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DECISION

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

Protest Alleging Improper Application of Solicitation Evaluation Criteria

FILE: B-199918.2 DATE: March 25, 1981

MATTER OF: Interscience Systems, Inc.

DIGEST:

Allegation that protester should have received award under proper application of solicitation provision stating that award would be made to technically acceptable proposal offering lowest systems life cost, subject to availability of funds for that method of acquisition, is without merit where agency reasonably concluded that funds were not available for exercise of purchase option under protester's lowest cost lease with option to purchase offer.

Interscience Systems, Inc. protests the award of a contract to Sperry Univac under request for proposals (RFP) No. N00600-80-R-5358 issued by the Naval Regional Contracting Office, Washington, D.C.

The procurement was for certain Univac-compatible peripheral automated data processing (ADP) equipment and related items. The RFP solicited offers for a 48 month systems life on four possible methods of acquisition (MOAs): purchase, lease with option to purchase (LWOP), full payout lease, and straight rental.

Interscience contends that it should have received the award under a proper application of the solicitation's evaluation and award criteria, which provided in pertinent part as follows:

"The proposal from a responsible offeror validated as being technically acceptable and offering the lowest (present value discounted) systems life cost, price and other

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> factors considered, shall be selected for award, subject to the availability of funds for the proposed MOA."

The Navy rejected Interscience's LWOP proposal, even though it was technically acceptable and offered the lowest systems life cost, because it found that funds were neither available nor budgeted and could not reasonably be expected to become available for the purchase portion of that MOA.

Interscience contends that this conclusion was unreasonable, that the Navy's efforts to make funds available by reprogramming were inadequate, and that section 101-35.206(e) of the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-35.206(e) (1980), requires that award be made on an LWOP basis in these circumstances. We find these allegations to be without merit and deny the protest.

The Navy advises that after systems life cost evaluations were completed, the cognizant Navy budget representatives were briefed by the contracting officer. These representatives were advised that the lowest evaluated systems life cost was LWOP at the end of twelve months (offered by Interscience, which was not identified). Accordingly, in order to take advantage of this offer, lease funds would be required in Fiscal year (FY) 1980 and purchase funds would be required in FY 1981 (and possibly FY 1982, depending upon the delivery date of the equipment).

The contracting officer was advised by the budget representatives that no purchase funds were available, or budgeted, nor could any be expected to become available for exercise of the purchase option in either FY 1981 or FY 1982, and that attempts to obtain funds through reprogramming (the method by which agencies shift funds within an appropriation account from one program to another) had been unsuccessful.

The contracting officer was also informed that no funds were available for outright purchase (also offered by Interscience, which has not protested the rejection of its proposal on this basis), the next lowest evaluated systems life cost MOA. Consequently, award was made to Univac on a straight rental basis since it offered the third lowest evaluated systems life cost and lease (rental) funds were available in FY 1980 and budgeted for FY 1981.

Interscience argues that despite the fact that the contracting officer was advised that no funds for the exercise of the purchase option were available, budgeted, or expected to become available, her conclusion that funds were unavailable for the LWOP MOA was unreasonable. In support of this contention, Interscience, pointing to the solicitation's "Availability of Funds for Next Fiscal Year" clause, which stated in part that "funds are presently not available for performance under this contract beyond 1980," argues that funds for the LWOP MOA were no more unavailable after FY 1980 than funds for the rental MOA. In addition, Interscience argues that it was improper and unreasonable for the Navy to award to Univac on a rental basis "simply because funds would need to be reprogrammed in a small amount" in the future in order to take advantage of the lower cost LWOP offer.

First, we believe it is apparent that the provision contained in the solicitation's evaluation and award criteria, warning that award would be "subject to availability of funds for the proposed MOA," is different in intent and scope than the "Availability of Funds for Next Fiscal Year" clause. The latter advised offerors that no funds had yet been appropriated for FY 1981 and made the Government's obligation and legal liability under the contract contingent on the future availability of appropriated funds from which contract payments could be made. (In this regard, the Navy advises that rental funds come from its appropriation for operation and maintenance which is available for one fiscal year only; a purchase, however, is funded out of a separate Navy procurement appropriation ("Other Procurement, Navy") which is available for obligation for three fiscal years.)

In contrast, the evaluation and award contingency establishes a prerequisite to contract award rather than a limitation on the extent of the Government's legal liability under the contract. As such, it cannot logically be viewed as making award on a particular MOA dependent upon future appropriations for that purpose, since award on any MOA covering a fiscal year for which funds had not yet been appropriated would then be impossible. The statement that award is "subject to availbility of funds for the proposed MOA" thus references a concern with the existence and expectation of funds availability in a more general sense.

Consequently, the evaluation and award contingency establishes that contract award is to be based on funds presently

budgeted or reprogrammable or, with respect to future fiscal years only, reasonably expected to become available. We find nothing objectionable in this. It seems apparent that in order for the Navy to reasonably determine the availability of funds for MOAs which covered a 48 month systems life, it not only had to consider whether funds were presently available but also, to the extent possible, had to make a reasonable projection about the future availability of funds for that purpose.

We believe that the contracting officer, having been advised by the cognizant budget representatives that no funds for the exercise of the purchase option were budgeted or expected to become available, and that none could be reprogrammed, reasonably concluded that funds were not available for the LWOP MOA. While it is true that as a consequence, the LWOP proposal offering a lower evaluated systems life cost was rejected in favor of a higher cost rental offer, it is significant that Interscience's LWOP offer was only low if the Navy could take advantage of the purchase option. Without a reasonable expectation that it could do so, we believe that award on that MOA would not have been in the best interests of the Government.

Moreover, we believe that the contracting officer was justified in her reliance on the advice of the cognizant budget representatives. Indeed, we believe that she could do no more since these were matters which were outside the scope of her authority.

While Interscience questions the adequacy of the budget representatives' financial review and reprogramming efforts, largely because of the lack of any documentation in this regard, the Navy has provided a detailed and persuasive defense of the conclusions reached. Furthermore, we agree with the Navy that reprogramming is essentially an internal agency matter and we are not convinced that any procedural deficiency which may have occurred would provide any basis to sustain this protest. See A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541; LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975),75-2 CPD 203. We also find no merit to Interscience's allegation that pre-selection documentation of the details of the Navy's funding decisions was mandated by FPMR § 101-35.208, which requires that documentation of the considerations taken into account and the basis for an agency's decision on an MOA be prepared and available to Office of Management and Budget examiners and the GSA as "necessary."

In addition, we find no merit to Interscience's contention that the contracting officer's rejection of its proposal was unreasonable because its acceptance would only entail reprogramming of funds in a small amount in the future. Interscience apparently bases this argument on the assumption that the only amount which would need to be reprogrammed is the difference between the purchase price under the option and the rental cost (for which funds were expected to be available) for the fiscal year in which the option was exercised. This assumption is erroneous since, as discussed above, funds for purchase and rental are contained in separate appropriatons and consequently are not interchangeable through reprogramming. 31 U.S.C. § 628 (1976).

We now turn to Interscience's allegation that it was entitled to award under FPMR § 101-35.206(e), which is part of the General Service Administration's (GSA) ADP and Telecommunications Management Policy. It provides:

> "(e) Acquisition criteria. The following criteria shall be used to determine the appropriate method of acquisition:
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> "(1) The purchase method is indicated when all of the following conditions exist:
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> (i) The comparative cost analysis, in consideration of all the factors noted above, indicates that purchase will provide the Government with the lowest overall cost.
>
> (ii) The agency's approved budget contains funds intended for the purchase, funds can be reprogrammed, or resources are available from the GSA ADP Fund.
>
> "(2) The lease with option to purchase method is indicated when it is necessary or advantageous to proceed with the acquisition of the equipment that meets system specifications, but it is desirable to defer temporarily a decision on purchase because circumstances do not fully satisfy the conditions which would indicate purchase. This situation might arise when it is determined that

> a short period of operational experience is desirable to prove the validity of a system design with which there is no previous experience.
>
> "(3) The straight lease method is indicated when it is necessary or advantageous to proceed with the acquisition of equipment that meets system specifications and it has been established conclusively that any one of the conditions under which purchase is indicated is not attainable."

Interscience argues that under subsection (2) LWOP was the appropriate MOA. Interscience contends that it was "desirable to defer temporarily a decision on purchase because circumstances [did] not fully satisfy the conditions which would indicate purchase" since purchase condition (ii), as set-forth in subsection (1), was not met. In addition, LWOP was the lowest cost MOA, and despite the Navy's current assessment of the situation, funds might still become available in the future for the exercise of the purchase option.

The Navy asserts that contrary to Interscience's contention, straight lease was the appropriate MOA under FPMR § 101-35.206(e). The Navy cites subsection (3) and argues that it was faced with precisely the situation described therein: it had been conclusively established that one of the conditions (condition (ii)) under which purchase is indicated was not attainable.

We are not persuaded by Interscience's argument that subsection (2) was applicable to the circumstances of this case. While the language relied upon is quite broad and arguably susceptible to the interpretation urged upon us, we note that the subsection goes on to state that "This situation might arise when it is determined that a short period of operational experience is desirable to prove the validity of a system design with which there is no previous experience." We recognize that this provides only an example of the circumstances under which subsection (2) would apply, but we believe it does militate against Interscience's contention that subsection (2) was applicable here.

More importantly, we agree with the Navy that the situation before us falls squarely within the scope of subsection (3), straight lease, since it has been established that one

of the conditions under which purchase is indicated is not attainable. The Navy has shown that condition (ii) is not attainable since no funds intended for purchase are budgeted, funds cannot be reprogrammed, and resources are not available from the GSA ADP fund. While Interscience points out that the Navy awarded the contract to Univac before it ascertained that no funds were available from the GSA ADP fund, the Navy was advised shortly thereafter that no funds were in fact available. It is therefore clear that Interscience was not prejudiced by this procedural deficiency.

Finally, Interscience asserts that the solicitation was deficient because it did not inform offerors that funds were not available for particular MOAs. However, the clause in the instant RFP making award subject to the availability of funds for the proposed MOA did apprise offerors that funds might not be available for a given MOA. While the contracting officer apparently did not explore the budget situation before issuing a solicitation, we are aware of no requirement that this be done. See Scona, Inc., B-191894, January 23, 1979, 79-1 CPD 43. Further, such a pre-issuance exercise may have been impracticable here in any case, since the record shows that the procurement was conducted under what were considered to be urgent circumstances. Accordingly, this contention does not provide a basis to sustain the protest.

Nevertheless, we agree with Interscience to the extent that where a solicitation requests offers on a basis that would necessitate the future availability of funds in order for that offer to be selected, a reasonable investigation into the expectation of the availability of such funds should be made before offers are solicited, if otherwise practicable. By separate letter, we are advising the Secretary of the Navy of our view.

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States

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

B-199918.2

March 25, 1981

The Honorable John A. Lehman
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in which we deny the protest by Interscience Systems, Inc. against your agency's award of a contract to Sperry Univac under solicitation No. N00600-80-R-5358.

Although we have denied the protest, we believe that where a solicitation requests offers on a basis that would necessitate the future availability of funds in order for such an offer to be selected, a reasonable investigation into the expected general availability of such funds should be made prior to the issuance of the solicitation, if otherwise practicable. If funds may not be available for a particular method of acquisition, offerors should be so advised.

Sincerely yours

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure