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DECISION



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

FILE: B-193527

DATE: October 23, 1979

CN 6/29/61

MATTER OF: International Business Machines Corporation

DIGEST:

[Protest of Proposed Award of GSA Contract for Data Processing Equipment]

1. Protest alleging improper conduct of Master Terms and Conditions (MTC) program for procuring ADPE will be considered as significant issue, even if untimely, since protest could affect numerous future procurements under MTC program.
2. Protester has not shown that agency determination that MTC provisions represent minimum needs of Government is unreasonable.
3. Administrator of GSA has broad discretion in area of ADPE procurement, so long as procurement policies do not violate law. MTC program is not abuse of that discretion.

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International Business Machines Corporation (IBM) protested the proposed award to ITEL Corporation (ITEL) of contracts for automatic data processing equipment (ADPE) under requests for proposals (RFP) Nos. RFP GSA CDPR-T-00007N and -C-00010N issued by the General Services Administration (GSA). IBM withdrew its protest of 00007N, since it was awarded the contract under that solicitation. However, in its withdrawal letter, IBM stated that it considered GSA's conduct of 00007N to be relevant to the remaining issues of the protest. ITEL was awarded the contract under 00010N.

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Background

Both procurements were issued under GSA's Master Terms and Conditions (MTC) program. The MTC program was initiated in 1972 to encourage competition in the

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procurement of brand name ADPE where the equipment is available from other sources in addition to the original equipment manufacturer (OEM). Generally, the MTC's establish requirements such as bid bonds, performance bonds, acceptance testing, maintenance requirements, and acceptable price plans. These requirements are made a part of every solicitation issued under the program. Each solicitation states the particular ADPE requirement and other technical requirements of the user agency for whom the ADPE is being procured.

Firms may agree to the MTC's on an annual basis, in which case they are eligible for award of a contract on any solicitation conducted under the MTC's. Firms may also agree to the MTC's for a particular procurement. While most firms that have agreed to the MTC's are non-OEM's, OEM's are not precluded from competition under the MTC's and may agree to them. IBM, however, has never agreed to the MTC's on an annual basis.

Prior to 1978, when IBM submitted an offer in response to an MTC solicitation, the offer was based on IBM's ADP Schedule contract with GSA. Since the terms of IBM's Schedule contract were and are different from the MTC, these offers were considered unacceptable. According to GSA, IBM showed no interest in participating in the MTC program until late 1977, after the first MTC procurement for plug-compatible central processing units (CPU's) was conducted. At that time, IBM expressed an interest in participating in the MTC program. GSA was considering a review and update of the MTC's, because they had not been revised substantially since 1972 and the market had changed substantially. In December of 1977, GSA and IBM agreed to meet to discuss IBM's participation in the MTC.

Meetings were held between GSA and IBM in February, March and April of 1978. The purpose and nature of these meetings are in dispute. GSA's view of the discussions is that they were for the general purpose of ascertaining IBM's objections to the MTC's so that these objections could be considered in any upcoming revision of the MTC's. IBM contends that the purpose of these meetings was to develop an acceptable set of MTC's for use by IBM in future

MTC procurements. According to IBM, tentative agreement was reached on such a set of MTC's.

IBM submitted offers on five MTC procurements, including the two protested here, incorporating the "revised" MTC's which resulted from the discussions with GSA. According to IBM, it assumed that its offers would be considered even though it had not executed the "standard" MTC's. IBM was notified that award had been made to another offeror due to a lower price on one of the procurements. On October 11, 1978, GSA notified IBM that its offers submitted in response to the four other RFP's would not be considered for award because of exceptions to the terms and conditions of the RFP's and the MTC's. Subsequently, IBM was awarded a contract under 00007N when it deleted its exceptions to the MTC's.

On October 16, 1978, IBM protested this action to GSA. Basically, IBM argued that it had been led to believe, through various actions of GSA, that its proposals based on the "revised MTC's" would be considered by GSA and that the rejections violated this understanding. IBM also contended that its deviations from the standard MTC's were minor.

On November 20, 1978, IBM protested to GAO. On November 21, GSA denied IBM's protest.

Grounds of the Protest

IBM's protest is based on GSA's overall conduct of the MTC program and its conduct of the two specifically named procurements. IBM argues that GSA's conduct of the MTC program and these procurements is deficient in the following respects:

1. The MTC's are out-of-date "boilerplate" and overstate, or otherwise do not accurately represent, the minimum needs of the user agency on a case-by-case basis.
2. The rejection of IBM's offer, without negotiations, for noncompliance with all aspects of the MTC's, violates the statutory and regulatory

requirements for meaningful discussions in negotiated procurements, since IBM's offer was technically acceptable and in conformance with its "agreement" with GSA.

3. GSA has entered into discussions with other firms on MTC procurements and has permitted deviations from the MTC's in such cases. Such action discriminates against IBM and illustrates that the MTC's do not represent the Government's minimum needs and that GSA can and does enter into discussions concerning the MTC's.

Timeliness

GSA and ITEL argue that IBM's protest is untimely and should be dismissed. They note that the protested solicitations stated that failure to comply with the MTC's would result in rejection of the offer. Therefore, they contend that the grounds of IBM's protest were apparent from the solicitation and IBM was required to protest before the closing date for initial proposals by section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979). Since the closing date of GSA-CDPR-C-00010N was August 15, 1978, and IBM's protests to GSA and GAO were filed after that date, they assert that the protest is untimely.

IBM contends that GSA's actions and statements led it to believe that its offers based on "revised MTC's" would be considered. According to IBM, it first knew that its offers would not be considered on October 11, 1978, when it received letters to that effect from GSA. Therefore, IBM argues, its protest to GSA of October 26, 1978, was timely and its protest to GAO is timely since it was filed prior to any adverse action by GSA.

It is unnecessary for us to resolve the issue of timeliness, since, even if IBM's protest is untimely, we will consider it under the "significant issue" exception to our timeliness rules. 4 C.F.R. § 20.2(c). The term "significant issue" refers to a principle of widespread interest to the procurement community. 52 Comp. Gen. 20 (1973). Since this protest challenges the propriety

of the MTC program under which numerous future procurements will be issued, it is of widespread interest. See Edw. Kocharian & Company, Inc., B-193045, January 15, 1979, 79-1 CPD 20; Mayfair Construction Company, B-186278, August 10, 1976, 76-2 CPD 148.

GSA has objected to IBM's reliance on facts and allegations concerning other MTC procurements that are not being protested here. According to GSA, these facts and/or allegations are irrelevant. We disagree. IBM is protesting the overall conduct of the MTC program. Such a protest would be difficult, if not impossible, to pursue if the protester was precluded from submitting evidence and arguments from several procurements conducted under the same program.

Merits

IBM has recounted circumstances which, in its opinion, illustrate that the MTC's do not represent the Government's minimum needs, which show that the MTC's have been the subject of negotiation with others, and which illustrate GSA's discriminatory treatment of IBM.

IBM contends that the fact that GSA would meet, negotiate and agree on revised MTC's in the spring of 1978 indicates that the MTC's as they stand are not reflective of the Government's minimum needs and that they are negotiable. IBM also notes that GSA has stated that the MTC's have basically been unchanged since 1972 and are in need of revision.

IBM argues that GSA's acceptance from Amdahl, Inc. (Amdahl), of terms at variance with the literal wording of the MTC's, in RFP GSA CDPR-T-00012N, an MTC procurement, again indicates that the MTC's overstate the Government's minimum needs and are subject to negotiation. According to IBM, Amdahl's offer deviated in significant respects from the literal wording of the MTC's. 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

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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. IBM contends that this shows that the standard MTC's did not represent the user's actual needs, that they are negotiable and that others are permitted to deviate from the literal wording of the MTC's without penalty, while IBM's proposals are rejected for similar deviations.

IBM further contends that the initial determination by the contracting officer under RFP GSA-CDPR-T-00007N that its initial proposal, incorporating deviations from the MTC's, was acceptable is evidence that its proposal met the Government's minimum needs and, therefore, should have been considered for award. IBM also argues that if its proposal deviating from the MTC's is acceptable, then the MTC's as stated did not represent the Government's minimum needs. IBM has characterized its offers, in the procurements discussed, as incorporating the MTC's with minor clarifications.

GSA's general response is that IBM's offers contained substantial deviations from the MTC's, including substantive deviations from Standard Form 32 (General Provisions (Supply Contracts)) and the supplement to that form, GSA Form 1424. Therefore, GSA argues, IBM's offers were unacceptable and were required to be rejected. GSA also argues that negotiations are not required to be conducted where award may properly be made on the basis of initial proposals and is in fact made on that basis. In the protested procurement, GSA states that the condition required for making award on the basis of initial proposals, adequate competition, was met and award was in fact made on the basis of initial proposals.

With regard to IBM's allegations concerning the award to Amdahl, GSA argues that Amdahl executed the MTC's 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 states that the contracting officer's initial determination of the acceptability of IBM's initial offer on RFP GSA-CDPR-T-00007N was in error, since the offer deviated substantially from the MTC's.

The Federal Property and Administrative Services Act of 1949, as amended, authorizes the Administrator of General Services "to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service," to "prescribe policies and methods of procurement" and to "procure and supply personal property and nonpersonal services for the use of executive agencies." 40 U.S.C. § 481(a) (1976). The Administrator's specific authority "to coordinate and provide for the economic and efficient purchase, lease, and maintenance" of ADP equipment was added by the Brooks Act, 40 U.S.C. § 759(a) (1976). We have held that these provisions vest in GSA broad authority over Government procurement of ADPE, 47 Comp. Gen. 275 (1967); 48 *id.* 462 (1969); 51 *id.* 457 (1972), and that in light of this authority, GSA could develop and implement policies regarding the award of ADP contracts so long as the policies are not contrary to law or otherwise detrimental to the Government's interests. See B-163971, May 21, 1969.

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We have previously considered whether "model contracts," generally, and the MTC's, specifically, abuse GSA's broad discretion by limiting negotiations and contravening the requirement that the Government procure no more than its minimum needs.

The protester's proposal was

In 51 Comp. Gen. 609 (1972), IBM's proposal was rejected because it contained terms that conflicted with the terms of the "model" or "standard" contract that was being used in the procurement for ADPE. IBM protested the use of the model contract arguing that the model imposed terms and conditions in excess of the minimum needs of the Government and that it prevented meaningful negotiations and eliminated the flexibility which should exist in negotiated procurements.

GAO We denied ~~IBM's~~ *the* protest, because we ~~found that the~~ offerors were given the opportunity to provide input into the model contract at the time that it was developed, and ~~that~~ the use of model contracts in such circumstances fell within the "broad discretion accorded agencies of the Government in determining the conditions under which they contract." /

In Comdisco, Inc., B-181956, February 13, 1975, 75-1 CPD 96, we considered GSA's overall system for procurement of ADPE in the specific context of GSA's refusal to award a Schedule contract to a non-OEM. GSA justified its refusal on the grounds that non-OEM's generally did not offer the full range of services required of Schedule contractors and that the MTC's provided an alternate adequate vehicle for non-OEM contracting.

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While only ruling specifically that GSA was justified in not awarding Comdisco a Schedule contract, we implicitly approved GSA's system of procuring ADPE through Schedule contracts, requirements contracts and the MTC's. / Regarding the MTC's specifically, we stated that "* * * GSA's approach appears to be consistent with our recommendation that GSA enhance competition in the ADP field by reducing reliance on Schedule contracts." Comdisco, supra.

Finally, in Federal Leasing, Inc., 58 Comp. Gen. 73 (1978), 78-2 CPD 343, we considered whether several specific provisions of the MTC's unduly restricted competition by overstating the Government's minimum needs and whether the alleged non-negotiability of the MTC's inhibited vendor/user communication and violated the

Brooks Act mandate that GSA provide for the "economic and efficient purchase, lease and maintenance" of ADPE.

Regarding the argument that certain provisions of the MTC's overstated the Government's minimum needs, we stated:

"The MTC provisions that FLI [Federal Leasing, Inc.] objects to reflect GSA's determination of its needs in procuring ADPE from the non-OEM market. Government procurement officials who are familiar with the conditions under which supplies, equipment or services have been used, and are to be used, are generally in the best position to know the Government's actual needs. Consequently, we will not question an agency's determination of what its minimum needs are, or what will satisfy those needs, unless there is a clear showing that the determination has no reasonable basis. Herley Industries, Inc., B-186947, September 30, 1977, 77-2 CPD 247; Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4. * * *"

We found that Federal Leasing had not shown that GSA's determination of what its minimum needs were was unreasonable. We also found that the MTC program was not an abuse of the discretion given GSA to develop methods of procuring ADPE.

GSA and ITEL argue that Federal Leasing amounts to a blanket endorsement of the MTC program and, therefore, that it is dispositive of the instant protest. IBM, on the other hand, attempts to distinguish Federal Leasing factually and argues, therefore, that it is inapplicable to the present facts. IBM contends that Federal Leasing addressed only the appropriateness of the MTC program for procuring ADPE from non-OEM's and, therefore, does not apply to use of the MTC in procuring from OEM's like

itself. IBM also argues that Federal Leasing did not involve the inconsistent conduct of the program nor the unfair treatment alleged here.

It is our opinion that Federal Leasing, like 51 Comp. Gen. 609, supra, and Comdisco, supra, recognized that → the use of standard form contracts, with their limited negotiations and broad statements of minimum needs, to procure ADPE is not an abuse of GSA's discretion. While Federal Leasing did involve some facts different from those present here, the general principles are still applicable. IBM has not shown that GSA's determination that the MTC's are an accurate statement of the Government's minimum needs is without a reasonable basis. IBM has not offered specific reasons why specific MTC provisions are in excess of minimum needs, but rather has argued that standard terms and conditions cannot possibly be an accurate statement of the minimum needs of all users, and that lack of revision in the MTC's since their inception in 1972 has rendered them obsolete. These assertions are not sufficient to show that GSA's determination is without a reasonable basis. Additionally, IBM has not shown why the limited negotiations approved in Federal Leasing are now inappropriate. Consequently, we affirm our holding in Federal Leasing, that the MTC program falls within GSA's discretion in the procurement of ADPE,

Accordingly, the protest is denied.

We do feel, however, that IBM has raised a legitimate concern that the MTC's may be outdated. GSA has indicated that the recent advent of the plug-compatible market makes it more likely that an OEM will be awarded an MTC contract. Since the MTC's were developed to protect the Government in dealing with non-OEM's (see Federal Leasing, supra), they may not be suitable for dealing with OEM's. GSA's meeting with IBM in spring 1978, to consider its objections to the MTC's indicates the possibility that the MTC's may need revision. Therefore, we recommend that GSA, if it has not done so, should review the MTC's to make sure that their provisions are adequate in light of current market place conditions.



Deputy Comptroller General
of the United States