



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Integrated Systems Group

File: B-272336; B-272336.2

Date: September 27, 1996

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Melissa K. Erny, Esq., Department of the Navy, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Where agency permitted offeror to submit information to clarify an ambiguity in the price of its alternate offer and to make that alternate offer acceptable, the agency conducted discussions. Since discussions were conducted with one offeror, the agency should have conducted discussions with all offerors whose proposals were in the competitive range and permitted those offerors to submit best and final offers.

DECISION

Integrated Systems Group, Inc. (ISG) protests the award of a contract to Force Computers, Inc. under request for proposals (RFP) No. N00163-95-R-0003, issued by the Department of the Navy for central processor units and right to use licenses. ISG argues that the Navy improperly opened discussions with Force Computers after initially awarding the contract to ISG.

We sustain the protest.

The solicitation sought proposals for a base quantity of 30 processors and licenses; offerors could propose specified units manufactured by Force Computers or Themis Computer, Inc. by inserting prices in the appropriate spaces in section B of the RFP. Offerors also were to submit prices for processors, licenses, and technical data for three option periods. Under the RFP, the first option could be exercised up to 365 days after award, the second option could be exercised up to 730 days after award, and the third option could be exercised up to 1,095 days after award. Although the RFP called for prices on 300 processors in each of the option periods, the solicitation limited the number of processors that could be ordered under the

options to 300. The solicitation included no specific warranty terms; offerors could offer their standard commercial warranties.

Under the solicitation, award was to be made to the offeror whose proposal represented the best overall value to the government, including consideration of price and "quality performance history." Each proposal was to be assigned a rating of low, moderate, or high risk based on an assessment of performance data. The solicitation explained that prices would be evaluated by adding each offeror's total price for the base period, the average of the offeror's unit prices for the option quantities multiplied by the maximum option quantity of 300 units, and a price for data.

Three proposals were submitted. Force Computers offered its own products, and ISG offered both Force Computers and Themis products. All of the proposals were given low risk ratings.

Based on an evaluation of prices, ISG's Themis proposal was determined to offer the lowest overall price of \$2,267,105. Although Force Computers' proposal included four additional pricing pages attached to its section B, the agency initially ignored those additional pages in the calculation of Force Computers' price. Based solely on the prices in section B of its proposal, the agency calculated Force Computers' price as \$2,313,295. The contract initially was awarded to ISG and unsuccessful offeror letters were sent to Force Computers and the third offeror. Those letters included ISG's price.

After the award, the contracting officer received a phone call from Force Computers questioning whether alternate proposals in its additional price pages had been evaluated and arguing that Force Computers should have been found to have submitted the lowest price. That phone call was followed by a letter dated April 24, 1996, from Force Computers requesting a review of the award decision. In that letter, Force Computers stated that its proposal offered three "options . . . in accordance with Section M (M2 Alternate Specifications)"¹ and that the second and third options offered significantly lower prices than the award price. The letter further stated:

"After further reviewing our submittal, it has become apparent that possibly the presentation although we admit may have been somewhat confusing, would still have provided a lower total price to the Government in the M2 options. The total savings to the government were either \$427,740.00 or \$692,340.00 (19% or 31%) in [Force

¹The solicitation, at section M2, permitted offerors to submit alternate offers meeting commercial standards equal to the military specifications in the solicitation.

Computers'] M2 options II and II, and each provided a three (3) year warranty. The purpose of these proposed options was to provide 'Best Value for the Government.'"

A memorandum prepared by the contracting officer before the protest was filed explains that an agency contract negotiator reviewed the additional pages in Force Computers' proposal and concluded that Force Computers was offering the government a discount on a 2-year warranty and had proposed a price for a one-time purchase of 300 of the processors which was required to be taken within of calendar year 1996. The contracting officer's memorandum explains that these alternatives were rejected because the government does not purchase additional warranty coverage and funding would not be available to purchase all 300 processors at one time.

The memorandum further explains that the negotiator was confused as to what Force Computers was proposing in its alternate pricing on the first additional page attached to its section B prices. According to the memorandum, during a conference call with Force Computers, agency officials asked the firm: "Besides the extended warranty, what was your intent of how the Government should [have] evaluated your alternate pricing?" When this question was not answered to the agency's satisfaction, an agency official stated: "Your alternate pricing is contingent upon exercising all of the options." Force Computers responded that the pricing was not contingent. The memorandum states that an agency official requested that Force Computers submit a letter explaining its prices.

In letters dated May 1 and May 2, Force Computers explained that it had submitted three different pricing proposals, each independent of the other two and that under a contract resulting from any of its proposals, the government would have the right to exercise the options as described in the option clause of the solicitation. More specifically, the May 2 letter explained that the first option could be exercised by the agency up to 365 days after award, the second option up to 730 days after award, and the third option up to 1,095 days after award.

The contracting officer reports that:

"In light of the clarification received from [Force Computers], I reevaluated the proposals, including [Force Computers'] alternate proposal which included a 24% discount on pricing for the option quantities from its Section B pricing. The results of that evaluation were that [Force Computers'] alternate proposal offered the lowest total evaluated price at \$1,825,677.00."

ISG's contract was terminated and a contract was awarded to Force Computers.

ISG argues that Force Computers' alternate proposal on which the award was based was unacceptable as submitted and therefore could not be the basis for award. In addition, ISG argues that the telephone conference calls with Force Computers and the letters from that firm after the contract was awarded to ISG amounted to discussions since those communications were necessary to make Force Computers' alternate proposal acceptable. According to ISG, the Navy violated regulatory requirements by not opening discussions with ISG and other competitive range offerors and requesting best and final offers (BAFO) from those firms.

It is a fundamental principle of federal procurement that all offerors must be treated equally. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182. Thus, the conduct of discussions with one offeror generally requires that discussions be conducted with all competitive range offerors and that offerors have an opportunity to submit revised offers. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. Discussions occur whenever (1) an offeror is given an opportunity to revise or modify its proposal, or (2) information provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601 (FAC 90-40); HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188. Here, we conclude that the agency's post award communications with Force Computers constituted discussions both because Force Computers was given an opportunity to modify its proposal and because the firm provided information essential for determining the acceptability of its alternate proposal.

First, after the firm was informed of ISG's low price, Force Computers was permitted to modify its alternate proposal to remove an ambiguity concerning the price of its extended warranty. Based on the firm's proposal as submitted, the cost of the extended warranty included in Force Computers' alternate proposal was unclear. The second of the four additional pages included with the proposal appears to offer a 2-year extended warranty with a 24-percent discount on the firm's section B prices for processors in the options years. The fourth additional page attached to the proposal, however, includes different warranty price terms; that page was Force Computers quotation form for an extended warranty for the Force Computers processor called for by the RFP. After the statement: "We are pleased to submit the following quotation," the quotation form included the following:

| Quantity | Description | Price |
|----------|-------------------|---------------------------|
| 1 Year | Extended Warranty | 12% of Cost of Unit Price |
| 2 Year | Extended Warranty | 24% of Cost of Unit Price |

Thus, the last of the four pages could be read as including an extended warranty of 1-year at an additional cost of 12 percent of the unit price of a processor, or an

extended warranty of 2 years at an additional cost of 24 percent. Based on the proposal itself, it is unclear how these terms were to be reconciled with the second page offer of a 2-year extended warranty with a 24-percent discount. Similarly, it was not clear which prices included the extended warranty and what was meant by such proposal terms as:

"THIS [price] IS CALCULATED BASED ON THE FOLLOWING CRITERIA[:]

"*EXTENDED WARRANTY COSTS ARE 12% PER UNIT PER YEAR OR 1% PER MONTH."

Although as a result of Force Computers' explanation agency officials decided the firm was offering an extended warranty at a discounted price, based on the proposal itself, including all of the attached pages, the price of the extended warranty was ambiguous.² The agency's communications with Force Computers to resolve the ambiguity concerning the warranty pricing after the award to ISG amounted to discussion since during those communications the firm was permitted to modify its proposal to remove the ambiguity.³ See Information Ventures, Inc., B-245128, Dec. 18, 1991, 91-2 CPD ¶ 558.

Second, the agency's communications with Force Computers constituted discussions because the firm was permitted to submit information essential for determining the acceptability of its alternate proposal. As submitted, Force Computers' alternate proposal was not acceptable because it did not clearly meet the terms of the solicitation. The third additional page included with Force Computers' proposal stated:

²The terms of this alternate proposal were not limited to a single one of the attached pages but were included on all of those pages since the last sentence of the first attached page states:

"PLEASE REVIEW THE ATTACHED PROPOSED SAVINGS PER BOARD TO GET THE AVERAGE COST PER BOARD THAT INCLUDES THE EXTENDED WARRANTY."

³The agency does not explain why they disregarded the fourth page or how the terms on that page are consistent with other terms in Force Computers' proposal.

"M2-ALTERNATE SPECIFICATIONS-ALTERNATE BID

"THIS ALTERNATE PROPOSAL IS FOR A ONE-TIME PURCHASE OF 300 PIECES THAT DELIVERY OF ALL BOARDS MUST BE TAKEN WITHIN 12 MONTHS OF CALENDAR YEAR 1996."

Although Force Computers' proposal package included two sets of option prices in addition to the option prices in section B, the proposal did not state that two separate and independent alternate proposals were intended and did not clearly state which delivery terms were to apply to which set of option prices. Thus, it was unclear from the face of the proposal as submitted whether any alternate proposal would meet the solicitation requirement that the first option could be exercised up to 365 days after award, the second option up to 730 days after award, and the third option up to 1,095 days after award. The agency's contract negotiator declined to evaluate the alternate proposals in part because of questions concerning the delivery schedule in the alternate proposals for the options. Not until Force Computers submitted its May 1 and May 2 letters did the firm specifically bind itself to the option schedule in the solicitation.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. The solicitation unambiguously required that the second and third options could be exercised up to 730 days and 1,095 days after award, respectively. But for the post-award communications with Force Computers, that firm's alternate proposal would not have been acceptable due to the ambiguity concerning its compliance with the option schedule required by the solicitation. Thus, the telephone conferences with Force Computers, and that firm's written responses-- which declared the firm's intent to comply with the option schedule under its alternate proposal--amounted to discussions. FAR § 15.601; ALT Communications, Inc., B-246315, Mar. 2, 1992, 92-1 CPD ¶ 248. Since discussions were conducted with Force Computers, discussions should have been opened with all competitive range offerors and BAFOs should have been requested.

ISG was prejudiced by the Navy's actions because it is not clear that the outcome of the competition would have remained the same had ISG been provided an opportunity to revise its proposal. See Microlog Corp., *supra*. In this regard, it is not uncommon for offerors to offer substantial price reductions when given the opportunity, even when the government's requirements have not changed. Information Ventures, Inc., *supra*.

We recommend that the Navy open negotiations with ISG and Force Computers and request BAFOs. If ISG offers the lowest price in its BAFO, the contract with Force Computers should be terminated and award made to ISG. We also find that ISG is entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1) (1996). In accordance with 4 C.F.R. § 21.8(f)(1), ISG's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 90 days of receipt of this decision.

The protest is sustained.

Comptroller General
of the United States