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DECISION

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

[Request For Reconsideration]

FILE: B-198782 DATE: February 19, 1981

MATTER OF: United Computing Systems, Inc.

DIGEST:

1. Prior decision is affirmed because protester has not shown any errors of fact or law in conclusions that (1) agency's basis for its current resource utilization estimate was not shown to be unreasonable and (2) agency's plan to revise RFP to reflect revised estimate was proper.

2. Agency's oral advice to offerors prior to benchmark concerning which transactions were to be measured in benchmark test constituted adequate notice of what agency's requirements were.

3. Protest against alleged defects in benchmark structure is untimely under 4 C.F.R. § 20.2(b)(2) (1980) where protester learned of basis of protest at first benchmark test but failed to file protest until after second benchmark, which was more than 10 working days after basis of protest was first known.

4. Agency's action in requiring offeror to rerun two portions of benchmark test, in requiring offeror to make routine format change prior to rerun of portion of benchmark test, and in not providing offeror third opportunity to successfully complete benchmark test was reasonable and proper in view of RFP's express requirements, time and expense of tests, and no showing of significant equipment failure.

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Our decision in United Computing Systems, Inc., B-198782, December 2, 1980, 80-2 CPD 412, concerned the protest of United Computing Systems, Inc. (UCS), against alleged improprieties in request for proposals (RFP) No. DABT19-80-R-0030 issued by the Army for certain teleprocessing support services in connection with operating the existing Computer-Assisted Map Maneuver System (CAMMS I) (a wargame for ground forces) and its second generation called CAMMS II. We concluded that (1) the Army could procure teleprocessing services for the existing training system and the second generation in a single procurement, since the technical requirements for both systems were currently known, substantially similar and adequately described in the RFP, and (2) the benchmark used in the cost comparison was not improper. This is our decision on (1) UCS's request for reconsideration of the December 2, 1980, decision, and (2) UCS's protest against the Army's determination to exclude UCS from the competition for failure to successfully complete one of the benchmark tests. For reasons indicated below, we affirm the December 2, 1980, decision and we conclude that UCS's benchmark protest is without merit.

A. UCS Reconsideration Request

UCS requests reconsideration on the ground that the December 2, 1980, decision is either factually erroneous in confusing the relevant dates or legally erroneous in applying the wrong tests to the undisputed facts. Specifically, UCS contends that, during the pendency of the protest, it demonstrated that the Army's initial estimate of resource utilization for CAMMS II was not reasonably based and that the Army's revised estimate was based on the same document (called the General Functional Systems Requirements), which was published in April 1979. UCS argues, therefore, that the Army's revised estimate was not based on later discovered information but the same information used to derive the initial estimate. Citing Informatics, Inc., B-187435, March 15, 1977, 77-1 CPD 190, aff'd, June 2, 1977, 77-1 CPD 383, UCS concludes that the Army should have the best estimate available when it first issued the RFP. Finally, UCS states that the Army should not be permitted to remedy its initial error by modifying the RFP at this stage.

In essence, the earlier decision recognized that when the Army took a second look at its estimate for CAMMS II resource utilization, in part because of UCS's convincing presentation, it determined that its initial estimate should be revised. The Army explained the basis for its more refined estimate and we concluded that UCS did not demonstrate that it was unreasonable. Further, the Army reported that it would amend the RFP to reflect the latest estimate if more than one vendor is in the competition at the point where best and final offers would be requested. In sum, the dates in the earlier decision were not confused and the decision was factually accurate.

Finally, we believe that UCS's reliance on Informatics, Inc. is misplaced. There, we concluded that negotiations should be reopened since the agency should have better advised potential offerors that the size of the file system of the incumbent contractor, which would have to be assumed, was probably closer to 1,500 files (based on current data) than the less than 20,000 files (stated in the RFP). Here, the Army recognized the need to revise the resource utilization estimate and made plans to amend the RFP, if necessary, to properly reflect the current estimate. In our view, that is all the Army is required to do.

Accordingly, since UCS has not demonstrated any errors of fact or law, the December 2, 1980, decision is affirmed.

B. UCS's Protest Regarding the Benchmark

1. What was to be Measured

The RFP contained a requirement that offerors successfully complete a certain benchmark test to demonstrate proposed technical capability and to provide a common basis for comparison of offerors' proposed costs. The RFP provided that the benchmark test was to be conducted at two sites, first in Hawaii, and second in the Federal Republic of Germany. UCS successfully completed the three portions of the test in Hawaii but failed the last of the three portions

of the test in Germany because the Army determined that UCS did not demonstate the capability of meeting the Army's "response-time" requirement.

The RFP specified a requirement for a 7-second maximum response time for interactive processing from depression of the return key or command transmission to initial response display. The RFP required that offerors demonstrate the capability of meeting the response time in at least 95 percent of the interactive processing.

Before the closing date for receipt of initial proposals, UCS protested that the RFP's response time requirement was not adequately defined in the RFP or in the Basic Agreement portion of the Teleprocessing Services Program. Later, UCS explained that the RFP did not identify the interactive processing transactions that would be counted in determining whether the offeror passed the test.

The Army did not amend the RFP to further define the transactions to be counted in determining whether an offeror passed the test. Instead, the Army reports that its representatives at both benchmark test sites explained to UCS's representatives that not all transactions would be counted; commands which required write access to files were not to be counted; summary and up-date entries were not to be counted; further, after each benchmark test, the UCS representative was given a copy of the benchmark scoring, and UCS's representatives were told of each response time considered unacceptable by the Army. The Army contends, in essence, that its specific advice to UCS should have been adequate, even if the RFP was not, and the Army argues that UCS was obligated to protest within 10 working days of such notification if UCS was still dissatisfied.

While UCS states that the Army's advice to its representatives was general and noncommittal in nature and did not explain exactly what was being timed or why, it participated in the first benchmark test and successfully completed all three portions. Therefore, UCS reponds that since it was not prejudiced by the results of the first benchmark test, it was not obligated to protest until the second benchmark test, where it was prejudiced.

We believe that, in this context, information concerning which transactions would be counted to ascertain whether an offeror demonstrated compliance constitued a modification of the RFP's requirements. Under Defense Acquisition Regulation § 3-805.4 (1976 ed.), oral advice of changes may be given in certain circumstances but the oral advice must be promptly confirmed in a written amendment. We remind the Army of its obligation in this regard to avoid in future procurements the instant conflict--between what the Army reports that it advised UCS and UCS's version--by reducing oral changes to a written amendment promptly. In situations like this, our Office has no absolute means from the record before us to determine the nature and adequacy of the oral advice. However, the record indicates that members of the Army's benchmark team and Army's local counsel went over the types of transactions that were to be counted with the UCS representatives. Further, after the benchmark, the Army's team reviewed UCS's performance with UCS's representatives. UCS admits that the conversations took place. In the circumstances, we believe that the record supports the Army's position. Thus, our first conclusion is that UCS did not establish that it was not actually advised of which transactions were to be counted. This conclusion renders moot UCS's initial basis of protest that the RFP was incomplete, since UCS was on actual notice of what was to be measured.

Our second conclusion is that the Army's oral advice constituted the agency response to UCS's protest regarding the RFP's inadequate response time definition. We believe that the Army's advice reasonably responded to UCS's need for information concerning which transactions counted. UCS lodged no objection prior to the first or second benchmark tests; instead, UCS participated in both tests and successfully completed the first benchmark test. Thus, since UCS did not timely object after actual notice of what was to be measured, UCS's protest against the adequacy of the RFP will not be further considered.

2. The Benchmark Structure

At least after the completion of the first benchmark test, we believe that UCS knew or should have known what transactions were being counted. Even if UCS was not prejudiced by the first test, at that point, it had enough information to protest if it was unhappy

with the Army's determination because it knew that the second benchmark test contained the same potential for prejudice because the Army would use the same response time definition. But UCS elected not to protest within 10 working days of the first benchmark.

Therefore, we believe that UCS's protest--based on any aspect of the benchmark procedure known to UCS from its experience in the first benchmark--is untimely under section 20.2(b)(2) of our Bid Protest Procedures, since it was not filed within 10 working days of the first benchmark. Thus, UCS's contentions concerning defects in the benchmark process that may have caused it to fail--related to "file contention," "offeror provision of terminals," "Army provision of local communications," "impact of operator (or user) error," "refusal to permit miniconcentrators," and "stopwatch measurement"--are dismissed, since they were not raised within 10 days of UCS's knowledge of their presence in the benchmark process.

UCS objects to the RFP's benchmark structure as not representing an appropriate means to adequately predict whether an offeror will perform satisfactorily. In essence, UCS contends that any test, which could result in the disqualification from the competition of an incumbent contractor for failing only one of six texts, must be unreliable. Further, citing Honeywell, Inc., 47 Comp. Gen. 29 (1967), UCS argues that it should not be eliminated solely on the basis of benchmark results. Since UCS did not raise this specific objection to the RFP until after the RFP's initial closing date, to the extent that it is a separate basis of protest, it is untimely under section 20.2(b)(1) of our Bid Protest Procedures and will not be considered.

Finally, UCS initially objected to the 95-percent requirement as not being in consonance with the General Services Administration (GSA) delegation of procurement authority (DPA). It appears that UCS based its objection on a draft DPA and when the Army provided a copy of the final DPA showing GSA's approval of the 95-percent requirement, UCS dropped this basis of protest.

3. Specific Objections to German Benchmark

UCS raises four specific objections to the Army's handling of the German benchmark. First, on December 9, 1980, UCS raised its objection to the Army's refusal to permit UCS to have access to the benchmark site to set up terminals for the August benchmark. To the extent that this objection is a separate basis of protest, it is untimely under 4 C.F.R. § 20.2(b)(2) (1980) and will not be considered.

Second, UCS objected to the Army's requirement that it rerun the second and third exercises on short notice. As background, the Army provided in the RFP that each offeror would have 3 days to complete the German benchmark. On UCS's first day, UCS set up its terminal and a condensed validation test was run. UCS could not proceed further on that day. On UCS's second day, UCS completed the exercises but the Army told UCS that it failed exercises 2 and 3 in that it did not satisfy the response time requirement. On UCS's third day, the Army advised UCS that exercises 2 and 3 would have to be rerun that day. Five hours later, UCS reran exercise 2 and passed the test. Shortly thereafter, UCS reran exercise 3 and failed the test with a score of about 80 percent as compared to the 95-percent requirement. UCS contends that it should have had more time to prepare for the reruns. We believe that the next-day retrial was reasonable in view of the time and expense involved, UCS's ability to pass exercise 2 that day, and the RFP's notice to offerors that those vendors, which did not successfully complete the benchmark within the allotted 3-day period, would be eliminated from the competition. Thus, we find this aspect of UCS's protest to be unmeritorious.

Third, UCS objects to the Army's requirement that UCS change the user format before rerunning exercise 3 on the ground that UCS did not have a fair and reasonable opportunity to make the adjustment. The Army reports, and UCS concurs, that such adjustments are common in benchmark tests. We find no merit in UCS's contention because, as the Army also reports, UCS did not object to making the change, UCS did not request more time to adjust it, the change had a trivial impact on output,

and all vendors were required to make format changes before running the benchmark test. Further, the Government has a right and an obligation to make such format changes to ensure that vendors have not "optimized" systems so that the Government would experience higher than expected costs for minor format changes during contract performance.

Fourth, UCS objects to the Army's determination not to give UCS a third opportunity to pass exercise 3. UCS contends that equipment failure caused it to fail the rerun of exercise 3 and under GSA guidelines, a second benchmark attempt should be allowed when there is an equipment failure. The Army reviewed the benchmark data relative to the rerun of exercise 3 and reports that there is no evidence of equipment failure. The Army says that the equipment failures referred to by UCS actually occurred on the day before the rerun. In our view, UCS had two opportunities to successfully complete exercise 3 and could not meet the RFP's requirements. As the RFP provided, UCS had 3 days to show its capability and did not do it. In the circumstances, we are aware of no legal requirement obligating the Army to give UCS a third opportunity. Thus, we find no merit in these aspects of UCS's protest.

4. Summary

UCS points out that four vendors submitted proposals in the instant procurement. One was eliminated because its proposal was late. One was eliminated during the Hawaiian benchmark. UCS was eliminated during the German benchmark, leaving only one firm in the competitive range. Where several firms submit proposals and only one firm is determined to be in the competitive range, our Office reviews the agency's competitive range determination very carefully to ascertain whether the agency observed its duty to obtain maximum practicable competition. Here, it appears that, in effect, each firm eliminated itself from the competition by not demonstrating that it could meet the RFP's requirements.

Here, UCS contends that it did not know what the requirements were but the Army reports that UCS was given oral notice of what was required. We conclude

that UCS has not proven its case on this point. Next, UCS contends that while it failed the test and the retest, its failure could have been contributed to by the Army operators, communications, and benchmark structure failures. It is also possible that UCS could be entirely responsible for its failure. We conclude that UCS failed to demonstrate the required response time capability and failed to raise certain benchmark-structure objections timely.

Finally, UCS contends that mere failure of the benchmark should not force UCS out of the competition. We conclude that failure to successfully complete the benchmark tests, as the RFP required, properly resulted in UCS's elimination from the competition.

Protest denied.

On February 6, 1981, UCS filed a new basis of protest alleging that the Army's communications with the only offeror in the competition gave it an unfair competitive advantage. The new basis of protest was not considered in this decision and will be considered as a separate matter.

Milton J. Socolar

For the Comptroller General
of the United States