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A. K. Hollander 12-1

DECISION



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

FILE: B-190632

DATE: August 4, 1978

MATTER OF: Computer Sciences Corporation

DIGEST:

1. Disappointed offeror in negotiated procurement is interested party to file protest within meaning of section 20.1, GAO Bid Protest Procedures, even though proposal had allegedly expired, since active pursuit of protest can revive proposal.
2. Where agency ordering office's unconventional negotiated solicitation document required schedule contractors to furnish copies of already effective contract modifications by specific time, but did not warn that failure to comply would eliminate contractor from consideration for award of orders, protest by contractor following its elimination from procurement is not "based upon" any apparent solicitation impropriety. Rather, protest was timely filed within 10 working days after protester knew basis for protest--elimination from procurement for failure to furnish copy of contract modification.
3. Contention by interested party (successful offeror) that its ability to respond to protest was hampered because protest correspondence was erroneously sent to branch office rather than company headquarters is without merit where different representatives of company gave conflicting instructions as to where correspondence should be sent, and in any event company had more than normal 10 working days in which to prepare its comments.
4. In negotiated procurement where schedule contractors were competing for award of orders for particular project, circumstances indicate that protester adequately communicated its offer to

perform work though it did not timely submit copy of modification to its contract as required. Agency was obligated to exert reasonable efforts to verify existence and contents of contract modification.

5. Where schedule contractors were competing for award of orders and agency required that (1) relevant contract modifications be effected by September 19 and (2) copies of modifications be submitted to agency's ordering office by September 23, accepting late copy of modification or verifying modification was effective as of September 19 would not have amounted to acceptance of "late proposal," because there was no opportunity for offeror to materially change its offer and thereby gain unfair competitive advantage. Copy requirement was matter of form and waiver by Government would not have prejudiced other offerors.
6. Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office--where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification--clearly had no reasonable basis. GAO recommends that USA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations.

Table of Contents

	Page
I. Background	
A. MASC's and Ordering Procedure ..	4
B. Initial Phase of Procurement ...	5
C. CSC Contract Modification	6
D. Other Contractor's Responses ...	9
E. Final Evaluation and Selection..	11
II. Procedural Issues	
A. Is CSC an Interested Party to to File Protest?	13
B. Is CSC's Protest Timely?	14
C. Did GE Receive Opportunity to Comment?	16
III. Substantive Issue	
A. Protester's Position	17
B. Agency's Position	18
C. Discussion	19
IV. Conclusion and Recommendation	23

This is our decision on a protest by Computer Sciences Corporation (CSC) concerning the General Services Administration's (GSA's) selection of the General Electric Company (GE) to receive orders for certain services under a GSA-GE contract. CSC contends that it should have been selected to receive the orders under its contract with GSA. The principal issue involves the reasonableness of GSA's finding CSC technically unacceptable to perform the work as a result of CSC's failure to meet a requirement that contractors furnish copies of any relevant contract modifications to the GSA office conducting the procurement by September 23, 1977.

I. Background

A. MASC's and Ordering Procedure

The services involved in the present procurement are for the Department of the Army's Computer Assisted Map Maneuver System (CAMMS). GSA's Region 6 office in Kansas City, Missouri, selected GE for this work in October 1977, with the expected cost being \$733,679 over a 3-year period. The first order (\$110,000) for CAMMS services through September 30, 1978, was issued under GE's Multiple Award Schedule Contract (MASC) No. GS-00C-50250 in November 1977.

GE, CSC and other companies have entered into MASC's under GSA's Teleprocessing Services Program (TSP). As provided in Federal Property Management Regulations, Temporary Regulation E-47, August 3, 1976, as amended, TSP is the mandatory method whereby Federal agencies acquire teleprocessing services from the private sector. MASC's are one of the alternatives under TSP whereby agencies can do so.

The MASC's describe in some detail the procedures for selecting a source for services. Briefly, paragraph D.9 of the MASC's provides that the principal evaluation criterion is least systems life cost. Paragraph D.10 provides, among other things, that Government activities selecting a source for a particular order should prepare a description of the services needed, develop and apply technical and cost evaluation criteria, including running any necessary benchmarks, and eliminate from consideration

sources which fail to meet the requirements. Selecting which contractor should receive an order, in short, is on the basis of the source which meets the user's requirements at the lowest overall cost to the Government.

B. Initial Phase of Procurement

By letter dated April 6, 1977, an Army procurement official invited CSC to attend a prebenchmark conference concerning the CAMMS project at Fort Leavenworth, Kansas, on April 18, 1977. The letter stated that "Failure to respond in writing (letter or telegraph) [by close of business April 15, 1977] will remove your company from further consideration." A total of 30 MASC vendors was contacted at this time to determine their interest in competing for and capability of satisfying the CAMMS requirement.

The record does not show whether CSC responded in writing to the April 6 letter. However, CSC and other vendors did express interest in competing for the award. CSC, GE, and three other vendors subsequently passed benchmark tests.

While this process was going on, the GSA Project Manager, by letter dated May 16, 1977, asked CSC how it would meet a CAMMS requirement for 80-percent reliability at the individual user level. The letter pointed out that the reliability currently offered at that level in CSC's MASC was "none," requested a response by May 26, 1977, and warned that failure to respond would eliminate CSC from further consideration for the CAMMS project.

CSC responded to this inquiry and at a meeting with GSA-Kansas City personnel on May 27, 1977, indicated that it would take necessary action to amend its MASC to provide an adequate reliability level. Apparently, in confirmation of this meeting, CSC's letter dated June 9, 1977, to the GSA Project Manager stated in part: "CSC INFONET agrees to maintain an available rate in excess of 90% reliability at the user level. INFONET will amend the schedule as agreed upon to meet the CAMMS user reliability requirement."

By letter to CSC dated July 25, 1977, the GSA Project Manager stated:

"Re: Multiple Award Schedule Contract
Amendment and/or Additional
Offerings.

"The purpose of this letter is to let you know the position that we must take with amendment to your MASC or additional offering under a MASC that could possibly effect the evaluation of CAMMS economically or technically.

"If a vendor has an amendment and/or additional offering for its TSP/MASC filed or will be filed with GSA in Washington, D.C., and may affect the CAMMS evaluation and subsequent systems-life technically or economically, such change(s) must be agreed upon by the vendor and GSA and effective on or before September 19, 1977, 4:30 pm (CDT). A copy of the signed agreement must be sent by the vendor to me so that it is received on or before 4:30 pm (CDT).

"If you have any questions regarding this information please call me * * * and I will discuss further with you."

GSA states that by letters of the same date, the same information was conveyed to the other competing vendors.

C. CSC Contract Modification

In a letter dated July 29, 1977, to GSA's ADP Procurement Division in Washington, D.C., a CSC representative stated:

"Pursuant to a request from the GSA Regional ADP Coordinator in Kansas City, who is processing an MASC competitive selection for the U.S. Army, Computer Sciences Corporation hereby offers to improve its agreement on maintenance of Network Facilities Reliability. Specifically we offer

to change our entry in subparagraph H.11.a.(2)(c) from 'none' to '90 percent.'

"Since this change is clearly in the best interests of the Government, I request that we meet as soon as possible to complete the requisite contract modification. Please call me * * * when you can set a meeting."

The record indicates that modification No. 2 to CSC's MASC was signed by the GSA ADP Procurement Division contracting officer (in Washington, D.C.) on August 26, 1977. Aside from the "boilerplate" language of Standard Form 30, the modification reads in its entirety:

"The above-numbered contract for teleprocessing Services, Industrial Group 737, Industrial 737, for the period December 17, 1976 through September 30, 1977, is hereby modified as follows:

"The response to Subparagraph H.11.a.(2)(c) Network Facilities Reliability is changed to offer a 90% availability rate for the communications network at the individual user level, in lieu of the original 'none' percent availability rate in the current contract."

The record also reflects that at about this time there were a number of conversations between various CSC personnel and the GSA-Kansas City Project Manager. In an affidavit dated March 17, 1978, the same CSC employee who signed CSC's July 29, 1977, letter states that on August 17, 1977, he met briefly with the Project Director and that:

"On that occasion I remarked to him that my letter offer to GSA to change the contract entry in question from 'none' to '90 percent' had been converted by GSA into an

appropriate contract modification form, which I had signed the previous Friday or August 12, 1977.

"I went on to state that I had been advised by GSA that the modification would probably be signed by the Contracting Officer during the next business week.

"Mr. Linebaugh [the Project Manager] remarked that it was a load off his mind to know that this problem was out of the way and we didn't have to worry about it anymore."

Another CSC employee (M. Sollenberger) in an affidavit dated March 18, 1978, states that after August 26, 1977, and prior to September 19, 1977, he notified the GSA Project Manager at least once by telephone that CSC's MASC had been amended regarding user-level reliability, and that the Project Manager did not ask him to forward a copy of that amendment by mail. The record also contains a copy of an affidavit dated March 18, 1978, by another CSC employee (G. Bishop), who states he spoke to the Project Manager on several occasions:

"On at least one of these occasions, shortly after the August 26 amendment was signed, I called the Project Manager and informed him we had the approved amendment. He indicated that he had already been made aware of this fact by one of our regional personnel. During these conversations the fact that CSC was going to be disqualified, or was disqualified, from the competition was never brought out. During the week of September 12 * * * I asked the CAMMS Project Manager if there was anything else that we needed to do. His response was 'no, you look in good shape.' I had several other exchanges of this type, both before and after the cut-off dates. During most of these discussions, I asked 'what else can I do?' or 'is there anything else I need to do?' Never was a response made that we would be eliminated or were eliminated from the competition."

Another CSC employee (M. Seeb), in an affidavit dated March 8, 1978, states that subsequent to August 26, 1977, and prior to September 23, 1977, he "confirmed" with the Project Manager at least once on the phone and once in person that a CSC contract amendment changing its communications network reliability at the individual user level from none to 90 percent had previously been "approved."

In this regard, GSA's report received by our Office on March 8, 1978, states that while the Project Manager "had been notified of CSC's intent to amend its MASC in a timely manner, he had not, as of September 23, 1977, seen a copy of the executed amendment." The Project Manager, in a memorandum dated March 17, 1978, states that during the CAMMS benchmark he had contact either by telephone or in person with six CSC employees, including the four who have furnished the above affidavits. The Project Manager states that "At no time during any of these situations did I exclude CSC from meeting the requirements of the 25 July 1977 letter. I did acknowledge their statements saying they had amended their contract. * * *"

As the dates of the foregoing documents indicate, none is contemporaneous with the conversations in question. In addition, the protester has not alleged any statements by any GSA officials explicitly waiving the requirement that a copy of any pertinent contract modification be filed with GSA-Kansas City not later than September 23, 1977. GSA denies that the Project Manager ever indicated to anyone that the September 23 filing requirement was waived and also asserts that one of the Project Manager's superiors who was involved in the procurement frequently reminded all vendors of the September 19 and 23 cutoff dates.

As far as the record shows, CSC did not mail or transmit in any other fashion a copy of its MASC modification No. 2 to the GSA Project Manager in Kansas City by September 23, 1977.

D. Other Contractor's Responses

GSA notes that, like CSC, several other contractors had stated during the procurement that proposed

contract modifications had been submitted to the contracting officer in Washington, D.C., but copies of these purported modifications were not received in Kansas City by September 23, 1977. Two vendors, on the other hand, did effect certain contract modifications during the procurement and did furnish copies of the modifications to Kansas City by September 23, 1977.

In this connection, GSA reports that GSA-Kansas City officials met, at GE's request, with GE representatives on September 17, 1977. At the meeting GE asserted, among other things, that its MASC currently provided toll-free access to certain CAMMS sites. GSA states essentially that its officials did not agree with GE's interpretation of the contract, that they declined to negotiate on this subject, and that they refused a GE request to extend the cutoff dates. On September 20, 1977, GSA-Kansas City received a GE letter of the same date which stated in part:

"In order to clarify our communications costs for the CAMMS procurement, General Electric would like to withdraw all previous communications documents which stated costs to the Government.

"General Electric will provide toll-free access to all CAMMS exercise locations mentioned in your communications request of 9 May 1977.

"We believe that the language in our TSP Schedule Price List provides for extension of toll-free access to new locations, when by management decision, it is required; the present usage of CAMMS does justify some extensions, and therefore toll-free access is being given where not covered. * * *

"We are preparing an amendment to our TSP Schedule Contract to further clarify our position and this amendment will be submitted in sufficient time to be evaluated for the CAMMS procurement."

GSA-Kansas City apparently received a copy of the proposed contract modification mentioned by GE on September 23, 1977. The modification (No. 4 to GE's MASC) was not signed by the GSA contracting officer in Washington until September 29, 1977, and did not become effective until that date.

GSA-Kansas City states that it maintained an "open door" policy and that the September 17 meeting was similar to meetings held with other vendors. It appears that there were approximately 30-40 such meetings with vendors during the procurement.

E. Final Evaluation and Selection

After September 23, 1977, GSA-Kansas City went through a final evaluation and selection process. An initial "findings and determinations" (source selection) memorandum dated October 7, 1977, was later superseded by a selection memorandum dated October 25, 1977.

In arriving at his determination, the GSA official making the selection considered the fact that during the procurement several offerors had submitted letters which, if considered as part of their offers, could affect their eligibility for award or their costs. These included CSC's June 9, 1977, letter, supra, concerning reliability at the user level; GE's September 20, 1977, letter, supra, concerning toll-free access; a letter from a third vendor dated September 22, 1977; and a letter from a fourth vendor dated July 8, 1977. None of these letters were accompanied by copies of MASC modifications which had become effective not later than September 19, 1977, nor were copies of such effective contract modifications furnished to GSA-Kansas City by September 23, 1977.

The October 7 selection was on the basis that the various letters including CSC's and GE's could be considered either as price reductions under section D.10 of the MASC's or as "management decisions" resulting in reduced costs under section H.4.F. of the MASC's. On this basis, GE's system life cost for CAMMS (\$733,679) was lower than any other vendor's.

However, after consulting with GSA-Washington, the selection official, as noted in his October 25 statement, decided that the various letters could not be accepted under either section D.19 or H.4.F. in the absence of contract modifications implementing their contents. Apparently, there was doubt that the offerings in the letters would be contractually enforceable absent contract modifications. On this basis, GE was the technically acceptable vendor with the lowest system life cost (\$1,445,872). Though CSC's cost was lower (\$1,061,467) it was considered technically unacceptable because it had not submitted by September 23, 1977, a copy of a contract modification increasing its reliability at the user level as CSC's June 9 letter had indicated would be done.

The October 25, 1977, selection memorandum concluded:

"If all of the letters referred to above could be accepted by the Project Manager under MASC Sections D.19 and/or H.4.F, then the GE MASC should be selected for CAMMS support with an evaluated systems life cost of \$733,679. If none of the letters referred to above can be accepted by the Project Manager (for reasons discussed above), then the GE MASC be selected for CAMMS support with an evaluated systems life cost of \$1,445,872.

"As evident from the above, insofar as the selection of a MASC for CAMMS support is concerned, the question of acceptability of the various letters referred to above under MASC Section D.19 and/or H.4.F is mute; in that the GE MASC would be selected in any case. Further, because the GE MASC has in fact been amended (albeit subsequent to the 9/19/77 cutoff date) to provide the additional services at no additional cost (referred to in the GE letters dated 9/20/77),

CAMMS support under the GE MASC would be provided at the lower systems life cost of \$733,679 regardless of whether the selection is based on that figure or the higher 'evaluation' figure of \$1,445,872."

Both GSA and GE assert that the selection was actually based upon GE's system life cost of \$1,445,872.

We note in this regard that if the source selection official had considered the fundamental "cutoff" for source selection purposes to be the actual contract modifications which had become effective not later than September 19, 1977, regardless of whether GSA-Kansas City had received copies of such modifications by September 23, 1977, CSC would have been technically acceptable and its evaluated systems life cost of \$1,061,467 would have been lowest. GE's cost would have been \$1,445,872, because it was not until GE's contract modification No. 4 became effective on September 29, 1977, that GE's cost was effectively reduced to \$733,679.

Finally, the selection official has indicated that on September 22, 1977, he contacted GSA-Washington to explore the possibility of independently verifying which vendors had effected contract modifications by September 19, 1977. He was told essentially that such requests had a lower priority in relation to GSA-Washington's other work, but that higher priority could possibly be given if it was necessary to check only one modification to one vendor's MASC.

II. Procedural Issues

A. Is CSC an Interested Party to File Protest?

GE questions the "standing" of CSC to file a protest under our Bid Protest Procedures, 4 C.F.R. Part 20 (1977). GE alleges that the expiration of CSC's MASC on September 30, 1977, and its replace-

ment by a modified MASC on October 6, 1977, operated as a total revocation of CSC's offer to the Government, and that CSC was therefore legally ineligible for award at the time GSA selected a contractor for the CAMMS project (October 28, 1977).

4 C.F.R. § 20.1 provides that an "interested party" may protest to our Office the award of a contract by a Federal agency. The fact that a proposal has expired does not mean the offeror is not an interested party to protest, because by actively pursuing a protest the offeror can revive its proposal. Riggins & Williamson Machine Company, Inc., et al., 54 Comp. Gen. 783, 789 (1975), 75-1 CPD 168. In any event, CSC points out that its fiscal year 1977 MASC was renewed by GSA effective October 1, 1977. CSC is sufficiently interested to file a protest with our Office.

B. Is CSC's Protest Timely?

GSA contends that the protest is untimely because section 20.2(b)(1) of our Bid Protest Procedures provides that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the bid opening or closing date for receipt of proposals must be filed prior to bid opening or the closing date for receipt of proposals. GSA interprets the protest as being based upon the establishment in GSA's July 25, 1977, letter of the requirement that copies of contract modifications be filed in GSA's Kansas City office by September 23, 1977. The agency believes that its July 25, 1977, letter was either an "adverse agency action," or established an apparent solicitation impropriety which CSC was required to protest prior to the time for filing the modifications.

By definition (4 C.F.R. § 20.0(b)(1977)), adverse agency action occurs only after a protest has been filed with an agency. GSA's July 25, 1977, letter cannot be an adverse agency action because CSC had not filed a protest with GSA prior to July 25.

Further, we do not think the protest is based upon any alleged impropriety in the solicitation which reasonably should have been apparent to CSC prior to September 23, 1977. GSA cites in this connection several cases where protesters, after submitting proposals, contended that the Government's requests for proposals (RFP's) had not allowed them sufficient time to prepare their proposals (e.g., Unicare, Inc., B-181982, September 4, 1974, 74-2 CPD 146, and United Terminals, Inc., B-186034, April 17, 1976, 76-1 CPD 286). Such protests are untimely because (1) the closing date for receipt of proposals is explicitly set out in the RFP and is well known to be a firm cutoff unless extended, and (2) an offeror at the time it is preparing its proposal is in a position to reach a decision whether it believes the RFP allows sufficient time for proposal preparation or not. Thus, such protests are based upon alleged solicitation improprieties which were "apparent," and, as GSA correctly points out, an offeror cannot acquiesce in the ground rules of the procurement and protest those ground rules later when award has been made or is about to be made to another offeror. See Kappa Systems, Inc., 56 Comp. Gen. 675, 687 (1977), 77-1 CPD 412.

However, it does not logically follow that every protest filed after submission of proposals concerning compliance with an RFP provision which was stated in mandatory terms is essentially based upon an apparent solicitation impropriety and is likewise untimely. A protest is "based upon" a solicitation impropriety only if, considering the nature of the solicitation provision, the impropriety reasonably should have been apparent to the offeror before it submitted its proposal. In other words, an offeror preparing its proposal cannot reasonably be expected to anticipate every conceivable way in which an agency might somehow misapply or misinterpret mandatory solicitation provisions. If RFP provisions are somewhat unclear or are subject to interpretation as to how they might be applied in any of a variety of concrete factual situations which might arise during a procurement, a protest

after award challenging the way the provisions were applied during the evaluation and selection process may be considered timely. See, generally, Computer Machinery Corporation, 55 Comp. Gen. 51 (1976), 76-1 CPD 358; Amram Nowak Associates, Inc., B-187253, November 29, 1976, 76-2 CPD 454; Telos Computing Inc., B-190105, March 27, 1978, 57 Comp. Gen. _____, 78-1 CPD 235.

It is noteworthy that the present procurement did not involve a conventional solicitation document such as an RFP. The pertinent solicitation document was GSA's July 25, 1977, letter which required that copies of contract modifications be filed in Kansas City by September 23, 1977. The letter did not warn that failure to do so would result in an offeror being eliminated from the competition. In these circumstances, we see no reason why an impropriety in the solicitation reasonably should have been apparent to CSC prior to September 19, 1977.

The applicable standard for determining the timeliness of CSC's protest is 4 C.F.R. § 20.2(b)(2), i.e., protests other than those based upon apparent solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. CSC timely filed its protest within 10 working days after it was advised by GSA in November 1977 why it had been eliminated from consideration.

C. Did GE Receive Opportunity to Comment?

GE has complained several times that its ability to respond to the protest was hampered because pertinent protest correspondence was erroneously forwarded to its Washington, D.C., sales office rather than to the cognizant GE headquarters office in Rockville, Maryland. In this regard, we do not know what instructions GE gave to GSA or to the protester about where to forward correspondence. However, our Office began forwarding protest correspondence to the GE Washington office on November 23, 1977, at the request of a GE representative in that office. We continued to send correspondence to that office until March 9, 1978 (approximately

1 month before the record in the case closed), when we were informed for the first time by a GE representative at Rockville that GE wanted all correspondence sent to its Rockville office.

In these circumstances, we see no merit in GE's complaint. It is up to GE to decide where it wants protest correspondence sent and to advise other parties accordingly. In addition, the record shows that GE had more time to prepare its comments in this case than the normal amount of time (10 working days) provided in our Bid Protest Procedures for commenting on an agency report (4 C.F.R. § 20.3(d)).

III. Substantive Issue

A. Protester's Position

CSC believes that the requirement established in the GSA Project Manager's July 25, 1977, letter that copies of any pertinent contract amendments be filed with GSA's Kansas City office by September 23, 1977, was, under the circumstances, a mere formality. The protester stresses there is no question that its MASC had been effectively amended before the cut-off date to provide the reliability level GSA had required and asserts that its contract could not be "unamended" for failure to send a copy to a particular GSA official.

Further, CSC believes it cannot be seriously contended that it was too great an administrative burden for GSA-Kansas City to check with GSA-Washington and confirm the existence of contract amendments effective as of September 19, 1977, particularly since only five vendors were competing in the procurement and CSC's amendment involved such a simple change to its contract. The protester believes that to eliminate a vendor from consideration for a million dollar award in these circumstances--where the GSA Project Manager had repeatedly received oral advice that CSC's contract amendment was being accomplished, and where the Project Manager's July 25, 1977, letter (contrary to two prior requests for information from the contractors) had included no warning about the con-

sequences of failure to submit a copy of a contract amendment--is a decision which exalts form over substance, and represents an abuse of the agency's procurement authority which cannot be allowed to stand.

B. Agency's Position

GSA believes this case is analogous to a late proposal situation. The agency points out that it is well established that to insure fairness to all offerors in a negotiated procurement, there must be a common cutoff date for submission of best and final offers, and that proposals not submitted on time must be rejected, citing 48 Comp. Gen. 583, 592 (1969), 50 id. 1 (1970), 50 id. 117 (1970), 52 id. 161 (1972) and other authorities. The agency states that "firm ground rules" therefore had to be established in the present procurement, and that GSA attempted to accomplish this by the Project Manager's July 25, 1977, letter which set common cutoff dates applicable to all vendors. GSA maintains that consistent with the ground rules, any contract amendments received after the cutoff dates were properly treated as late and were not considered. To do otherwise, the agency believes, would have been prejudicial to vendors which submitted copies of their amendments on time. The agency reasons that CSC's only effective offer was its MASC and amendments thereto which had been received by GSA-Kansas City prior to the September 23, 1977, cutoff date, which, however, did not satisfy the Army's technical requirements because it provided reliability at the user level of "none." Thus, in GSA's view CSC was necessarily rejected as technically unacceptable, and GE was properly selected as the technically acceptable vendor with the lowest cost.

GSA points out that the requirement for contractors to furnish pertinent MASC information to the local ordering office is not inconsistent with the MASC's, and that this requirement was established because it would be too great an administrative burden for the GSA Washington headquarters to distribute this information. GSA notes that there are 32 MASC's in

existence, and that over 500 delegations of authority to use the Teleprocessing Services Program have been made.

Further, the agency maintains that GSA-Kansas City could not rely on oral notification of a contract modification (and subsequent documentary proof) because this would not have allowed proper analysis and evaluation within the very short amount of time allotted for the evaluation in this case (September 23-September 30, 1977). It was anticipated that the CAMMS services would begin on October 1, 1977. The agency points out that a contract modification might be complex or contain carefully worded stipulations or conditions.

GE, similarly, comments that under the MASC's selections must be made based upon the information made available by the contractors to the ordering offices, as indicated by paragraphs D.17 and D.18 of the MASC's which obligate contractors to distribute their pricelists and amendments thereto to ordering offices.

C. Discussion

The essential facts in the case are reasonably clear. A GSA ordering office in Kansas City conducted a procurement which was to lead to the selection of one of several schedule contractors to receive orders for certain services. The ordering office required that the competing contractors (1) accomplish any contract modifications pertinent to the procurement not later than September 19, 1977, with the GSA office in Washington, D.C., responsible for processing such modifications, and (2) provide copies of such modifications to Kansas City not later than September 23, 1977.

The ordering office had told the protester that for the purposes of this procurement it was technically deficient in one respect (reliability at the user level). The protester replied in writing that it would modify its contract to correct this deficiency and did so well before September 19.

There were oral statements by the protester to the GSA official conducting the procurement in Kansas City that the modification had been accomplished. However, the protester failed to furnish a copy of the modification to Kansas City by September 23.

Reasoning that the selection had to be based on the results as of the two "cutoff" dates, the ordering office decided that--due solely to the fact that a copy of the contract modification described by the protester had not been received--the protester was technically unacceptable, and selected GE as the technically acceptable vendor with the lowest cost. Subsequent to September 23, a GE contract modification had the effect of reducing its costs below the figure at which the agency states the selection was made.

We believe the basic issue in the present case is whether CSC made an offer prior to September 19, 1977, to perform the required services for the CAMMS project, including reliability at the user level of 80 percent or better. An offer to be effective must be communicated to the offeree. 37 Comp. Gen. 37 (1957). We think the offeree here was not the GSA Washington office which processed CSC's contract modification, but the GSA-Kansas City office which was conducting the CAMMS procurement.

In formally advertised procurements, as in 37 Comp. Gen. 37, there are rather strict rules as to how the communication of bids is to be accomplished. Negotiated procurements are characterized by greater flexibility, although it is required that proposals be submitted by a common cutoff date. In the present case, the Project Manager's July 25, 1977, letter amounted to a notification that "best and final" offers had to be finalized by the cutoff date of September 19, 1977. The letter further required that any portion of those offers not already in the hands of the procuring office be furnished not later than September 23, 1977. There was no warning that failure to comply with this communication requirement might or would result in the rejection of an offer.

Considering CSC's participation in the procurement through its letters, satisfactory performance of the

benchmark tests, execution of contract modification No. 2 and oral advice to GSA-Kansas City concerning the modification, there is no question that GSA-Kansas City was on notice of an offer by CSC to perform the CAMMS services. That CSC's failure to comply with the formalities of communication required by the agency was not a material defect in its offer is also clear. If GSA-Kansas City had issued an order to CSC on September 24, 1977, without having received a copy of CSC's contract modification No. 2, there is no question that CSC would have been obligated to furnish the CAMMS services with reliability at the individual user level of 90 percent because CSC in finalizing its offer prior to the September 19 cutoff date had contractually obligated itself to do so by modifying its contract.

In these circumstances, we believe it was incumbent upon the responsible GSA officials in Kansas City to make reasonable efforts to verify the contents of CSC's offer to the extent necessary. The principle involved is similar to cases where it has been held that reasonably available descriptive data on file with the Government before bid opening may properly be used to establish whether the product bid is equal to a brand name product (see Cummins-Wagner Co., Inc., et al., B-188486, June 29, 1977, 77-1 CPD 462 and decisions cited), or a situation where reasonable efforts to examine prior contract drawings referenced in a bid may resolve a bid ambiguity (Sentinel Electronics, Inc., B-185681, June 24, 1976, 76-1 CPD 405).

In this connection, the "late proposal" analogy advanced by GSA is inapposite. The rationale underlying strict application of the late proposal (and late bid) rules is to prevent even the slightest possibility of any offeror gaining an unfair competitive advantage by being able to make material changes in its offer after the cutoff date and time. As already indicated, the offers in this case consisted of the submissions made to GSA-Kansas City during the procurement along with the contract modifications implementing those submissions which had been made effective not later than September 19, 1977. For GSA-Kansas City to have verified the existence of a contract modification which had been made not later

than September 19, 1977, or to have accepted a late copy of such a modification, would not have involved any material change whatsoever in the offer; in other words, whether an offeror met the "copy requirement" could not affect the price, quality, or quantity of its offer. The copy requirement was a matter of form, established for the Government's convenience to expedite the evaluation of offers. For the Government to waive a solicitation requirement of this kind for an offeror which failed to comply works no prejudice to other offerors which did comply. See, in this regard, 40 Comp. Gen 321, 324 (1960).

Further, we are not persuaded that GSA-Kansas City made reasonable efforts to verify the contents of CSC's offer. Initially, the argument that it was impracticable to verify the existence of contract modifications because the selection was to be made within a week after September 23, 1977, is completely undercut by the fact that GSA-Kansas City spent 5 weeks evaluating the offers and making a selection. During this time, GSA-Kansas City was in contact at least twice with GSA-Washington to obtain advice concerning the procurement. Further, the protester has obtained and submitted a copy of a memorandum dated October 17, 1977, by an Assistant Commissioner of GSA's Automated Data and Telecommunications Service in Washington, D.C. The memorandum shows that GSA-Washington examined the contracts of the five vendors competing in the CAIMS procurement to determine, among other things, what contract modifications were in effect by September 19, 1977.

There was a total of eight such modifications. Copies of some of these had been submitted to GSA-Kansas City by September 23, 1977. However, GSA states that in addition to CSC, three vendors had indicated that contract modifications relevant to the procurement were being processed, but had failed to submit copies of the modifications to Kansas City. In this regard, it seems clear from the record that the possible modifications spoken of by two vendors (GE and Control Data Corporation) could not have become effective by September 19, 1977. Also, it became clear at an early stage in the evaluation that regardless of possible modifications by a third vendor (United Computing Services,

Inc.), its evaluated system life cost would not be lowest in any event. This left only one pre-September 19 modification needing verification--CSC's. Considering the extremely simple nature of this modification, we believe it is clear that with a reasonable effort its existence could have been verified by GSA-Kansas City.

For the foregoing reasons, we believe GSA's decision to reject CSC's offer as technically unacceptable clearly had no reasonable basis. It is apparent that but for the lack of reasonable efforts by GSA to verify the contents of CSC's offer, CSC would have been considered technically acceptable. It is also apparent that under GSA's own reasoning in making the selection, had CSC been technically acceptable it would have been the vendor selected, because its evaluated system life cost was lower than the cost figure which was the basis for selecting GE. The fact that a GE contract modification effective September 29, 1977, had the result of further reducing the costs the Government expected to pay for the CAMMS services is immaterial, as this modification was not accomplished prior to the September 19, 1977, cutoff date.

IV. Conclusion and Recommendation

The protest is sustained. In view of this conclusion, it is unnecessary to address other issues raised by the protester.

GSA has furnished an estimate that as of March 16, 1978, it would cost \$290,657 to change from GE to CSC as the CAMMS vendor (\$17,500 changeover costs plus \$273,157 differential between GE and CSC estimated costs for the period April 1978 .. September 1980). The \$290,657 figure does not include the amounts, if any, which GE might recover as a result of any claims against the Government.

GE suggests that any termination for convenience under the circumstances of this protest would be wrongful and would entitle it to recover damages in the form of its anticipated profits. In this regard, the law is clear that settlement of a termination for convenience does not include anticipated profits. See FPR § 1-8.303(a) (2d ed. amend. 103, March 1972) and Nolan Brothers, Incorporated v. United States, 405 F.2d 1250 (Ct. Cl. 1969). Even in cases where the Court of Claims

believed that the Government had wrongfully canceled contracts (John Reiner Co. v. United States, 325 F.2d 438, Brown & Son Electric Co. v. United States, 325 F.2d 446 (Ct. Cl. 1963)) recovery of anticipated profits was not allowed.

Further, we note that section D.11 of the MASC's provides in pertinent part:

"e. Termination of Orders by the GSA Contracting Officer.

The right is reserved by the GSA Contracting Officer to terminate orders for services under this contract. One basis for a termination of an order by the GSA Contracting Officer is the failure of the ordering agency to reimburse GSA for payments to the Contractor from the GSA ADP Fund." (Emphasis in original.)

We recommend that GSA either (1) expeditiously terminate any orders for CAMMS services issued under GE's MASC and order any further requirements for these services under CSC's MASC, or (2) reopen negotiations, establish a new common cutoff date, make a selection, and terminate any orders issued under GE's MASC in the event a contractor other than GE is selected. By letter of today, we are advising the GSA Administrator of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.


Deputy Comptroller General
of the United States