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[Competitive Award of Contract for Automatic Data Processing System]. B-186313. April 13, 1977. 10 pp.

Decision re: Honeywell Information Systems, Inc.; Department of the Interior; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: Miscellaneous: Automatic Data Processing (1001).
Organization Concerned: Burroughs Corp.; Mining Enforcement and Safety Administration.
Authority: 51 Comp. Gen. 423. 55 Comp. Gen. 60. 55 Comp. Gen. 1066. 48 Comp. Gen. 536. 55 Comp. Gen. 864. 50 Comp. Gen. 222. B-185103 (1976). B-178701(1) (1974). B-180292 (1974). B-185592 (1976). B-187659 (1977). F.P.R. 1-3.805-1(b).

Reconsideration was requested of the decision which sustained a protest against the award of a contract for the acquisition of an automatic data processing system for the Mine Enforcement and Safety Administration. The earlier recommendation for solicitations of new best and final offers from the protester and the contractor was modified in recognition of the portion of work already performed under the contract. Otherwise, the prior decision was affirmed. (SC)

DECISION

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

FILE: B-186313 DATE: April 13, 1977

MATTER OF: Honeywell Information Systems, Inc.

DIGEST:

1. Since protester's contention that it only became aware of protest when it learned facts concerning contents of successful proposal is reasonable and not refuted, limitation on filing begins to run from that time and protest is timely.

2. Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by GAO, mission of protecting health and safety of miners will be delayed for up to year if recompetition results in termination of proposed award. Even assuming accuracy of claimed costs and delays--which have not been explained or analyzed in detail--confidence in competitive procurement system mandates recompetition, where improperly awarded ADP contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not.

3. To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester.

4. When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible.

5. Possible administrative difficulties attending recompetition of improper award in determining performance period, residual value of offered equipment, and treatment of services already performed by incumbent contractor do not constitute reasons to change prior recommendation for recompetition.

The Department of the Interior, by letter dated December 20, 1976, and Honeywell Information Systems, Inc. (Honeywell), by letter dated December 21, 1976, have requested that we reconsider our decision in Burroughs Corporation, B-186313, December 9, 1976, 56 Comp. Gen. ____, 76-2 CPD 472. Our decision sustained the protest of Burroughs Corporation (Burroughs) against the award of a contract to Honeywell for the acquisition of an automatic data processing (ADP) system by the Mine Enforcement and Safety Administration (MESA) of the Department.

We sustained the protest after finding several irregularities in the protested procurement which are summarized as follows: (1) the award to Honeywell (for services over a possible 65-month period) was based on an unacceptably late best and final offer which was intended to correct a timely received but unacceptable "best and final" communication; (2) no fixed or finitely determinable price was proposed in the timely communication as required by the request for proposals; (3) Honeywell's final technical submission was technically unacceptable because it contained a significantly different equipment configuration from that which passed the benchmark tests; (4) Honeywell was improperly permitted to correct its proposal deficiencies after the closing date for receipt of proposals; (5) payment of "separate charges" set forth in Honeywell's contract in the event the Honeywell system was terminated prior to the end of the intended "systems life" would violate statutory funding limitations.

Because of our findings, we concluded:

> "* * * Burroughs and Honeywell [should] be afforded an opportunity to submit new price proposals in a manner consistent with this decision. After negotiating with these sources, the Honeywell contract should be terminated for the convenience of the Government, if Burroughs is the successful offeror. In this event, Honeywell should not be paid separate charges; rather, settlement with Honeywell is required to be made in a manner consistent with the T for C clause. If Honeywell is

> successful at a price lower than that contained in its existing contract, the contract should be modified in accordance with Honeywell's final proposal. Also, a clause in the RFP to be used for resoliciting price proposals should expressly provide that Honeywell, as a condition of participating in the resolicitation, agrees to the modification scheme. * * *"

The Department requests reconsideration of our prior decision on two basic grounds: (1) a recompetition would not serve the Government's best interests in view of the substantial costs and the severe impact on NSA's programs which would result if the Honeywell contract were terminated; and (2) the recompetition between Burroughs and Honeywell would not be on an equal basis, particularly because Burroughs was provided with a complete copy of the initial delivery order under the Honeywell contract which contained a detailed description of the ADP system configuration and the unit prices.

Two of Honeywell's bases for reconsideration are essentially the same as the Department's two bases. In addition, Honeywell asserts that Burroughs' protest was improperly found to be timely under our Bid Protest Procedures because we improperly allocated the burden of proving Burroughs' protest was not timely on Honeywell and the Department rather than requiring Burroughs to show by conclusive evidence that its protest was timely.

There is no requirement in our Bid Protest Procedures requiring proof of timeliness by conclusive evidence, notwithstanding the cases and authorities concerning rules of evidence generally applicable in the courts cited by Honeywell. Burroughs met the burden of showing the protest was timely in this case by stating when it became aware of the bases for protest concerning the contents of the Honeywell proposal--which was not publicly disclosed. There is no evidence indicating that Burroughs' statement--which is reasonable under the circumstances-- is incorrect. (Contrast Reliable Maintenance Service, Inc., B-185103, May 24, 1976, 76-1 CPD 337, where the agency contradicted with objective evidence the protester's contentions regarding when it became aware of the bases for protest.) Thus, to use Honeywell's terms, Burroughs has established--in the absence of conflicting evidence-- "when" (rather than "how") it came into knowledge of the facts giving rise to the protest. Since Honeywell concedes that the "when [rather than the how] is vital," we do not agree that Burroughs

also had to establish "now" it became aware of facts which it was not otherwise entitled to possess. Moreover, since neither Honeywell nor the Department has questioned our determination that the award to Honeywell was improperly based on a late price proposal containing separate charges violative of the funding statutes and a technically unacceptable final technical submission, it would be incongruous for our Office to now ignore the clearly improper Honeywell award because of this procedural contention.

Both the Department and Honeywell have asserted that if Burroughs should win the recompetition, it would be very costly to the Government and MESA's mission would be severely affected. In brief, these costs and effects are said to be:

(1) Termination costs of at least $500,000;

(2) Possible "separate charges" liability;

(3) Duplicate operation costs;

(4) Conversion costs of $358,173;

(5) Previously expended conversion costs of $1,128,000;

(6) Equipment investment loss of $47,900;

(7) Support services of $113,779;

(8) Delay in implementing a possible Burroughs' system thereby hindering MESA's mine enforcement responsibilities.

Honeywell has claimed that termination for convenience costs will be at least $500,000. This figure has not been documented, analyzed, or verified by the Department. Honeywell has also implied that it may be entitled to the separate charges quoted in its proposal. As discussed in our prior decision, payment of these charges would not be authorized.

MESA states that the Government will have to pay duplicate operation costs if the system is changed. For example, the Burroughs and Honeywell systems will have to be run in parallel, MESA insists, for 1 month if Burroughs wins on recompetition. Honeywell asserts that the systems will have to be run in parallel for 4 months—at a price of $34,500 per month.

The Department also estimates that it will cost at least $358,173 in additional software conversion costs to change from the Honeywell system to the Burroughs system. This estimate consists entirely of payroll costs of MESA employees. The Department has also obtained a conversion cost estimate of $434,325 from a GSA term contractor. Burroughs--which supplied MESA's ADP requirements prior to the installation of the Honeywell system--has stated that it understands that at least a portion of the programs converted from its old system--a lesser system than presently required--to the Honeywell system was first converted into Burroughs' COBOL 68 programs. These intermediate programs are apparently consistent with the more powerful ADP system proposed by Burroughs in this case and, if still in existence, would appear to lessen conversion difficulties and costs.

In addition, MESA claims: (1) a prospective loss of $1,128,000 (mostly MESA payroll costs) to convert programs to the Honeywell system--a process which is approximately 70 percent complete. (These are primarily lost investment costs rather than "out-of-pocket" costs payable as a result of a change in systems. This investment should not completely be lost by such change, e.g., the documentation revisions and augmentations for the software in the Honeywell system are useful for either system.); (2) a prospective loss of $47,900 in equipment (RCP707 remote job entry terminal device and eight disc packs) purchased from Honeywell under the contract. (This equipment would have to be reprocured to conform to a Burroughs configuration. This cost also represents a lost investment rather than an "out-of-pocket" cost.); (3) a prospective loss of $113,779 in supporting services supplied by Honeywell. (These services would have to be reprocured from Burroughs if it is successful on the recompetition; however, Burroughs denies that the cost of these supporting services will be as much as $113,000.)

Honeywell has also asserted that MESA will lose substantial investment costs (not less than $1,000,000)--most of which are outlined by the Department above--if Burroughs wins the recompetition. The investment costs mentioned by Honeywell include hiring and training of personnel, computer usage, communications, construction and/or plant modification and software conversion. A substantial portion of these costs may be duplicated by converting to the Burroughs system. Also, the Government will lose the benefit of purchase credits that it has earned on the Honeywell system. (The amount of the earned credits are claimed to be proprietary by Honeywell.)

Honeywell and the Department assert that in view of these costs and since the value of the Honeywell contract if all 65 months in options are exercised is only $2,511,856, it would not serve the Government's best interests to terminate the contract. The bulk of the Department's and Honeywell's claimed costs has not been documented.

The Department also claims that reprocurement from Burroughs and the resulting inherent delay of converting from the Honeywell system to a Burroughs system would seriously impede and delay MESA's mine enforcement and safety program responsibilities. The Department states that this impact is even more serious than the above-outlined significant costs that may have to be incurred.

For example, MESA's Civil Penalty and Assessment program has been redesigned for the Honeywell system during the past year, partially in response to congressional criticism regarding delays in implementing the program. The Department states that this program is heavily dependent on Honeywell's particular data base management system, query language and telecommunications software--which are unique to Honeywell hardware. The Department claims that 10 man-years of effort over a calendar year would be needed to convert this program to a Burroughs system. Also, assessment program personnel would have to be diverted for such a task, which would cause further case backlogs in enforcement activities. (The program is apparently not on the Honeywell system yet, however. Further, the Department says that "minor modifications to the system are required before the product is formally released to the user.")

The Department also contends that the Metal/Non-Metal Inspection program--an especially critical program created to spot hazardous trends in mines and to analyze the effectiveness of mine inspections--and the Mine Health and Safety Academy program will be delayed for at least 6 months if a change to the Burroughs system is made. These programs are also apparently not on system yet.

Finally, MESA says that it is revising regulations governing the monitoring of respirable coal dust--the cause of pneumoconiosis (black lung disease)--which allegedly cannot be implemented without an ADP system. The Department asserts that a change in contractors would delay for 3 months the implementation of the regulations.

In summary, the Department asserts that, in addition to the substantial costs which may be involved in recompeting the procurement, MESA's basic mission of protecting the health and safety of the Nation's miners may be adversely affected by the recompetition and that ADP support may well be delayed for a year if Burroughs wins the recompetition.

In determining whether it is in the Government's best interest to undertake action which may result in the termination of an improper award, certain factors must be considered, such as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or 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 on the user agency's mission. 51 Comp. Gen. 423 (1972); Dynetaria, Inc., B-178701(1), February 22, 1974, 74-1 CPD 90; DPF Incorporated, B-180292, September 12, 1974, 74-2 CPD 159; PRC Computer Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 35; C3, Inc., B-185592, August 5, 1976, 76-2 CPD 128; ABC Cleaning Service, Inc., B-187659, February 4, 1977, 77-1 CPD 91.

Before issuing our decision, we were aware that the Government would incur termination costs and substantial conversion costs in the event Burroughs won the recompetition. Also, we presumed that MESA's ADP requirements would be disturbed if the contractor had to be changed.

Notwithstanding our awareness of these costs and effects, we recommended action leading to a possible termination because, in part, of the knowledge that the improperly awarded contract might otherwise extend for 65 months--assuming all options are exercised as as is still presently planned by MESA. It remains our view that the competitive procurement system is hardly served by permitting the prejudicial effects of an improperly awarded contract to stand for 5 years.

Moreover, in the contracting officer's report on the protest to our Office, it was specifically represented with regard to the technical evaluation of the final technical submissions of Burroughs and Honeywell:

> "* * * As a result of that evaluation, both proposals were found to be technically responsive to the RFP and therefore acceptable. * * *"

As discussed in our prior decision, Honeywell proposed an equipment configuration in the final technical submission which was clearly inconsistent with its benchmarked configuration. Since even a cursory comparison of this submission with the benchmarked Honeywell configuration reveals this deficiency, we are unable to ascertain from the record how MESA could possibly have determined that Honeywell's final technical submission was "technically responsive to the RFP and therefore acceptable."

Consequently, confidence in the integrity of the competitive procurement system would best be preserved and thereby the Government's best interests served by recompeting this requirement as recommended in our prior decision, notwithstanding the Department's and Honeywell's assertions--even assuming their accuracy--regarding the high cost and the adverse impact on MESA's mission that may result. (Although for the purpose of discussion we assume the accuracy of the claimed costs and delays, we observe that the varying estimates of the projected delays (3-, 6-, and 12-month periods) attending recompetition and the prospective termination charges have not been explained in any detail. Further, the projected delays seem to be inconsistent with the 21-week period on which MESA's cost estimate for converting to the Burroughs system is based.) Also, the alleged adverse impact on MESA's mission in the event Burroughs wins the recompetition can be reduced. For example, any switch-over of contractors need not be done hastily. Moreover, critic . ADP requirements could possibly be met on an interim basis by sharing time on other Honeywell equipment.

The Department and Honeywell assert that the recompetition would not be on an equal basis because Burroughs was provided by MESA with a complete copy of the initial delivery order to Honeywell. This order detailed the initial system configuration of Honeywell with unit prices. Honeywell was not provided any data regarding Burroughs' price and technical proposals other than Burroughs' total evaluated price.

The previous record did not indicate that Burroughs had this special knowledge. We agree with the Department and Honeywell that such knowledge gives Burroughs an unfair competitive advantage on the recompetition. Consequently, as a condition to competing on the resolicitation, Burroughs must consent to the Department's disclosure to Honeywell of information from Burroughs' best and final cost proposal regarding the details of the proposed initial equipment configuration and unit prices. This information should be substantially comparable to that disclosed in Honeywell's initial order. See TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299, where a similar remedy was recommended. Burroughs has said that this procedure would not be objectionable.

The Department and Honeywell state that such a disclosure would create an improper auction situation. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. 48 Comp. Gen. 536 (1969); 53 id. 253 (1973); TM Systems, Inc., supra. Indeed, the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. Cf. Minjares Building Maintenance Corp., 55 Comp. Gen. 864 (1976), 76-1 CPD 168.

Honeywell seeks to distinguish TM Systems, Inc., supra, because it involved a preaward situation rather than a postaward situation where significant performance has been accomplished. We are not persuaded by this distinction where the award, as here, is improper. Honeywell also cites two prior decisions--50 Comp. Gen. 222 (1970) and RCA Corporation, 53 id. 780 (1974), 74-1 CPD 197--for the proposition that when proposals are improperly disclosed, the procuring agency should make an award, if possible, without further discussions so as to avoid an auction. However, these cases involved otherwise proper awards--apart from the impropriety of the price disclosure. Moreover, unlike the cited cases, it is not possible to avoid an auction-like situation here to allow for a nonprejudicial recompetition insofar as possible, if the prejudicial effects of the improper award are to be overcome. To this extent, the mandate for fair and equal competition which flows from the procurement statutes must be considered to override any regulatory restrictions (see, e.g., Federal Procurement Regulations § 1-3.805-1(b) (Amend. 153, Sept. 1975)) on auction techniques. Cf. Minjares, supra.

Honeywell also asserts that since its low evaluated price and configuration was the one on which award was based, it is the only proposal of significance, so that the disclosure of comparable information from Burroughs' proposal will not place the competition on an equal basis. While we recognize that it may not be possible to achieve total equality on the recompetition, the disclosure of substantially comparable information from the Burroughs price proposal will eliminate, insofar as possible, Burroughs' unfair competitive advantage resulting from the knowledge of the initial order. See TM Systems, Inc., supra, at 1071.

The Department has referenced certain other problems which it states will not allow equal competition under a new call for best and final offers. For example: should the resolicitation be based on a 53-month or 65-month basis since Honeywell will have provided 12 months of service prior to any new award? Also, the Department states that Honeywell would not have to propose the $117,000 in support services that it has already provided, while Burroughs will have to provide these services. Also, since Honeywell will be proposing the already installed equipment while Burroughs may well propose new equipment, the evaluation of the equipment's residual value would affect each offeror differently.

We recognize that total competitive equality in the recompetition may not be possible to achieve in view of Honeywell's ongoing performance under the contract. Such is the case to some degree in all reprocurements of improperly awarded contracts. Nevertheless, we believe the Government's best interests will be served by a recompetition in this case. Unfair competitive advantages should be eliminated to the extent legal and feasible. For example, we would not object to a recompetition based on either a 53-month or 65-month basis, so long as both offerors are proposing on the same basis and the Government's actual requirements are being solicited.

The recommendation in Burroughs Corporation, supra, that new best and final offers be solicited from Burroughs and Honeywell is modified in accordance with this decision. Otherwise, our prior decision is affirmed.

R. F. Keller

Deputy Comptroller General
of the United States