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DECISION



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

FILE: B-193527

DATE: September 22, 1980

MATTER OF: International Business Machines
Corporation--Reconsideration

DIGEST:

GSA action in accepting proposal deviating from literal terms of standard contract Master Terms and Conditions (MTC) in one procurement, while rejecting deviating proposals in other procurements, may have caused confusion on negotiability of MTC. Recommendation to clarify policy on acceptance of deviating proposals, requested by protester, is not necessary, however, as MTC has been revised to provide for negotiation concerning literal compliance with requirements.

International Business Machines Corporation (IBM) has requested reconsideration and clarification of our decision in International Business Machines Corporation, B-193527, October 23, 1979, 79-2 CPD 280. In that decision, we considered the propriety of the General Services Administration's (GSA) Master Terms and Conditions (MTC) program for procuring automatic data processing equipment (ADPE). We found that the program was within the authority of the Administrator of GSA "to coordinate and provide for the economic and efficient purchase, lease, and maintenance" of ADPE, 40 U.S.C. § 759 (1976), and that it was not contrary to law or otherwise detrimental to the Government's interest.

On reconsideration, IBM has requested that we further address the question of GSA's conduct in administering the MTC program. IBM alleges that GSA has been inconsistent in its administration of the program in recent procurements. According to IBM, GSA has summarily rejected several IBM proposals which deviated from the MTC while accepting proposals from

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IBM and other offerors which also deviated from the MTC. IBM argues that, because of this inconsistency, potential offerors cannot know the rules of MTC procurements--a situation which "flaunts all accepted and acceptable principles of fairness in the competitive process." Therefore, GAO should require GSA to clarify the situation by stating whether the MTC is entirely nonnegotiable, thereby requiring rejection without discussions of all deviating proposals, or whether the MTC is negotiable, thereby requiring GSA to discuss proposed deviations with offerors. IBM states that to permit GSA to use both approaches in an ad hoc manner is unfair and unacceptable.

IBM initially argued that GSA's conduct in four recent procurements proves that its administration of the program has been inconsistent, capricious and unpredictable. IBM later agreed to resolution of this reconsideration without our consideration of one of the procurements which is the subject of a separate protest here. GSA contends that its actions have been reasonable, consistent and in accordance with the request for proposals (RFP) in each instance. IBM's allegations and GSA's responses concerning each procurement are discussed below.

RFP No. GSA CDPR-D00025

IBM argues that it was awarded the contract even though it had not executed the MTC and its proposal deviated from the MTC. GSA points out that, while the procurement was initially conducted under the MTC program, all prices received were unreasonable and the solicitation was canceled. Then a sole-source award was negotiated with IBM. This, GSA argues, was not an MTC procurement and whether IBM's proposal complied with the MTC is irrelevant.

RFP No. GSA CDPR-T00012N

IBM's proposal was rejected because it did not comply with the MTC. IBM contends that the awardee's (Amdahl Corporation) proposal also deviated significantly from the MTC, yet it was accepted. IBM points out that, while the Standard of Performance clause

required a 90-percent effectiveness level to be achieved in 90 days, Amdahl offered and GSA accepted a 95-percent effectiveness level to be achieved in 120 days. IBM also argues that Amdahl was permitted to deviate from the MTC definition of "downtime" in its proposal. The MTC definition includes "software" and measures downtime from the time that the Government makes a bona fide attempt to notify the contractor of the malfunction. According to IBM, Amdahl offered and GSA accepted a definition that deleted software malfunctions and measured downtime from the time that Amdahl's designated representative was actually notified of the malfunction by the Government.

GSA argues that Amdahl executed the MTC and its offer conformed to them with "minor deviations." GSA admits that Amdahl was permitted to offer 120 days to meet the required performance level, but contends that the proposed higher performance level (95 percent vs. 90 percent) offset the extended time and thus rendered the deviation minor. Concerning Amdahl's definition of downtime, GSA argues that it was equivalent to the MTC definition because software malfunctions are included in the term "system" in Amdahl's definition and Amdahl's designated representatives were on-site during the testing, rendering actual notification to them the equivalent of a "bona fide attempt to notify the contractor." GSA contends that, by comparison, IBM's deviations from the MTC were substantial.

IBM argues, however, that even assuming that the Amdahl deviations are minor, if the rule is, as GSA allegedly has stated, that the MTC are mandatory and nonnegotiable, then the magnitude of the changes is irrelevant and literal compliance is required.

RFP No. GSA CDPR-C-00010N

IBM's offer, incorporating deviations from the MTC, was rejected without discussions. According to GSA, after proposals were evaluated, the agency's requirements changed to the extent that peripheral equipment was not needed. An amendment deleting this requirement was issued to the eight offerors whose

initial proposals were found to be acceptable. Award was made on the basis of proposals altered in response to the amendment. IBM attempted to submit an amended offer, which was rejected.

IBM attacks GSA's actions, based on the understanding that the justification for refusing to hold discussions with IBM was that award was made on the basis of initial proposals due to urgency and because adequate price competition had been achieved. IBM contends that adequate competition was not achieved and that, even assuming that it was, award was not made on the basis of initial proposals. Therefore, IBM contends discussions were required with all offerors including IBM.

ANALYSIS

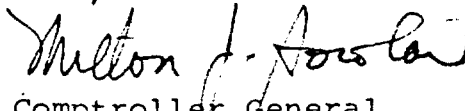
We agree with GSA that whether IBM's proposal deviated from the MTC in RFP No. GSA-CDPR-D00025 was irrelevant, since the MTC solicitation was canceled when all prices received were determined to be unreasonable. The award was made to IBM on a sole-source basis.

Concerning RFP No. GSA CDPR-C-00010N, GSA did argue that no discussions were required because adequate price competition had been achieved and award was made on the basis of initial proposals. However, our decision did not uphold the lack of discussions in MTC procurements on that basis, but rather it reaffirmed our view that the use of model contracts to procure ADPE, even though it inherently limits discussions, is a permissible exercise of the GSA Administrator's discretion under the Brooks Act, 40 U.S.C. § 759(a) (1976). Therefore, the arguments concerning the initial proposal justification are irrelevant. IBM has not shown that GSA negotiated with offerors proposing deviations from the MTC or that award was made on the basis of such a deviating offer in this procurement.

GSA's actions in RFP No. GSA CDPR-T00012N, however, may have caused some confusion with regard to its stance on the negotiability of the MTC. The provisions of the MTC are stated as mandatory requirements and the RFP states further that proposals which

do not meet the mandatory requirements will not be considered for selection. In accepting Amdahl's admittedly deviating offer, GSA apparently determined that Amdahl's offer was in substantial compliance with the mandatory requirements. Generally, such a determination is within the discretion of the contracting agency so long as the determination is reasonable. See, e.g., KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429. Assuming that the determination in this case was reasonable, we think that, in the context of GSA's pronouncements concerning the nonnegotiability of the MTC and its actions in other MTC procurements in conformance with those pronouncements, its acceptance of the deviating Amdahl proposal could be reasonably interpreted as constituting inconsistent treatment of offerors.

A recommendation, as requested by IBM, that GSA cure the inconsistency by amending the MTC to explicitly provide for the acceptance of offers not in literal compliance with the MTC is not necessary, since we have been advised that the MTC program has already been revised to permit negotiation with respect to the method of meeting MTC requirements.



For the Comptroller General
of the United States