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W. W. [unclear]  
P. [unclear]

**DECISION**



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

**FILE: B-189585**

**DATE: April 19, 1978**

**MATTER OF: Four-Phase Systems, Incorporated**

**DIGEST:**

1. Protest against alleged restrictive specifications is untimely under section 20.2(b)(1) of Bid Protest Procedures because protest is against improprieties in solicitation apparent prior to closing date for initial proposals and was not filed before that time, as required.
2. Protest concerning request for second best and final offers and potential price leak filed initially with contracting agency was not filed at GAO within 10 days of receipt of agency denial of protest and, therefore, is untimely and not for consideration under Bid Protest Procedures.
3. Allegations that negotiations were improperly conducted and operational capability demonstration was biased are untimely under section 20.2(b)(2) of Bid Protest Procedures, since protest was filed more than 10 working days after basis for allegations was known. Allegations will not be considered as part of timely issues, since untimely issues are distinct and separable.
4. Protester should not have been assessed penalty for conversion costs as they were not included in RFP as evaluation factor. Since amount assessed did not affect relative cost standing of protester, however, no prejudice resulted and award will not be disturbed.
5. Protester has not shown that difference between its credit for desirable features offered and credit given awardee was based on anything other than fact that awardee offered more desirable features.

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6. Allegation that awardee employed third party to assist in selection for award, but did not so indicate in proposal, as required, is matter for consideration of procuring agency.
7. Allegation that awardee may intend to provide currently installed equipment in contravention of RFP requirements will not be considered, since awardee's proposal stated no exception to requirement and determining compliance of equipment provided is matter of contract administration.

Four-Phase Systems, Inc. (Four-Phase), has protested the award of a contract to Entrex Corporation (Entrex) under request for proposals (RFP) No. 6-35030, issued by the Department of Commerce, Bureau of the Census (Commerce), for data entry equipment.

Four-Phase's basic allegation is that the entire procurement process was essentially noncompetitive and was aimed at selecting the incumbent contractor, Entrex. As evidence supporting this broad contention, Four-Phase has made a number of specific allegations: (1) that the original specifications were overly restrictive and favored Entrex's design; (2) that Commerce did not negotiate in good faith with Four-Phase; (3) that the technical committee had access to cost data, and this fact combined with Commerce's request for second best and final offers led to a substantial risk that Four-Phase's price was leaked; (4) that the operational capability demonstration (OCD) was mishandled, overly stringent and was intended to render Four-Phase technically unacceptable; (5) that certain cost evaluation factors were prejudicially applied; (6) that Entrex's price reflects overly high discounts, which may indicate that it intends to provide currently installed equipment in contravention of RFP requirements; (7) that Entrex used a consultant in the preparation of its proposal, but did not so indicate in the proposal as required; (8) that the contract was defective in that it did not include model numbers or quantities; and (9) that Entrex's offer may have expired before award was made.

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Timeliness of Certain Contentions

Four-Phase argues that the specifications as originally written were essentially "Entrex or equal" and, therefore, were restrictive of competition. Four-Phase complained of this in a letter to Commerce dated July 9, 1976, and the specifications were revised in response to this complaint. Apparently Four-Phase was satisfied with this revision, as it stated in its letter of August 16, 1976, to Commerce "\* \* \* the technical specifications were subsequently and substantially mollified."

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), in pertinent part, provides:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. \* \* \* "

The alleged restrictive nature of the specifications was obviously known prior to the closing date for receipt of proposals, August 23, 1976, yet the issue was not protested to us until July 12, 1977. Therefore, the protest of this issue is untimely. In any event, Commerce's responsiveness in revising the specifications is indicative of an effort to enhance competition.

By letter of March 24, 1977, Four-Phase protested Commerce's request for a second best and final offer on the grounds that the technical committee had access to cost data, and in the circumstances substantial risk of a price leak existed. By letter of April 5, 1977, Commerce denied the protest.

Section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20.2(a) (1977), provides, in pertinent part:

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"\* \* \* If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered \* \* \* ."

In order to be timely, Four-Phase's protest to us on these grounds must have been filed within 10 days of receipt of Commerce's denial letter of April 5, 1977. These issues were not, however, raised until Four-Phase's letter to us received on July 12, 1977.

Four-Phase argues that the agency protest was based only on the suspicion of an impropriety, and that the grounds for protest were not known until award was made to Entrex. It is clear, however, that Four-Phase knew the bases for protest, as they were set forth in the agency protest in the same terms as in the protest to us.

In any event, once a protest is filed initially with the agency, any subsequent protest to us must be filed within 10 days of initial adverse agency action. This was not done here, and, therefore, this issue is untimely and will not be considered.

Four-Phase alleges that the contracting officer (C.O.) consistently exhibited an uncooperative attitude during the course of the procurement and resisted Four-Phase's efforts to engage in meaningful negotiations. Specifically, the protester alleges (1) that there was no established schedule of procurement events, which made it difficult for Four-Phase to plan and respond appropriately; (2) that the C.O. was often nonresponsive to requests for information or clarification, and he responded orally when a written response would have been more appropriate; (3) that the C.O. failed to provide adequate leadtime for vendors to respond to events or requests by Commerce and (4) that the C.O. refused to negotiate on matters such as warranties, revenue guarantees and separation charges.

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After technical negotiations, Commerce, by letter of February 8, 1977, stated that the Evaluation Committee felt that Four-Phase's proposal was not technically responsive, but that it might be made responsive if certain corrective actions were taken. The letter specified three general areas of deficiency and stated that if Four-Phase felt that its proposal could be made technically acceptable, it should schedule an OCD within 30 days. The letter further specified that the OCD would require 2 days to complete. The OCD was conducted beginning on May 3, 1977, and spanning 3 days, rather than the specified 2 days.

Four-Phase raises several objections to the handling of the OCD: (1) that Four-Phase clearly scheduled a 1-day OCD and was not prepared for a 3-day OCD; (2) that the OCD was unreasonably rigorous and that Commerce intended to continue testing Four-Phase until it could not meet some requirement; and (3) that Commerce refused to advise Four-Phase as to whether it passed the OCD, thus preventing Four-Phase from having an opportunity to correct any deficiencies.

Section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1977), provides that:

"\* \* \* [B]id protest shall be filed not later than 10 days after the basis for the protest is known or should have been known, whichever is earlier."

The above events and actions occurred over a period of time from July 1976 to May 1977. Four-Phase complained of these matters to Commerce during the course of the procurement, but did not formally protest either to Commerce or to us. In its agency protest of the request for second best and final offers, Four-Phase stated, "\* \* \* Four-Phase may protest [to GAO]\* \* \* based on these and other irregularities not cited here." It is clear that Four-Phase knew of the bases for protest concerning conduct of negotiations and the OCD at the time they were occurring. Four-Phase argues that any untimely contentions should be considered as evidence of the overall contention of lack of competition. To take such an approach, however, would encourage the use of "blanket" allegations to circumvent the timeliness provisions of the bid protest procedures.

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In this case, the grounds that are untimely raised are distinct and separable issues, and are not so intertwined with the timely grounds that they should be considered in that context. See, e.g., EG&G, Incorporated, B-182566, April 10, 1975, 75-1 CPD 221. Therefore, the contentions concerning the conduct of negotiations and the OCD will not be considered.

#### Cost Evaluation

Four-Phase alleges that the \$95,455 penalty assessed against it for conversion costs is improper because it was not listed as an evaluation factor in the RFP. Four-Phase also argues that it received less evaluation credit for desirable features than Entrex.

Commerce states that the assessment for conversion costs is required by General Services Administration (GSA) Automated Data Processing (ADP) Guidelines. Commerce also provided in its report the breakdown of the desirable features evaluation. Additionally, Commerce argues that the amount assessed for conversion costs and the dollar difference based on the evaluation for desirable features added together would not change the relative cost standing of the two offerors because of the cost difference between the two basic cost proposals before these factors were considered.

Even though the assessment of conversion costs might be required by GSA ADP Guidelines, there is no indication in the RFP that such a factor would be considered or that the Guidelines were incorporated by reference. We have consistently held that procuring agencies are required to advise offerors of the criteria against which proposals will be evaluated and to adhere to those criteria when evaluating proposals. See, e.g., Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD 384, and cases cited therein. Therefore, the RFP here should have stated that conversion costs would be applied or, at least, that the GSA ADP Guidelines were incorporated into the RFP. However, since the assessment of this penalty had no effect on the relative cost standing of the offerors based upon the base proposal costs, there was no prejudice to Four-Phase and, therefore, there is no reason to disturb the award to Entrex on this basis.

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Regarding Four-Phase's complaint concerning the assessment for desirable features, Four-Phase has not shown that Entrex received credit for desirable features that it was not offering or that Four-Phase did not receive credit for features it was offering. Also the RFP included the desirable features that were in fact evaluated. The fact that Entrex received more credit for desirable features is not, without a showing that the evaluation was arbitrary or in violation of procurement statutes or regulations, a basis for disturbing the evaluation. QUAD Corporation, 56 Comp. Gen. 745 (1977), 77-1 CPD 453.

#### Contingent Fee

Four-Phase alleges that Entrex employed a third party " \* \* \* to assist in their selection for the 1977 award," but did not so indicate on the contingent fee representation, clause B.3 of the RFP. The protester asks whether this " \* \* \* constitutes a bidding error that thereby causes their bid to be at fault."

Clause B.3 provides:

"CONTINGENT FEE (See 'General Instructions' par. I. 14.)

"(a) He  has,  has not, employed or retained any company or person (other than a full-time, bona fide employee working solely for the offeror) to solicit or secure this contract, and

"(b) He  has,  has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the offeror) any fee, commission, percentage, or brokerage fee contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above, as requested by the Contracting Officer. (For interpretation of the representation, including the term 'bona fide employee,' see Code of Federal Regulations, Title 41, Subpart 1-1.5.)"

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Additionally, FPR § 1-1.503 (1964 ed. amend. 18) requires that every contract shall contain the following clause:

**"COVENANT AGAINST CONTINGENT FEES**

"The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee."

This provision was included here in standard form 32 incorporated by reference at article IX of the RFP.

The information provided by the contingent fee representation pertains to the offeror's responsibility. See, e.g., Wexler Paper Products, B-179231, January 22, 1974, 74-1 CPD 23. The information does not affect the offeror's duty to comply fully with the terms of the RFP, but merely provides a reference vehicle to the Government for action to be taken under the covenant against contingent fees. Wexler Paper Products, supra.

FPR § 1-1.508-3 (1964 ed., amend. 18) provides a number of options to the procuring agency, in the event the covenant is violated. The provision states:

"Misrepresentations or violations of the covenant against contingent fees.

"In case of misrepresentation, or violation or breach of the covenant against contingent fees, or some other relevant impropriety, the

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executive agency concerned shall take one or more of the following actions, or other action, as may be appropriate:

"(a) If an award has not been made, or offer has not been accepted, determine whether the bid or offer should be rejected.

"(b) If an award has been made or offer has been accepted, take action to enforce the covenant in accordance with its terms; that is, as the best interests of the Government may appear, annul the contract without liability or recover the amount of the fee involved.

"(c) Consider the future eligibility as a contractor of the bidder or contractor in accordance with established procedure.

"(d) Determine whether the case should be referred to the Department of Justice in accordance with established procedure with respect to determining matters of fraud or criminal conduct." (Emphasis supplied.)

Therefore, even if Four-Phase's allegation is correct, which we are not suggesting, this is a matter for consideration by the procuring agency in accordance with the above provision. Commerce is aware of the allegation and the information supplied by Four-Phase regarding this matter.

#### Other Contentions

Four-Phase has argued that the Entrex price reflects overly high discounts, indicating that Entrex may intend to provide currently installed equipment in contravention of RFP requirements. Entrex has taken no exception to the requirement that currently installed equipment may not be provided and, therefore, is contractually bound to provide equipment in compliance with the RFP requirements.

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Overseeing the actual installment of the equipment and determining its compliance with the requirements is a matter of contract administration not for consideration by our Office. Crowe Rope Company, B-187092, August 18, 1976, 76-2 CPD 174.

Regarding Four-Phase's contention that the contract as awarded was defective in that it did not include quantities or model numbers, amendment No. 1 to the contract provided more detailed composition and quantity figures of contract line item numbers for both initial and option quantities.

Four-Phase questioned whether award was made against a valid offer. Award was made to Entrex on June 23, 1977. By letter of May 27, 1977, Entrex extended its offer to July 1, 1977.

#### Conclusion

FPR § 1-3.807-1(b)(1) (1964 ed. circ. 1), in pertinent part, provides:

"(1) Adequate price competition. (i) Price competition exists if offers are solicited and (A) at least two responsible offerors (B) who can satisfy the purchaser's (e.g., the Government's) requirements (C) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (D) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (A) through (D) is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation."

Commerce solicited a total of 191 firms and advised them of a preproposal conference. The RFP closing date was extended to permit those firms that attended the conference to submit written questions. The questions and answers were disseminated to the 27 firms that had requested copies of the RFP. The specifications were

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amended to broaden competition. Finally, the requirements of FPR § 1-3.807-1(b)(1) were met by the proposals submitted by Four-Phase and Entrex and the resulting negotiations.

In summary, Four-Phase has not shown that Commerce was biased in favor of selecting Entrex, that the procurement was a sham and artifice, and that there was not competition as a result.

Accordingly, the protest is denied.

  
ACTING Comptroller General  
of the United States