



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: International Data Systems, Inc.

File: B-277385

Date: October 8, 1997

Al Barlas for the protester.

Sherry Kaswell, Esq., Department of the Interior, for the agency.

Katherine Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency permitted competitive range offerors to submit information to clarify ambiguities in their proposals and requested responses in the form of best and final offers (BAFO), the agency conducted discussions; these discussions were not meaningful where the agency failed to advise the protester of its concern regarding the protester's proposed noncompliant delivery schedule which, while it was readily correctable, provided the basis to reject the protester's BAFO as technically unacceptable.

2. Where the agency's needs regarding the type of processor that it required changed after receipt of proposals, the agency improperly failed to issue an amendment alerting offerors of the revised requirement and providing all offerors an opportunity to submit proposals based on the agency's actual requirement.

DECISION

International Data Systems, Inc. (IDS) protests the award of a contract to Applied Computer Technology (ACT) by the Department of the Interior under request for proposals (RFP) No. 143868-RFP97-12097. IDS primarily objects that the agency failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

The agency issued a combined Commerce Business Daily synopsis and solicitation for personal computers which was published on March 21, 1997. The solicitation contemplated the award of a fixed-price, indefinite delivery/indefinite quantity contract for 6 months. The RFP provided that award would be made to the responsible offeror whose proposal represented the best value to the government, taking into consideration price, conformance with technical specifications, and past

performance, with technical considerations being more important than price. The solicitation stated that the agency reserved the right to award the contract to other than the lowest-price offeror and provided that the agency "intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification)." The agency issued one amendment on March 28.

The agency received 42 offers by the April 17 due date. A technical evaluation panel (TEP) evaluated the advantages and disadvantages of each proposal, as a result of which seven proposals were "determined to meet or exceed [the agency's] minimum specifications in all critical elements, but each had not addressed some minor issues," and were included in the competitive range. The agency sent each of the seven competitive range offerors a written request for clarifications, requiring each offeror to submit the additional requested information in the form of a best and final offer (BAFO). The TEP then ranked the seven BAFOs, weighing technical merit and past performance each at 40 percent, and price at 20 percent. This evaluation resulted in the IDS proposal being ranked first, with ACT's proposal ranked second. ACT proposed as an alternate a Pentium II processor, in addition to the Pentium Pro specified in the solicitation.¹

The contracting officer then reviewed the IDS proposal in greater detail and noticed that IDS offered a 30- to 45-day delivery schedule, rather than the 15-day delivery period required by the solicitation. The contracting officer stated that she had earlier rejected other proposals that failed to meet the 15-day delivery requirement; she therefore felt compelled to similarly find the IDS proposal ineligible for award based on noncompliance with the required delivery schedule. Moreover, believing that she had up to that point merely obtained clarifications and had not conducted discussions, she decided not to advise IDS about the problem with its proposed delivery schedule, in order to avoid holding discussions, which she feared would delay the procurement.

The agency found that ACT's proposal represented the best value to the government and awarded the contract to that firm on June 19. In ACT's contract, the agency added a line item that did not appear in the original solicitation for the Pentium II systems that ACT offered in its proposal. While ACT failed to acknowledge the one amendment that was issued in connection with this solicitation, the agency waived this omission as a minor informality. IDS protested to our Office, whereupon the agency determined that it was in the best interests of the government to continue with performance, notwithstanding the pendency of the protest. See 31 U.S.C. § 3553(d)(3)(C)(i)(I) (1994).

¹The contracting officer stated that the Pentium II offered by ACT was considered "state of the art."

DISCUSSION

IDS asserts that the agency's failure to advise it of the agency's concerns regarding the IDS delivery schedule constituted a failure to conduct meaningful discussions and that, had the matter been brought to its attention, the firm could have easily corrected what it describes as a typographical error regarding the delivery schedule. The agency takes the position that the communications between it and the seven competitive range offerors were clarifications and not discussions. In addition, the agency contends that, due to the unacceptable delivery schedule in its proposal, that proposal should not have been included in the competitive range, and IDS therefore was not entitled to discussions at all, so that any deficiency in the communications with IDS would be immaterial.

Federal Acquisition Regulation (FAR) § 15.610(a) (1997) permits contracting agencies to make award on the basis of initial proposals without discussions, where the solicitation, as here, announces this possibility. As set forth in FAR § 15.601; the difference between clarifications and discussions is as follows:

'Clarification' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. . . . Unlike discussion . . . , clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision.

'Discussion' . . . means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that- (a) [i]nvolves information essential for determining the acceptability of a proposal; or (b) [p]rovides the offeror an opportunity to revise or modify its proposal.

It is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 at 11; ABT Assocs., Inc., B-196365, May 27, 1980, 80-1 CPD ¶ 362 at 5. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. 51 Comp. Gen. 479, 481 (1972); New Hampshire-Vermont Health Serv., 57 Comp. Gen. 347, 353 (1978), 78-1 CPD ¶ 202 at 9.

Here, the communication with the seven competitive range offerors clearly constituted discussions, both because the communications concerned information essential for determining the acceptability of their proposals and because the offerors were given an opportunity to submit BAFOs modifying their proposals.

The communications would constitute discussions even if the information provided by the competitive range offerors served only to resolve ambiguities. See Integrated Sys. Group, B-272336, B-272336.2, Sept. 27, 1996, 96-2 CPD ¶ 144 at 6.

We next consider whether the agency was obligated to raise its concern regarding the delivery schedule in the IDS proposal during discussions. When discussions are held, they are required to be meaningful. See Fidelity Techs. Corp., B-276425, May 30, 1997, 97-1 CPD ¶ 197 at 6; Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108 at 3. Discussions cannot be meaningful unless they lead an offeror into those aspects of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award. Voith Hydro, Inc., B-277051, Aug. 22, 1997, 97-2 CPD ¶ ____; Global Indus., Inc., B-270592.2 et al., Mar. 29, 1996, 96-2 CPD ¶ 85 at 4-5; Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430 at 7, recon. denied, Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. Under this standard, Interior was required to advise IDS of the agency's concerns with its delivery schedule so that IDS would have an opportunity to revise it and resolve this readily correctable matter. We therefore conclude that the agency failed to afford IDS meaningful discussions.

We also note that the contract that was awarded to ACT by Interior contained a line item for the Pentium II processor that was not in the original solicitation. ACT's proposal offered two configurations, one was the Pentium Pro processor required by the solicitation, and the second configuration proposed the Pentium II. ACT's proposal "urged" the agency to "strongly consider" the Pentium II technology because the RFP's specifications state that the replacement parts and support must be available for the lifetime of the system and Intel had indicated that the required Pentium Pro would be phased out at the end of 1997. ACT further advised the agency that Intel had announced that the Pentium II was the scheduled replacement for the Pentium Pro. The agency was receptive to ACT's "urging," and cites as its reason for including the Pentium II line item in ACT's contract that the Pentium II is the newest technology available, and that it was not available when the solicitation was issued. The agency also stated that many users that were scheduled to receive the Pentium Pro in the computer upgrade have expressed a preference for receiving the Pentium II instead.

Generally, where an agency's requirements change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR § 15.606(a); Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. The purpose of the rule is to avoid award decisions not based on the agency's most current view of its minimum needs. See N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD ¶ 467 at 12. Agencies must amend solicitations to reflect a significant change in the government's requirements even after the submission of BAFOs, up until the time of award. See United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-9, aff'd, Department of Energy et al., B-246977.2 et al., July 14, 1992, 92-2

CPD ¶ 20. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis reflecting the agency's actual requirements. Dairy Maid Dairy, Inc., B-251758.3 et al., May 24, 1993, 93-1 CPD ¶ 404 at 7-9.

Here, while the RFP specified a Pentium Pro processor, it appears that the agency determined during the course of the procurement that the Pentium II represented its needs and should be incorporated into the contract. To the extent that the agency's needs changed to include the Pentium II, the agency was required to issue an amendment permitting all offerors an opportunity to submit revised proposals on a common basis reflecting the agency's actual needs.

RECOMMENDATION

Where an agency determines that it is in the best interest of the government to proceed with contract performance in the face of a protest in our Office, and we sustain the protest, the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(b)(2), calls for us to make our recommendations for corrective action without regard to any cost or disruption from termination, recompeting, or reawarding the contract. In this case, the agency reports that all of the required equipment has been delivered and the contract fully performed. Under these circumstances, corrective action is not available. See Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 4. We therefore recommend that IDS be reimbursed for its proposal preparation costs as well as the reasonable costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1), (2) (1997). In accordance with 4 C.F.R. § 21.8(f)(1), The protester's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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