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DECISION



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

*W. A. ...*  
GENERAL  
COUNSEL  
20540

FILE: B-189752, B-190222

DATE: November 29, 1977

MATTER OF: Burroughs Corporation

DIGEST:

1. Requirement in RFP that hardware vendors must submit price for mandatory option for software conversion does not constitute unreasonable restriction on competition, because, despite allegation that hardware vendors are being forced into software field, RFP contained no restriction on sub-contracting.
2. Contention that evaluation criteria are misleading, ambiguous and subjective is found to be without merit, because, upon review, criteria adequately advise offerors of manner in which proposals will be evaluated and evaluation of proposals is essentially a subjective judgment.
3. Possibility that ceiling price on award under software solicitation will eliminate competition from software vendors, where purpose of ceiling price is to assure lowest total system cost to Government, does not outweigh requirement that Government obtain its needs at lowest total cost.
4. Competitive advantage of incumbent contractor need not be equalized where advantage does not result from Government preference or unfair action.
5. "Unbalanced Prices" clause in RFP, which was supplemented by list of three criteria which would be utilized to determine if proposal was unbalanced, complies with past GAO decisions that offerors should be advised of standards or guidelines which will be employed in deciding whether prices are unbalanced.
6. Failure to disclose amount of ceiling price which must not be exceeded for offerors under solicitation to be eligible for award is not objectionable because ceiling price is equivalent to Government estimate which will be used to decide reasonableness of prices submitted and there is no requirement that Government estimates be disclosed.

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7. Whether or not contracting officer has made determination under FPR § 1-3.807-3(b) that there is adequate price competition, there is nothing objectionable in requiring cost and pricing data to be submitted with proposals since cited regulation makes it discretionary with contracting officer as to when data will be requested and data will be utilized in deciding whether proposals are unbalanced.
8. Where RFP excludes certain nonallowable software conversion efforts, which will be competed under separate procurement, protest that separate procurement may not result in lowest cost to Government is denied, since overall effect of separate procurements is to increase competition and thereby give Government best opportunity for obtaining lowest cost.

Burroughs Corporation (Burroughs) has protested the award of any contracts under request for proposals (RFP) Nos. 00-77-R-26 and 00-77-R-41 issued by the Department of Agriculture.

RFP 00-77-R-26 is for the procurement of a computer system for the Department of Agriculture Kansas City Computer Center to replace and consolidate the existing computer systems at the Kansas City and the St. Louis Computer Centers. RFP 00-77-R-41 is for the procurement of a computer system at Agriculture's New Orleans Computer Center. Since both protests filed by Burroughs involve the same grounds, they have been consolidated into this single decision.

Both procurements employ a similar method of obtaining the hardware equipment and software conversion effort. An RFP is issued to hardware vendors for the hardware requirements of Agriculture. Also included in the RFP is a mandatory option for the software conversion effort which must be offered by the hardware vendors in order for their proposals to be determined acceptable. The software conversion must be separately priced from the hardware costs. Following the award under the RFP, which is based on technical acceptability and lowest overall cost for both hardware and software conversion, another solicitation is issued to software firms solely for the software conversion effort. After a technical review of the software proposals, either a separate award for the software is made under the second solicitation or the option is exercised under the first solicitation depending on the costs involved. A ceiling price for the software solicitation is obtained by subtracting the low hardware vendor's

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total system cost less its conversion cost from the second low hardware vendor's total system cost. The separate software solicitation will be awarded only if the cost is less than the ceiling price obtained by the above formula. The ceiling price is not disclosed until after the software award.

Burroughs' first basis of protest is that the RFP's utilize a new and unusual contracting technique which could have an adverse impact on Federal competitive bidding and on computer hardware and software vendors. In these procurements, both the hardware requirements and software conversion effort are mandatory items upon which a hardware vendor must submit a proposal. Burroughs argues that this method of procurement does significant violence to the traditional method of procuring computer services. By using this method, Agriculture is forcing a hardware vendor into the software field in order to remain competitive. If a hardware vendor does not desire to become involved in software, the only option is to make a collateral arrangement with a software firm. Burroughs contends this result is contrary to Federal procurement law and regulations, both in letter and spirit.

The reason for this procurement approach, according to the General Services Administration (GSA), which issued a Delegation of Procurement Authority (DPA) to Agriculture approving this manner of procurement, and Agriculture, is to assure the lowest total system cost to the Government. While it is unfortunate if certain hardware vendors forego competing in the procurement because of the mandatory software portion, the inclusion of the requirement is not an unreasonable restriction on competition. Here, as will be discussed infra, the Government is retaining the option as to whether purchasing the entire system from one firm or purchasing components from various suppliers offers the lowest cost to the Government. Moreover, there is no prohibition in the RFP's forbidding hardware vendors from subcontracting the software portion of the procurement if they chose to do so. Accordingly, our Office has no objection to the requirement that a hardware vendor must also offer to perform the software conversion effort.

Burroughs cites a portion of a House Government Operations Committee position paper, entitled "Basic Principles Governing the Management of P.L. 89-306," to support its position that hardware vendors should not be required to propose a conversion effort. The cited portion states:

"Following the procedures prescribed by GAO and GSA in the USDA Kansas City procurement, vendors must be required to bid separately on software conversion. To further assist

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agencies in evaluating realistic software needs and software conversion costs, there is a need to support and adequately fund the Software Conversion Program . . . . By separating software procurement from hardware, the element of undue competitive advantage that might otherwise accrue to a hardware vendor of an in-place system would be eliminated. (Emphasis added.)"

Burroughs asserts that the language, "vendors must be required to bid separately on software conversion," should be interpreted to mean those vendors who choose to bid on software must be required to bid separately on the software conversion. Burroughs contends that realistic software costs will not be obtained by forcing all hardware vendors to bid on conversion costs.

We believe Burroughs' position is a tortured interpretation of the clear meaning of "vendors must." GSA and GAO obtained the same meaning from the phrase as Agriculture did and the congressional committee which issued the position paper was aware of this interpretation and has raised no objection to software being a mandatory option.

Burroughs' second basis of protest is that the evaluation criteria contained in the RFP's are misleading and ambiguous. Paragraph G.7.7 of the RFP's relating to software and data conversion states, in part, "The offer for software and data conversion will be part of the overall evaluation of this proposal." In amendment A-09 to RFP -26, the following question was posed by an offeror and responded to as follows by the contracting officer:

"QUESTION:

"7. It is our understanding that the technical evaluation section of the Conversion RFP (00-77-R-29), including its points structure, will not be included in the final evaluation of the Hardware RFP (00-77-R-26). The result being that only the price of the Conversion will be evaluated. Furthermore, after the hardware award is made and the target system announced, the winning hardware vendor's response will be evaluated again and at this time the

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technical evaluation, with its concurrent point structure, will be applied. Is this interpretation correct?

"ANSWER:

"7. It is the intent of the Government to fully evaluate the technical proposal of the OEM for conversion prior to award of the hardware RFP. A technical score will be assigned during the hardware evaluation for purposes of future evaluation under the conversion RFP. However, the score will not affect the award of the hardware RFP except that the conversion must be at an acceptable as is level. The price for conversion will be negotiated during overall negotiation of the hardware RFP. After award of the hardware RFP, the only area open to the OEM vendor is a price reduction of his offered cost for conversion."

Burroughs states it desired further clarification of the evaluation criteria and filed a protest letter with the contracting officer concerning the criteria and was advised by the contracting officer that:

"1. The solicitation-evaluation criteria are stated on pages 14 and 15 of RFP-00-77-R-29. The conversion response to the hardware RFP must be in an 'acceptable as is' condition by completion of negotiations and call for best and final.

"2. Only one set of evaluation criteria will be utilized in the two phases of the procurement. The criteria, as already stated, are stated on pages 14 and 15 of RFP-00-77-R-29."

Burroughs argues that the evaluation criteria contained on pages 14 and 15 are totally subjective in nature and, while appropriate for the software portion of the procurement, clearly miss the benchmark evaluation of the hardware portion of the procurement, against which the industry is used to competing.

The evaluation criteria contained in the RFP for software conversion, which were made a part of the hardware RFP, are as follows:

"SECTION D - EVALUATION AND AWARD FACTORS

"A. Evaluation

- "1. Initial Review. Vendors' proposals will be reviewed first to ascertain if they satisfy all stated requirements. Those proposals that meet all requirements will then be evaluated on the basis of a uniform selection criteria and weighting technique.
- "2. Two-Phase Evaluation. Proposals will be evaluated in two phases, the first on technical and experience factors. The second on the results of Phase I evaluation and on cost. Only those proposals which are judged to be technically qualified in Phase I evaluation will be further evaluated under Phase II.
- "3. Relative Values. Points have been assigned to the selection criteria on Phase I evaluation. During the evaluation process a score will be developed for each proposal by each member of the selection committee. The evaluation process will include a review of each offeror's proposal and a personal interview, if such interview is deemed to be necessary by the Government.

- "B. Phase I Evaluation 1. 100 Points
- "1. Personnel Qualifications 30 Points
    - "1.1. Relative experience of the team - 25 points
    - "1.2. Mix of skills of proposed personnel - 5 points
  - "2. Experience of Firm and Corporate Management 15 Points
    - "2.1. Degree of general corporate experience - 5 points
    - "2.2. Level of management participation - 5 points
    - "2.3. Quality, extent, depth, and variety of prior experience - 5 points

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- "3. Technical Approach to the Statement of Work 40 Points
- "3.1. Degree of use of conversion aids proposed - 10 points
  - "3.2. Conceptual soundness of approach - 15 points
  - "3.3. Schedule and plan to implement the approach - 10 points
  - "3.4. Use of project management techniques - 5 points
- "4. Responsiveness and thoroughness of Proposal 15 Points
- "4.1. Responsiveness and thoroughness of proposal - 5 points
  - "4.2. Innovative approaches in proposal - 10 points
- "C. Call For Best and Final Offer. All offerors who pass Phase I evaluation will be requested to furnish a 'Best and Final' cost figure for the proposal. Upon receipt of the 'Best and Final' price, the Government will proceed to Phase II evaluation.
- "D. Phase II Evaluation. Each successful offeror submitting a 'Best and Final' offer will have his proposal evaluated using a formula assigning 50 percent weight to the technical portion (Phase I) and 50 percent weight to the cost portion of the proposal. Using the lowest proposal cost as base, the offeror receiving the highest weighted score in Phase II evaluation will be eligible for award pending a preaward survey, if deemed necessary by the Government, and a positive determination of responsibility by the Contracting Officer."

Regarding the contention that the evaluation factors are totally subjective, our Office has always recognized that the evaluation of proposals is essentially a subjective judgment. 52 Comp. Gen. 198, 209 (1972), and Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. Further, we find that the statement in the

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RFP in paragraph G.7.7 and the answer to question 7 in amendment A-09 adequately advised offerors of the manner in which their proposals would be evaluated. When a hardware vendor submits its proposal, the software portion of the proposal will be evaluated in accordance with the above criteria. However, the score arrived at following this evaluation is not utilized in determining the successful hardware vendor. An offeror's software proposal must be technically acceptable (at an "acceptable as is" level) to be eligible for award consideration. The hardware award is made to the offeror with technically acceptable hardware, determined during a benchmark demonstration, and software who offers the lowest total system cost. Then, during the evaluation of the software RFP, the successful hardware vendor's software score, arrived at during the evaluation under the first RFP, is used to compute the 50-percent technical and 50-percent cost award formula to determine if the software conversion option under the hardware contract should be exercised.

Upon our review, we conclude that the RFP adequately advises offerors of the evaluation factors to be employed and the manner in which the successful offerors will be selected. National Health Services, Inc., B-186180, June 23, 1976, 76-1 CPD 401, the decision cited by Burroughs for the proposition that offerors must be advised of the evaluation factors to be used, is distinguishable from the instant fact situation. In the procurement considered in the cited decision, the agency only advised offerors that award would be based on "price and other factors" and the solicitation did not contain detailed evaluation criteria similar to that quoted above.

Next, Burroughs argues that the ceiling price on the possible award of the second or software RFP will effectively eliminate any meaningful participation by technically competent software vendors. The ceiling price, as noted above, is the difference between the successful hardware vendor's total system cost (hardware and software) less the cost of software conversion and the next low offeror's total system and award will be made under the second solicitation only if the cost is below the established ceiling price. Burroughs states that since conversion prices must be evaluated in the fifth month of the cost evaluation model (thereby incurring a



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high present value factor), Agriculture is encouraging hardware vendors to understate their true conversion costs or bury them in the hardware portion of the proposals. These factors, contends Burroughs, could lead to an unreasonably low ceiling price which would necessitate rejection of otherwise valid software proposals and, therefore, would be unreasonably restrictive of competition.

Interrelated with the above basis of protest are two more separate bases which must be considered together with the ceiling price argument.

First, Burroughs states that the RFP gives an unwarranted advantage to the incumbent contractor because the incumbent's conversion cost will be substantially lower than any other hardware vendor's. Because the incumbent could show the Government that little or no cost would be involved in conversion, subsequent offers by the software industry against the resulting ceiling price would be an academic exercise.

Secondly, Burroughs argues that the unbalanced price criteria contained in RFP -26 and in the answer to question 63 in amendment A-08 are misleading and confusing to offerors and emasculate the concept and understanding of "unbalanced bidding." The RFP contained the following clause at paragraph B.9.3 relating to unbalanced offers:

"B.9.3. Unbalanced Prices

"An offer which is unbalanced as to prices for the basic and optional quantities may be rejected. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items. In determining an offer which is unbalanced as to prices, the Government will evaluate separate charges, if any, which the Government will incur for failure to exercise the options."

Question 63 and the answer were as follows:

"QUESTION:

"63. How will you determine a proposal to be unbalanced?"

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"ANSWER:

"63. A proposal will be measured as being unbalanced by applying three criteria:

- "a) the Government estimate;
- "b) the historical data submitted by the vendors (conversion only); and
- "c) the competitive range established by all the vendors.

"a) The Government has established an estimate for the performance of the conversion effort. Significant deviation from this estimate will be a reason for deeming a proposal unbalanced.

"b) The historical data submitted by the vendor for conversion will reflect labor rates, overheads, etc., and other costs incident to the performance of work. Should a vendor drastically reduce a negotiated price without technical support for such reduction he may have his proposal declared unbalanced.

"c) The competitive range is effectively established by the various vendor-participants in the RFP. If a vendor has a significant deviation from the established competitive range for unit as well as total cost the proposal may be declared unbalanced.

"One, two or all three factors may be utilized in determining a proposal to be unbalanced as to prices."

Burroughs argues that vendors do not know if the above three criteria relate to unbalancing between the hardware and software proposals or within the hardware and software proposals. Burroughs concludes by stating that it does not see any relation between the three criteria announced in question 63 and determining unbalancing as between "prices and optional quantities" addressed in paragraph B.9.3.

Initially, the purpose of the ceiling price formula is to avoid the possibility of separate awards being made under the two solicitations at a total system cost which exceeds the second low hardware vendor's total system cost under the first RFP. While Burroughs argues that the ceiling price will eliminate competition

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from software vendors, we do not find this factor to outweigh the requirement that the Government obtain its needs at the lowest total cost. See Martin & Turner Supply Company, 54 Comp. Gen. 395 (1974), 74-2 CPD 267.

Regarding the contention that by evaluating the conversion prices in the fifth month of the cost evaluation model, resulting in a high present value factor, the Government is encouraging the understatement of conversion costs, we believe this is based on erroneous information. In amendment A-09 to RFP -26, the contracting officer in response to question No. 3 regarding the date to be used for price proposal evaluation stated:

"\* \* \* the conversion portion of the solicitation will be evaluated in Month 1 of the system life. \* \* \*"

Our Office has often recognized that firms may enjoy a competitive advantage by virtue of their contract incumbency. As long as the advantage does not result from Government preference or unfair action, there is no requirement for equalizing competition by taking into consideration these types of advantages. See Kay and Associates, Incorporated, B-187521, March 4, 1977, 77-1 CPD 163, and Aerospace Engineering Services Corporation, B-184850, March 9, 1976, 76-1 CPD 164. We have found no evidence of preference or unfair action in the instant procurements.

Concerning Burroughs' allegation relating to unbalancing of proposals, we believe the unbalancing clause relates to both examples given by Burroughs in its protest. The hardware proposal must be balanced between the hardware, support, maintenance and various special plans offered and the software proposal likewise balanced. Also, the hardware and software proposals must be balanced between themselves. In other words, all items offered must carry their share of the cost.

As to the unbalancing clause itself, we believe it sufficiently advises offerors as to the criteria to be employed in judging whether a proposal is unbalanced. In past decisions of our Office, we have stated that merely advising bidders or offerors that unbalanced proposals will be rejected does not adequately inform offerors of the standards or guidelines which will be utilized in reaching such a

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decision. Without such guidelines, any determination by an offeror in preparing its proposal would necessarily be subjective in nature rather than objective. See Mobilease Corp., 54 Comp. Gen. 247 (1974), 74-2 CPD 185; Standard Services Incorporated, B-182294, April 8, 1975, 75-1 CPD 212, and Burroughs Corporation, 56 Comp. Gen. 142 (1976), 76-2 CPD 472. The three guidelines or criteria stated in response to question 63 adequately comply with the above requirement.

With regard to Burroughs' concern that the incumbent could submit a low conversion cost, under the above criteria (particularly historical data), the incumbent, as well as other offerors, will have to justify the amount shown for conversion or risk being rejected as unbalanced.

Burroughs has raised several additional grounds of protest in relation to RFP's -41 and -44 for the New Orleans Computer Center.

Burroughs argues that RFP -44, the software solicitation, does not advise software vendors that they are competing with the hardware vendor's proposal under RFP -41, that a ceiling price exists and what that price is. Agriculture has advised that when the award is made under RFP -41 for the hardware, an amendment will be issued to RFP -44 advising the software vendors of the targeted system and of the ceiling formula to be used. The manner in which the ceiling price is arrived at will be explained; however, the amount of the ceiling will not be disclosed. To disclose the ceiling price would result in an auction under the software solicitation according to Agriculture.

Therefore, software vendors will be advised of the ground rules of the solicitation. As concerns the failure to reveal the amount of the ceiling, we do not believe this is required. In effect, the ceiling price will be utilized by Agriculture to determine the reasonableness of the prices offered under RFP -44 much the same as a Government estimate. There is no requirement for the Government to disclose this type of information and, in some instances, disclosure of a Government estimate is prohibited specifically. See, for example, section 18-108 of the Armed Services Procurement Regulation (1976 ed.). See also Nicolai Joffe Corporation (Reconsideration), 56 Comp. Gen. 230, 238 (1977), 77-1 CPD 9.


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Burroughs objects to the requirement that the hardware vendors must submit cost detail breakdowns for their conversion proposals because this information is not required by section 1-3.807-3(b) of the Federal Procurement Regulations (1964 ed. amend. 138) where there is adequate price competition and that the requirement puts an unwarranted burden on the offerors. FPR § 1-3.807-3(b) states that cost and pricing data need not be obtained where the contracting officer determines in writing that there is adequate price competition. Whether or not the Agriculture contracting officer has made such a determination, the cost and pricing data can still be requested since the cited regulation makes it discretionary with the contracting officer and the data will be utilized to determine whether proposals are unbalanced. Therefore, we see nothing objectionable in requiring the data.

Burroughs also questions the exclusion from the software RFP of nonallowable conversion costs and including only allowable conversion costs. The allowable conversion costs are those involving high level (COBOL or FORTRAN) language conversion and the nonallowables are the conversion efforts to other than high level languages. Burroughs argues that these nonallowables will be procured under a third solicitation and, therefore, because of this third procurement, the system may not be procured at the "lowest total cost."

Nonallowables were excluded from the software solicitation to enhance competition and remove an unfair advantage which the incumbent would have because of vendor unique languages in existing programs. By restricting the software proposals to high level standard languages, more firms are able to compete for the software award. By obtaining more competition for the system, the Government has the best opportunity for obtaining the lowest system cost. We recognize, however, that treating the nonallowable conversion effort in this manner may not result in the lowest overall cost to the Government. This situation is analogous to instances where agencies have decided not to consider the cost of changing contractors in evaluating proposals, which we have found to be within the agency's discretion. 49 Comp. Gen. 98 (1969) and 50 *id.* 637 (1971). Therefore, and since the overall effect will be to increase the competition and to obtain for the Government the resulting benefits, we do not find the treatment of the nonallowable conversion effort to be objectionable.

Accordingly, our Office has no objection to the procurement method being utilized by Agriculture and Burroughs' protest is denied.

  
Deputy Comptroller General  
of the United States



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

*J. Keenan  
P. 2*

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November 29, 1977

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

Dear Mr. Chairman:

This is in regard to the prior interest you have expressed in the Department of Agriculture's ADP procurements for the Kansas City and New Orleans Computer Centers.

Enclosed is a copy of our decision of today on the protest of Burroughs Corporation.

Sincerely yours,

Deputy

*R. M. Keenan*  
Comptroller General  
of the United States

Enclosure