

DECISION

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

74546

FILE: B-208879

DATE: March 16, 1983

MATTER OF: NCR Comten, Inc.

DIGEST:

Protest that agency deliberately and improperly excluded protester from competition is denied where firm had opportunity to submit proposal in response to Commerce Business Daily notice of intent to award against schedule contract of another firm, protester admitted in writing prior to issuance of RFP that it could not satisfy alleged restrictive technical requirement in notice which was subsequently incorporated into solicitation, award was made to firm other than schedule vendor, and adequate competition and reasonable prices were obtained.

NCR Comten, Inc. (NCR), protests the award of a contract under request for proposals (RFP) No. 00-82-R-83, for an International Business Machines (IBM) 3705 front-end processor (FEP) or equal, issued by the United States Department of Agriculture (USDA). The FEP is a computer providing an interface between a primary computer and multiple computer terminals.

NCR protests that USDA deliberately excluded the protester from an opportunity to submit a proposal to meet the requirement and requests that the award to Amdahl Corporation (Amdahl) be terminated and the requirement resolicited.

We deny the protest.

On November 21, 1980, USDA placed an order for the lease of an NCR FEP. About that time, USDA acquired an IBM 3705 FEP. Both FEP's were installed at USDA's Washington, D.C., computer center. USDA intended to conduct tests by alternating use of the two FEP's weekly to select one type of FEP for permanent use at USDA.

While the IBM FEP was brought into production, USDA never used the NCR FEP. NCR contends that USDA's software contractor lacked the technical expertise to properly use the NCR FEP and that this was the reason that NCR's computer was never used. USDA advises that the NCR FEP was not used because USDA lacked the additional Government personnel

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necessary to install and operate the NCR computer. On May 3, 1982, USDA canceled the NCR lease. NCR states that USDA orally advised that the cancellation was due to budget cuts and the continued failure to bring the NCR computer into production.

On August 11, 1982, in accordance with Federal Procurement Regulations (FPR) § 1-4.1109-6 (1964 ed., amend. 211), USDA published notice in the Commerce Business Daily (CBD) of its intent to place a delivery order against IBM's schedule contract for an IBM 3705 FEP. The notice stated that the "machine must run with existing software which will be loaded identically to the software then currently in production." The notice essentially advised that USDA would award under the schedule to IBM unless affirmative written responses with technical literature and cost were received within 15 days after publication of the notice, which showed that a comparable source was available or that other offers were more advantageous to the Government than purchasing from the schedule. The notice also advised that no contract award would be made on the basis of offers or proposals submitted in response to the notice.

NCR did not submit a proposal in response to this notice, but on August 26, 1982, the last day for receipt of responses to the notice, it notified USDA by letter of its intent to protest the intended award to IBM. In this letter, NCR took exception to the acquisition stating it "clearly brings the veracity of the [NCR FEP lease] cancellation into question" and undermines the intent of the FPR's which envision competitive procurement. On September 1, 1982, NCR protested to this Office against USDA's procurement of an IBM 3705 FEP from IBM or any other vendor. By letter of September 17, 1982, NCR detailed its protest contending that an award to IBM violated various FPR provisions governing computer acquisitions, and that the USDA requirement was unduly restrictive of competition since it allegedly could not be satisfied by any vendor other than IBM. NCR specifically argued that the above-quoted notice requirement--"machine must run with existing software which will be loaded identically to the software then currently in production"--limited competition since no machine except the IBM already in operation could run the existing software without changes. NCR also argued that, had its computer been brought into production, it would have been competitive with IBM.

USDA received three timely offers in response to the CBD notice which were determined to be technically acceptable. In accordance with FPR § 1-4.1109-6(g)(2)(ii) (1964 ed., amend 211), USDA then issued the RFP on September 23, 1982, without a CBD notice, for the IBM 3705 FEP on a brand name or equal basis to the three offerors and IBM. The RFP contained the above-quoted software requirement. Under USDA's interpretation of the applicable FPR provision, USDA had to solicit only the three offerors responding to the notice and the schedule vendor. On October 26, 1982, USDA awarded the contract to Amdahl for an Amdahl 4705 FEP.

NCR concedes that its initial protest concerning any award under the IBM schedule contract is moot. However, based on USDA's protest report, filed here on December 6, 1982, NCR now protests that it was deliberately excluded from an opportunity to submit a proposal on the FEP requirement. Apparently, NCR was unaware of the competitive procurement until its receipt of the USDA report.

NCR points to the USDA failure to synopsise the RFP, send NCR a copy of the RFP, or otherwise notify NCR of the issuance of the solicitation. NCR points out that its stated purpose in protesting initially was to obtain a competitive procurement and that its protest indicated interest in the procurement. NCR states that, had it been advised of the competitive solicitation, it would have withdrawn its initial protest and submitted a proposal, noting that USDA has never stated its equipment is not suitable. Finally, NCR argues that, although USDA may have obtained adequate competition, the FPR's require maximum practical competition and that this requirement was not met here since USDA disregarded a known potential source. NCR requests that award to Amdahl be canceled and the requirement resolicited.

We have held that a solicitation need not be canceled solely because an offeror (even the incumbent contractor) did not receive a copy of the solicitation where adequate competition resulted in reasonable prices and where there was no deliberate or conscious intent on the part of the procuring agency to preclude an offeror from competing. Thomas G. Morrow, B-208878, October 7, 1982, 82-2 CPD 316. However, where an agency intentionally did not provide an offeror with a copy of the solicitation, we have held that

the offeror has been improperly precluded from competing and corrective action is required. See Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry, 54 Comp. Gen. 29 (1974), 74-2 CPD 27. Based on this standard, we conclude that NCR was neither deliberately nor improperly precluded from competing.

The record shows that NCR was aware that USDA published the CBD notice required by applicable regulations, which invited affirmative responses from comparable sources to demonstrate whether a schedule award to IBM was advantageous to the Government. This notice solicited competition, and also made clear that, if comparable or advantageous offers were submitted, an award on the schedule would not be made. Thus, the notice and the applicable FPR provision (FPR § 1-4.1109-6(g)(2)(ii) (1964 ed., amend. 211)) clearly contemplate that issuance of a competitive RFP could follow if responses to the notice show that competition is advantageous to the Government.

Instead of submitting a response and participating in this process, NCR protested the synopsis requirement based on its view that the requirement could only be met by IBM, and thereby precluded competition. In NCR's letter of protest sent prior to USDA's issuance of the RFP, NCR further admitted that it could not satisfy the stated USDA software compatibility requirement. The RFP contained the same software compatibility requirement as was contained in the CBD notice. Thus, prior to issuance of the RFP, USDA was aware that NCR had not responded to the CBD notice inviting offers and that NCR had conceded that it was not capable of meeting USDA's requirement. Subsequently, USDA received three technically acceptable responses to the notice which appeared to disprove NCR's contention that no firms other than IBM could meet the requirement.

As for the failure of USDA to synopsise the RFP, we recognize the general rules governing synopsis of procurements. See FPR §§ 1-1.1003-2 (1964 ed., amend. 153), 1-3.103(a) (1964 ed., amend. 194), and 1-4.1109-3 (1964 ed., amend. 211). However, we cannot conclude that the procedures used here required USDA to synopsise the RFP after synopsis of an agency's intent to award under the schedule which places potential offerors on notice of the requirement and invites a showing of interest with a possible view

towards a competitive acquisition. We note that FPR § 1-4.1109-6(g)(2)(ii) (1964 ed., amend. 211) provides that, where the evaluation of the offers in response to a notice indicates that a competitive acquisition would be more advantageous to the Government, the contracting officer normally should issue a formal solicitation, but it does not require synopsis. This provision further implies that issuance of the RFP will be made to "addressees, including the schedule vendor." This suggests that USDA's interpretation of the provision--that it only needed to send the RFP to those firms which were considered technically acceptable in response to the notice--is reasonable. Thus, we conclude USDA was not obligated to synopsise the RFP after it previously had synopsized the requirement and invited competition.

As already noted, NCR admits that it could not satisfy the software requirement. In addition, NCR's allegation that the software requirement limited competition to IBM has been disproved since competition was obtained under that requirement, and award was made to Amdahl, not IBM.

Since USDA did not deliberately or improperly preclude NCR from the competition and adequate competition and reasonable prices apparently were obtained, we deny the protest.

for 
Comptroller General
of the United States