
> "As defined in the RFP, term refers to fiscal year, the first 'year' extending from the date of the award to September 30, 1977. Our quoted cost of $.145 applies to the first term or 'year' of the contract, regardless of the number of images processed.
>
> "For example, if the volume for the first year, or term is 1.5 million, the cost per image would remain $.145, as quoted. Likewise, if the volume in the two succeeding years (terms) should vary from the volume indicated, the quoted price for each term would remain the same. Even the 1.5 million images as quoted in the RFP as the first year evaluation criteria may not be true, since term (year) is defined as beginning on the date of contract award.
>
> "Therefore, all quoted costs are applicable for each remaining term, or year, of the contract, regardless of volume."

Moreover, although price is certainly a critical factor in a contract, Rehab merely confirmed its ambiguous January 3, 1977, price proposal in its January 14 best and final offer without making any reference to a clarification or understanding of image pricing. Indeed, Rehab still asserts that its intended image pricing scheme was based on "term." Furthermore, Rehab does not confirm or mention the January 11 and 12 telephone conversations in the extensive briefs and affidavits it has submitted in this case.

Also, if agreement on the image pricing had been reached, why did the legal consultant feel a need to broach the subject and Rehab feel compelled to respond? Also, SEC spelled out and required Rehab to agree to the agency version of Rehab's image pricing in the second award document.

Finally, at the debriefing, PRC was repeatedly informed that Rehab proposed image prices based on "term." For example, the SEC attorney conducting the debriefing summarized Rehab's image pricing scheme as follows:

> "* * * Rehab submitted to the Commission a firm fixed price indefinite quantity proposal in which there was a specific figure set for a per image event, irrespective of the volume, irrespective, as I understand, of factors that may fluctuate during the terms in issue.
>
> "So, for term one, Rehab set for term one we will charge you 'X' per image; for term two, we will charge you 'Y'; and for term three, we will charge you 'Z,' and if the earth should open up and disastrous things should happen, that is the price we will be willing to stand behind." (See p. 20 of PRC Debriefing Conference Minutes.)

Even the SEC offical, who spoke to Rehab on the telephone on January 11 and 12 and who was in attendance at the PRC debriefing, indicated to PRC that Rehab had intended "term" image prices. He said to PRC:

> "The unit price offered by Rehab, first term, .139; for the second term, .133; for the third term, .141." (See p. 125 of PRC Debriefing Conference Minutes.)

(There is some implication from another SEC representative's statements at the debriefing that Rehab's image prices may have been based on "quantity"; however, the discussion is totally ambiguous and unclear on this point. See pp. 58-59 of PRC Debriefing Conference Minutes.)

With regard to SEC's assertions that Rehab was otherwise bound in the first award to the image pricing "quantity" interpretation, it is clear that contracts should not be awarded in negotiated procurements based upon ambiguous offers through the application of the contra proferentem rule of construction against the offeror. Discussions are supposed to be used to clarify ambiguous proposals. FPR § 1-3.804, supra; Garrett Corporation, B-182991, B-182903, January 13, 1976, 76-1 CPD 20. We recognize that this rule of construction has been applied to the interpretation of contracts, see, e.g., 16 Comp. Gen. 569 (1936); WPC Enterprises, Incorporated v. United States, 323 F.2d 874 (Ct. Cl. 1963), and, in appropriate circumstances, to the interpretation of bids under formally advertised procurements (e.g. where no other bidders are prejudiced). See 39 Comp. Gen. 546 (1960); 43 id. 663 (1964). However, we are unaware of any decisions which apply this rule to proposals in negotiated procurements prior to award, where discussions are generally the rule. Unlike a bid under an IFB--which is an irrevocable offer for

a reasonable amount of time once submitted (i.e., the "firm bid rule," see 49 Comp. Gen. 395 (1969))--a proposal in a negotiated procurement may be discussed and changed. For example, discussions should be held where offered price is ambiguous. See FPR § 1-3.804, supra.

Further, the "quantity" interpretation of image pricing in the first award under the contra proferentem rule of contract construction would seem inappropriate, also because it is not necessarily the most advantageous to the Government in all instances. Although the "quantity" image pricing may be the most advantageous to the Government under the RFP evaluation criteria (evaluation based on a hypothetical 1.5 million images for the first term, 5 million images for the second term, and 6 million images for the third term), it may not be the most advantageous if the volume of images actually processed under the contract turns out to be higher or lower than estimated. Substantial volume variances could mean significant dollar differences in the Government's liability under the contract depending on whether image pricing by "quantity" or "term" is applicable.

Moreover, where the Government has been put on direct notice that the offeror's intended pricing is different from the Government's interpretation of the clearly ambiguous proposal, the Government cannot compel the offeror to accept the Government's interpretation in the award. Such an award in a negotiated procurement by the Government varying the intended terms of the offer constitutes the initiation of discussions, since the offeror can either accept or reject the award basis proposed by the Government. Cf. Computer Network Corporation et al., B-186858, June 13, 1977, 56 Comp. Gen. ____. Since SEC was expressly made aware that Rehab's intended image pricing was based on "term" rather than "quantity," the second award incorporating image prices based on "quantity" could have been rejected by Rehab; although Rehab accepted the Government's version in signing the award document.

Whether discussions have been held is a matter to be determined upon the basis of the particular actions of the parties, and not merely upon the characterizations of the contracting agency. Food Science Associates, Inc., B-183054, April 30, 1975, 75-1 CPD 269; Centro Corporation, B-186842, June 1, 1977. We have held that discussions have been conducted where the offeror has been afforded an opportunity to change or modify its proposal, regardless of whether such opportunity to revise or modify resulted from actions initiated by the Government or the offeror. 51 Comp. Gen. 479 (1972). Rehab had the right in the present case to reject SEC's profferred "award" or propose some compromise on the disputed price terms.

The fact that it was the inquiry of the legal consultant--who SEC states was not its agent--may have been the proximate cause for surfacing the confusion between Rehab and SEC regarding Rehab's proposed price does not make the apparent failure to previously achieve common agreement on price and SEC's knowledge of the problem any less real. In view of the subsequent course of action involving SEC's essentially modifying the price it knew was intended by Rehab in the second award document, the fact that the legal consultant may not have been SEC's agent is irrelevant.

The cases cited by SEC and Rehab for the proposition that no discussions were conducted are distinguishable from the present situation. In B-170989, B-170990, November 17, 1971, a meeting with an offeror after the close of negotiations, which was intended only as an opportunity for the contractor to explain its price reductions and was in fact so limited, did not constitute discussions. Unlike the present case, there was no opportunity for the offeror to make any change in its proposal or for the Government representatives to effect any change in the solicitation provisions. In Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404, a contracting officer allowed an offeror to submit a certification that its sample met the specifications after the closing date. This was not discussions because the offeror had already committed itself, by signing and submitting a proposal, to comply with the specifications, so the certification did not add to the legal obligations the offeror would have upon receiving the award. In the present case, however, Rehab was not bound to the Government's interpretation of the ambiguous price proposal because it had previously made SEC aware (albeit indirectly) that this interpretation was not the intended one.

The image pricing "quantity"/"term" dichotomy is not the only peculiarity of the SEC/Rehab price agreement. In Rehab's January 3, 1977, final price submission, although the prices for software and training (totaling $32,500) are stated, they were included in the initial $0.139 image unit price (for the first term or first 5 million images). In his affidavit, the SEC official who spoke to Rehab on the telephone states that during the January 11 and 12 telephone conversations he discussed with Rehab the problems involving the inclusion of software and training in the image price, but no change was made because it made no difference in the evaluated price.

The second award document set a price of $0.133 per image for the first 5 million images. SEC explains that this lower image rate is a result of breaking out the fixed prices for the software and training so that these items could be separately paid. However, this intent is nowhere memorialized in the second award document.

Under the "quantity" image pricing interpretation, Rehab would have eventually been paid for most of the $32,500 in software and training ($0.139 - $0.133 = $0.006 x 5 million images = $30,000). If the image price had been dependent on "term," however--which Rehab still asserts was its intended pricing scheme--there would be no certainty that a sufficient volume of images would have been processed in the first term to cover the software and training costs. (The record indicates that substantially less than 5 million images (i.e., 1.5 million images) were apparently intended to be processed in the first term.)

Moreover, under the second award--assuming there was no disagreement regarding the nonmemorialized treatment of software and training--Rehab would not have to wait for sufficient images to be processed to cover the price for these services, but rather could bill for the services upon their completion--which probably is to Rehab's benefit. Therefore, it would appear that the price treatment of software and training was also the subject of discussions with Rehab.

There is another peculiarity in the image pricing which also shows that the second award document constituted the initiation of discussions. In Rehab's January 3, 1977, final price submission, it proposed alternative image rates ($0.139, $0.133, $0.141 and $0.145, $0.138, $0.146). The first group of rates are labeled in the final price submission as the "cost per documents without the Mini and maintenance." The second group of rates are apparently for the operation of a complete system, including the minicomputer with maintenance.

The first award letter did not state which alternative the Government selected in making the award, although from other information in the record it is clear that the lower rates were intended by the Government to be the contract rates. In Rehab's February 23, 1977, letter, explaining its intended image pricing, Rehab states its quoted price for the first term was $0.145 per image. It would appear that because it was not stated whether the first award was for the "without minicomputer" alternative rates or the "with minicomputer" alternative rates, there was no "meeting of the minds" in the first award on this point either. Rehab's February 23 letter should have made this apparent to SEC.

The second award document specifically incorporates the rates quoted for the "without minicomputer" alternative. However, the record indicates that the minicomputer with maintenance seems to be included in the awarded system. Since the second award was not based on an alternative proposed by Rehab, the second award document and Rehab's acceptance by signing the document seems to constitute discussions for this reason also.

If discussions have been conducted with one offeror, it is required that discussions be conducted with all offerors within the competitive range, including an opportunity to submit revised offers. See FPR § 1-3.805-1, supra; 50 Comp. Gen. 202 (1970); 51 id. 102 (1971); id. 479 (1972); Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472; Airco, Inc. v. Energy Research and Development Administration, 523 F.2d 1294 (7th Cir. 1975). The competition should generally be reopened, even when the improper post-selection negotiations do not directly affect the offerors' relative standing, because all offerors are entitled to equal treatment and an opportunity to revise their proposals. See 49 Comp. Gen. 402 (1969), modified on other grounds in Donald N. Humphries and Associates et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275; 50 Comp. Gen., supra; Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144, affirmed 55 Comp. Gen. 972 (1976), 76-1 CPD 240; Airco, supra. In this regard, although it has been argued that PRC was not prejudiced if discussions were in fact conducted with Rehab, the point is that every offeror within a competitive range has the right to change or modify its proposal, including price, for any reason whatever, so long as negotiations are still open; and that Rehab, but not PRC, was afforded this opportunity. 49 Comp. Gen., supra; Corbetta, supra; Airco, supra. PRC's debriefing did not constitute meaningful discussions, as is suggested by Rehab, since PRC was afforded no opportunity to change or revise its proposal. See Group Operations, Incorporated, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79.

Both Humphries, supra, and Northrup Services, Inc., B-184560, January 28, 1977, 77-1 CPD 71 (cited by SEC and Rehab), represent unusual circumstances where the agencies suddenly encountered funding problems after the closing date. We found under the particular circumstances of these cases that what would ordinarily be regarded as discussions was not a sufficient reason to reopen negotiations with the other offerors in the competitive range.

In Humphries, supra, since the reduction in funds after the closing date did not permit the award originally contemplated, an agency could extend an opportunity only to the successful offerors to accept award for a 22-percent reduced scope of work at the same proposed unit price, since the other offerors' relative positions would not be affected in this case by such an opportunity. The funding problem was an event that was not foreseeable or caused by the successful offeror in Humphries. In the present case, however, no funding problem existed. Also, it was certainly foreseeable that problems might occur with Rehab's ambiguous proposal if it was not properly clarified. Also, unlike Humphries, Rehab did change its intended price by agreeing to the Government price interpretation.

Similarly, in Northrup, supra, since the reduction in funds after the closing date did not allow an award for the originally contemplated 28-month term, an agency could extend an opportunity only to the successful offeror to accept award for 16 months at the prorated proposal price, since the successful offeror's selection would not have been affected if other offerors had been given the same opportunity. In this case, it was particularly significant that the offerors proposed on a 16-month basis also and that the successful offeror had been selected on the basis of technical superiority. Besides the factors set out above which distinguish Humphries, supra, and Northrup, supra, from the present case, the Rehab award selection was ultimately based on price rather than technical merit as in Northrup, supra.

In addition to SEC's failure to conduct discussions with PRC as well as Rehab, the second Rehab award with the "quantity" image pricing scheme violates section II.2.1 of the RFP Instructions. This section states:

> "Fixed Prices
>
> "To be considered responsive to the solicitation, offerors must offer fixed prices for the initial contract period for the initial system or items being procured. Fixed prices, or prices which can be finitely determined must be quoted for two separate option renewal periods and remain in effect throughout that period. Where optional quantities are offered, prices must be fixed or finitely determinable."

This clause clearly requires offerors to propose "fixed" or "finitely determinable" prices for the entire initial contract and evaluated option periods. See Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358, affirmed C3, Inc., B-185592, August 5, 1976, 76-2 CPD 128; Burroughs, supra; Computer Network, supra, where we found offerors' proposals under procurements with substantially identical "fixed prices" provisions to be unacceptable because they did not propose a "fixed" or "finitely determinable" price for all periods.

Although we believe it was permissible to base image prices on quantities, see PRC's proposal offering varying daily image volume rates, the rates must be "fixed" or "finitely determinable" for all evaluated periods of the system. Under Rehab's pricing scheme, if the volume exceeded 18 million images during the first three terms, there would be no price applicable for the additional images. See Computer Machinery Corporation, supra. Although SEC asserted at the bid protest conference that this volume probably will not be achieved, there is no provision in the RFP or the Rehab contract limiting image processing to 18 million images. (Section F.8.B. of the RFP indicates that 18 million images are

the estimate (not the limitation) for the first three terms.) Therefore, Rehab's second award is based on a proposal which is unacceptable under the RFP "Fixed Prices" clause.

During our review, we noted that PRC's final cost submission also was not "fixed" or "finitely determinable" for all of the evaluated terms. Although PRC's quoted varying daily image rates were applicable in all instances to the initial contract term, the image rates for the two evaluated option terms were the same unit prices "adjusted each 1 October by the percentage increase in the Cost of Living Index for the Washington, D.C. area over the previous 12 month period as determined by the Bureau of Labor Statistics." We believe the "Fixed Prices" clause contemplates prices that are "fixed" or "finitely determinable" as of the time of award, so that a proper price evaluation can be made for award selection purposes. See Computer Machinery Corp., supra. Since the Cost of Living Index for future years is speculative, PRC's proposal also did not propose a "fixed" or "finitely determinable" price for all evaluated periods. However, SEC did not object to PRC's proposal for this reason. Furthermore, this is the kind of problem that should be cured in meaningful discussions.

Rehab and SEC have argued that SEC's actions were reasonable under the circumstances because a new round of best and final offers would have constituted a prohibited auction technique. See FPR § 1-3.805-1(b), supra. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. 48 Comp. Gen. 536 (1969); TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299; Honeywell Information Systems, Inc., B-186313, April 13, 1977, 56 Comp. Gen. ____, 77-1 CPD 256. In Honeywell, supra (affirming Burroughs, supra), we recommended a new round of best and final offers, even though the awardee's initial equipment configuration and prices had been disclosed to the protester, where the award was based on an unacceptably late price proposal and an unacceptable technical proposal which was corrected after the closing date, notwithstanding the agency's and Honeywell's objections to the auction atmosphere. Also, see TM Systems, Inc., supra, and Axel and Deutschmann, B-187798, May 12, 1977, 77-1 CPD 339, where similar remedies were proposed to allow for equal treatment of the offerors, notwithstanding an auction atmosphere. We have taken this position because of the primacy of the statutory requirements for competition over the regulatory prohibitions of auction techniques. Honeywell, supra; Axel and Deutschmann, supra. Cf. Minjares Building Maintenance Company, 55 Comp. Gen. 864 (1976), 76-1 CPD 168. Contrast 50 Comp. Gen. 222 (1970) (cited by Rehab and SEC), which involved an otherwise proper award--apart from the improper price disclosure by the Government--where we held that an agency should make an award, if possible, without further discussions to prevent an auction situation. The present

situation is also different from Saturn Systems, Inc., B-184330, March 2, 1976, 76-1 CPD 145, where an improper award was terminated after a re-evaluation under the RFP evaluation criteria and the requirement was reawarded to the true lowest-priced offeror under the RFP evaluation criteria. Since the agency did not resolicit in Saturn, SEC and Rehab contend that it would be inappropriate to do so in the present case because of the auction possibilities. But Saturn involved the mis-evaluation of proposals rather than the unequal treatment of offerors. The latter situation can only be cured by soliciting a new round of best and final offers.

SEC and Rehab also argue that PRC should not be allowed to force a recompetition where it created the auction situation by aggressively seeking the contents of Rehab's proposal, including unit prices, at the debriefing. SEC did not have to disclose any information to PRC that it determined should not be disclosed under the Freedom of Information Act, 5 U.S.C. § 552 (1970). SEC and Rehab would have us find that a party attempting to ascertain why it was unsuccessful on a procurement and whether it has any bases for protesting the award bars itself from receiving a meaningful remedy if it is successful in its efforts. We find this argument incongruous.

SEC has asserted that even though it may have erred in the conduct of this procurement, it would not be in the Government's best interest to terminate the contract at this time. SEC suggests that if any remedy is necessary, the option periods should be resolicited after the system is installed, tested, and made operational by Rehab.

In this regard, SEC asserts that it is important to the agency mission to get the system operational as soon as possible. The system is to film, store and retrieve documents which publicly held companies are required to file with SEC in order to ensure that certain information is available to the investing public. The system replaces the present "paper filing" system--which has been the operating system for over 40 years--in recognition of the limitations of the present system (e.g., the accelerating number of documents filed at SEC). Consequently, SEC asserts that a delay in implementing the new automated micrographics system will harm the public as well as the agency's interest in having a more efficient system to help protect the investing public. Also, SEC has determined that it will be impractical to put in the system the many documents received during the delay prior to implementing the system.

Besides Rehab's termination costs and the resolicitation costs, SEC asserts that the delay incident to a recompetition will cause additional costs to be incurred. For example, the present "paper filing" system is more costly to operate. Also, much time, effort and funds have been invested in support systems for the micrographics system. SEC states that it may also lose the appropriated money which has been set aside for the purchase of the system equipment.

Moreover, SEC asserts that Rehab--a small business--will be adversely impacted by a recompetition, since Rehab, with SEC encouragement, did not make a profit on the installed "common" equipment. Also, SEC states that Rehab will have difficulty participating in an auction caused by PRC--a large business.

In determining whether it is in the Government's best interest to undertake action to terminate an improper award and recompete the requirement, certain factors must be considered, such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact on the user agency's mission. See Honeywell, supra, and decisions cited therein.

SEC should not "lose" any money appropriated and obligated for the Rehab contract if it is terminated. See Lawrence W. Rosine Co., 55 Comp. Gen. 1351 (1976), 76-2 CPD 159. Also, we do not believe Rehab's termination costs should be substantial in this case because a stopwork order has been in effect since April 5, 1977. Although Rehab placed orders on much of the system equipment prior to that date, a significant percentage of the equipment has been designated by SEC as "common" with PRC's equipment and is not subject to the termination action we recommend below. Moreover, SEC is not without document processing facilities because the present system is still operating. Furthermore, Rehab would gain a significant competitive advantage by virtue of the improper award it received, if the system were to continue through the fiscal year because it would have experienced on-site personnel as well as the use of the equipment not common to PRC's proposed equipment. Finally, the record indicates a number of inconsistent statements and actions by SEC and substantial irregularities in the conduct of this procurement.

Therefore, we believe that the confidence in the integrity of the competitive procurement system, and thereby the Government's best interests, would best be served by recompeting this requirement, notwithstanding the adverse mission and cost impact on SEC and Rehab.

We recommend that SEC terminate Rehab's contract for the convenience of the Government, except for the "common" equipment which was to be installed pursuant to the stipulation of the parties. PRC and Rehab should be afforded as equal an opportunity as feasible to submit new best and final offers for the remainder of the system. Other offerors need not be solicited in the present case, since no firm other than PRC was prejudiced by the foregoing procurement deficiencies. See Burroughs, supra.

In view of our conclusion, we need not consider PRC's other bases for protest. With regard to the SCA problem, however, we have held that the most proper way to determine the effect of SCA provisions on a procurement is to compete the procurement under the applicable SCA wage rates. See B-177317, December 29, 1972; Minjares, supra.

Also, the RFP evaluation criteria should clearly indicate how price proposals are to be evaluated. For example, since SEC made various allusions at the PRC debriefing that PRC's image pricing methodology was inconsistent with the RFP, it should be amended to clearly indicate what image pricing methods SEC considers to be unacceptable. Also, the image volumes used in the evaluation criteria (1.5 million, 5 million and 6 million images) are inconsistent with those set out in section F.8.B of the RFP (5 million, 6 million, and 7 million images). SEC should base its evaluation on the best image volume estimates available and disclose these estimates in the RFP.

Moreover, various "separate charges" were quoted under the RFP. In view of our determination in Burroughs, supra, that payment of certain "separate charges" is illegal, and that clauses similar to sections II.2.2 and II.2.3 of the RFP Instructions are unclear as to how "separate charges" are to be evaluated, the RFP should be revised to advise offerors of the extent to which "separate charges" will be permitted and how they are to be evaluated.

As this decision contains a recommendation for corrective action, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). This statute requires written statements by the agency involved to the House and Senate Committees on Appropriations, the House Committee on Government Operations and the Senate Committee on Governmental Affairs concerning the actions taken with respect to our recommendation.

Deputy Comptroller General
of the United States

Spangenberg
P.L. 89

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

B-188305

JUL 7 1977

The Honorable Charles R. Richey
United States District Court for
the District of Columbia

Dear Judge Richey:

Reference is made to PRC Information Sciences Company v. Roderick M. Hills, et al., Civil Action No. 77-0527.

Enclosed is a copy of our decision of today sustaining the protest and recommending that the requirement be resolicited.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

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

B-188305

JUL 7 1977

The Honorable Harold M. Williams
Chairman, Securities and Exchange
Commission

Dear Mr. Williams:

Enclosed is a copy of our decision of today sustaining the protest of PRC Information Sciences Company against the award of contract No. SE-77-D-0006 to Rehab Computer, Incorporated, d.b.a. Rehab Computer, Inc., for a micrographics system.

We recommend that Rehab's contract be terminated, except for the equipment which was determined to be "common" to both Rehab's and PRC's proposals. We further recommend that a new round of best and final offers be solicited from these two sources for the remainder of the system consistent with our decision.

Inasmuch as our decision contains a recommendation for corrective action, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970. The act requires that you submit written statements to the named committees within specified times as to the action taken with respect to our recommendation.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

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

B-188305

JUL 7. 1977

The Honorable George H. Mahon
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today sustaining the protest of PRC Information Sciences Company against an award of contract No. SE-77-D-0006 to Rehab Computer, Incorporated, d.b.a. Rehab Group, Inc., by the Securities and Exchange Commission for the acquisition of a micrographics system.

We have recommended to the Commission that Rehab's contract be terminated and that new best and final offers be solicited consistent with our decision.

This matter is being brought to your attention pursuant to the Legislative Reorganization Act of 1970.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

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

B-188305

JUL 7 1977

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today sustaining the protest of PRC Information Sciences Company against an award of contract No. SE-77-D-0006 to Rehab Computer, Incorporated, d.b.a. Rehab Group, Inc., by the Securities and Exchange Commission for the acquisition of a micrographics system.

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This matter is being brought to your attention pursuant to the Legislative Reorganization Act of 1970.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

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

B-188305

JUL 7 1977

The Honorable John L. McClellan
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today sustaining the protest of PRC Information Sciences Company against an award of contract No. SE-77-D-0006 to Rehab Computer, Incorporated, d.b.a. Rehab Group, Inc., by the Securities and Exchange Commission for the acquisition of a micrographics system.

We have recommended to the Commission that Rehab's contract be terminated and that new best and final offers be solicited consistent with our decision.

This matter is being brought to your attention pursuant to the Legislative Reorganization Act of 1970.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
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