Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Transportation; Computer Sciences Corporation--Reconsideration and Modification of Remedy

File: B-278466.2; B-278466.3

Date: May 11, 1998

Richard J. Webber, Esq., and Alison J. Micheli, Esq., Arent Fox Kintner Plotkin & Kahn, for Hughes STX Corporation, the protester.
David S. Cohen, Esq., Cohen Mohr LLP, and Helaine G. Elderkin, Esq., for Computer Sciences Corporation, an intervenor.
Lee Wolanin, Esq., John A. Volpe National Transportation Systems Center, Department of Transportation, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Requests for reconsideration are denied where the agency and the intervenor in essence repeat arguments made previously and express disagreement with our prior decision, but fail to show that the decision may have contained either errors of fact or law warranting reversal or modification of that decision.

2. Recommendation for corrective action is modified where the reopening of discussions and the reevaluation of proposals, with the possibility that the awardee's contract may have to be terminated for the convenience of the government, is not in the best interests of the government because of the impact a termination would have on the agency's mission.

DECISION

The Department of Transportation (DOT) and Computer Sciences Corporation (CSC) request reconsideration of our decision sustaining the protest filed by Hughes STX Corporation in Hughes STX Corp., B-278466, Feb. 2, 1998, 98-1 CPD ¶ 52. Hughes successfully challenged the award of a contract to CSC for on-site information systems support under request for proposals (RFP) No. DTRS57-97-R-00001, issued by DOT's John A. Volpe National Transportation Systems Center. In the alternative and at a minimum, DOT and CSC request that we modify our recommendation for corrective action.

We deny the requests for reconsideration and modify our recommendation for corrective action.

In sustaining the Hughes protest against the award to CSC, we concluded that the agency's cost realism evaluation was unreasonable and discussions conducted with Hughes concerning its proposed direct labor rates were not meaningful. We recommended that the agency reevaluate proposals for cost realism and then reopen discussions and request another best and final offer (BAFO) from, at a minimum, Hughes and CSC. We stated that if an offeror other than CSC is selected for award as a result of the agency's reevaluation, the agency should terminate CSC's contract for the convenience of the government.[1]

REQUESTS FOR RECONSIDERATION

In requesting reconsideration, DOT and CSC in essence repeat arguments made previously and express disagreement with our prior decision. Under our Bid Protest Regulations, however, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a). DOT's and CSC's repetition of arguments made during our consideration of the original protest and their disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274 at 2.

For example, DOT and CSC disagree with our conclusion that in determining what offerors would need to pay in direct labor rates in order to retain a large percentage of incumbent personnel--the agency's primary concern--the agency "mechanically compared" the Hughes and CSC proposed labor rates to the incumbent's historical labor rates, thereby "substantially overstat[ing]" the lack of realism in the Hughes proposed labor rates. Hughes STX Corp., supra, at 8. As discussed in the decision, the agency did not meaningfully consider the realism of the labor rates proposed by Hughes. The agency failed to explain in the contemporaneous evaluation record or during the hearing conducted by our Office in connection with the protest why the rates proposed by Hughes, which were approximately [deleted] percent below historical rates, were deemed unrealistic, while the rates proposed by CSC, which were approximately [deleted] percent below historical rates, were deemed realistic. Other than the fact that there was an approximate [deleted] percent differential in proposed labor rates between Hughes and CSC--which the agency acknowledged was due to [deleted]--we had no basis to know from the record why for this cost-type contract a [deleted] percent deviation below historical rates was realistic

[1]We also recommended that Hughes be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). This part of our recommendation has not been challenged.

for purposes of retaining incumbent personnel, yet a [deleted] percent deviation was not. Had the agency meaningfully considered the reason for the [deleted] percent differential--[deleted]--the agency should have recognized that both Hughes and CSC would have been [deleted]. At that point, the agency could have determined whether a [deleted] percent deviation below historical rates was realistic for purposes of retaining a high percentage of incumbent personnel. On reconsideration, DOT and CSC have failed to show that our conclusion regarding the arbitrariness of the agency's cost realism analysis was legally or factually erroneous.

As a result of the arbitrary initial evaluation of cost realism, the agency did not, and in fact was unable to, conduct meaningful discussions with Hughes regarding the realism of its proposed labor rates. Because of the flawed cost realism analysis, the agency, in noting that Hughes failed to provide first-year escalation and that the firm's proposed first-year labor rates were too low, induced Hughes both to escalate and to increase these rates when, in fact, escalation alone would have been sufficient.[2] In addition, in light of (1) the generic discussion question posed to Hughes concerning its proposed first-year labor rates by category being lower "in many instances" than the agency's historical data; (2) the fact that no offeror, including Hughes, had access to historical labor rates since these rates were not included in the RFP; and (3) the fact that Hughes was not told which particular labor categories--the senior, higher-priced ones--were underpriced in relation to historical labor rates, we concluded that Hughes had no choice but to assume that its rates were too low across the board, rather than for specific labor categories. Contrary to DOT's and CSC's position, however, we were not suggesting that the agency had to specify for Hughes which individual labor categories were underpriced. It did have to at least direct Hughes to the fact that the agency's concern was not to be generalized, but was to be focused with respect to the more senior, higher-priced labor categories. DOT and CSC have not shown that this aspect of our decision was legally or factually erroneous.

DOT and CSC also argue that we erroneously concluded that Hughes was prejudiced by the agency's failure to disclose that it was concerned with the Hughes information systems (IS), not contract administration (CA), labor rates. In making this assertion, however, DOT and CSC have taken out of context an example of how discussions concerning the Hughes labor rates were misleading and not

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[2]The chair of the cost business evaluation team stated at the hearing that he knew that the difference between the Hughes and CSC initially proposed labor rates was approximately [deleted] to [deleted] percent, but he did not wish to "speculate" about the impact of Hughes escalating its proposed rates and then comparing these numbers to CSC's proposed labor rates. Hughes STX Corp., supra, at 8. The record showed that for each of the other contract years, Hughes proposed [deleted] percent escalation. Had the agency reasonably applied this percentage, [deleted].

meaningful. While we recognized that CA rates accounted for only a small portion of overall costs, our Office was concerned with the arbitrariness of the agency's decision to generally question all of the Hughes proposed labor rates, including its CA labor rates, which were closer in percentage terms to historical labor rates than any of the IS and CA rates proposed by CSC. CSC was only questioned regarding its proposed CA labor rates. Again, the agency's discussion questions conveyed two distinct cost concerns--that Hughes had failed to escalate its first-year labor rates and that its overall rates were too low. As a result of the agency's articulated cost concerns, Hughes not only provided first-year escalation, but also increased its overall rates when, in fact, [deleted] in terms of historical labor rates. The agency's failure to hold non-misleading and meaningful discussions clearly prejudiced Hughes in terms of its ability to meaningfully propose direct labor rates.

Lastly, after discussions, the Hughes final proposed labor rates exceeded the level the agency considered necessary to retain incumbent staff. (The final Hughes rates were approximately [deleted] percent above historical labor rates.) The agency noted that Hughes might have to offer higher-than-historical labor rates in order to hire and retain qualified technical staff. DOT and CSC object to our conclusion that if Hughes might have to pay higher labor rates (as finally proposed), then CSC might have to pay even higher rates than those finally proposed (these rates were approximately [deleted] percent below historical labor rates) in order to hire and retain qualified technical staff. Neither DOT nor CSC has provided any rationale for why the agency accepted in the final cost analysis CSC's considerably lower rates when CSC, like Hughes, was a nonincumbent which similarly would face the possibility of having to pay higher-than-historical salaries to retain incumbent employees. Again, DOT and CSC merely disagree with our conclusion that the agency, in performing its cost realism analysis of final proposed labor rates, unreasonably failed to take into account the agency's expressed concern with high incumbent retention in evaluating CSC's proposed rates.

In sum, the record amply supports a conclusion that the agency did not reasonably evaluate the cost realism of the direct labor rates proposed by Hughes and did not conduct meaningful discussions with Hughes concerning these rates. DOT's and CSC's disagreement with our conclusions does not render our decision legally or factually incorrect.

MODIFICATION OF REMEDY

In determining the appropriate recommendation in cases where we find a violation of procurement laws or regulations, we consider all the circumstances surrounding the procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the

recommendation on the contracting agency's mission. 4 C.F.R. § 21.8(b); see Science Applications Int'l Corp.; Dep't of the Navy--Recon., B-247036.2, B-247036.3, Aug. 4, 1992, 92-2 CPD ¶ 73 at 10.

The agency states that if it reopens discussions and reevaluates new BAFOs, with the result that CSC's proposal is no longer determined the most advantageous to the government, the termination of CSC's contract "could pose tremendous risk of disruption to several nationally critical transportation projects." The record shows, and Hughes does not dispute, that it did not file its protest within the statutory period for obtaining a stay of contract performance. When the contract was awarded on September 23, 1997 (approximately 9 months after the RFP was issued), CSC immediately began the transition/phase-in, and has been engaged in actual contract performance since November 1, 1997. Two critical Federal Aviation Administration (FAA) computer system projects which are being supported by CSC under the Volpe contract involve the Enhanced Traffic Management System (ETMS) and the Telecommunication Information Management System (TIMS), both projects requiring prompt resolution of Year 2000 compliance issues.

More specifically, according to DOT and CSC, the ETMS is a mission-critical air traffic control system being developed on a high priority basis to replace an existing system with serious Year 2000 defects. FAA requires the replacement ETMS to be ready to be deployed to 80 sites by June 1999, leaving 6 months to actually engage the new system. The TIMS is also a mission-critical system used to track and manage FAA telecommunication assets (airport radar, relay switches, and satellites and leased communication circuits) and requires repair in order to operate in the Year 2000 and after. FAA requires TIMS Year 2000 compliance by March 1999.

The criticality of FAA's ability to timely address Year 2000 compliance issues was recently addressed by our Office in an audit report. See FAA Computer Systems: Limited Progress on Year 2000 Issue Increases Risk Dramatically (GAO/AIMD-98-45, Jan. 1998). In this report, we conclude:

> Should the pace at which FAA addresses its Year 2000 issues not quicken, and critical FAA systems not be Year 2000 compliant and therefore not be ready for reliable operation on January 1 of that year, the agency's capability in several essential areas—including the monitoring and controlling of air traffic—could be severely compromised. This could result in the temporary grounding of flights until safe aircraft control can be assured.

Id. at 15.[3]

[3]Hughes does not comment on our audit conclusions.

Here, because of the critical need to timely address FAA Year 2000 compliance issues for which the Volpe contractor--in this case, CSC--is providing support services, the record supports the agency's position that it is not in the best interests of the government to require a new selection decision with the possibility that a contractor other than CSC would be selected, thus requiring another costly and disruptive transition. Accordingly, we modify our recommendation to allow CSC to perform the contract for the entire 2-year base period and to permit the agency, if necessary, to exercise the first option under CSC's contract, which should reasonably cover the period necessary to ensure completion of FAA's critical Year 2000 compliance projects.[4] We recommend that the agency not exercise the last two options under CSC's contract, but instead conduct another procurement for its follow-on requirements. In this regard, the agency reports that to implement our original recommendation, it would take 210 calendar days from the time of reconvening the source evaluation board to obtaining award approvals and notifications. We recommend that the agency use this time to prepare a new source selection plan and to issue a new solicitation for its follow-on requirements.[5] We further modify our recommendation to allow Hughes to be reimbursed for its proposal preparation costs, as well as its costs of responding to DOT's and CSC's requests for reconsideration. 4 C.F.R. § 21.8(d)(1), (2). These costs are in addition to the costs associated with Hughes filing and pursuing its initial protest with our Office. Hughes should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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[4]Our modified recommendation is consistent with CSC's request that if our Office decided not to reverse our prior decision, that we "at least modify [our] recommended remedy to permit the continuation of the current contract through a minimum of the two-year base period." (The contract was for a 2-year base period and three 1-year option periods.) Moreover, with respect to the options, we note that a contractor has no legal right to compel the exercise of a contract option since contract options are exercised solely at the discretion of the government. California Shorthand Reporting, B-236680, Dec. 22, 1989, 89-2 CPD ¶ 584 at 2. A contractor assumes the risk that the agency might not exercise the option. Arlington Pub. Schs., B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 at 3.

[5]The agency has provided no explanation for why, prior to the expiration of the 2-year base period and the possible exercise of the first option under CSC's contract, CSC could not complete projects involving Year 2000 compliance issues. The agency also has provided no explanation for why, after conducting a procurement for its follow-on requirements and if a decision were made to award to other than CSC as the incumbent, it would not be feasible to transition to another contractor at that time.

The requests for reconsideration are denied and our prior recommendation for corrective action is modified.

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