

7400 B. [unclear]
Part II

DECISION



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

FILE: B-188399

DATE: August 17, 1978

MATTER OF: Ampex Corporation

DIGEST:

1. Rule that Government may at any time accept unilateral reduction in price, or other terms more favorable to it, does not apply where result of accepting amended proposal would be to permit offeror to make unacceptable proposal acceptable after closing date.
2. Where award was improper, corrective action is recommended. Moreover, present record indicates need for GSA to review evaluation formula used to determine lowest priced offer, to assure that formula reflects its reasonable expectations regarding the number, size and nature of the equipment which would be purchased.

The Ampex Corporation protests the General Services Administration's (GSA's) award to Cambridge Memories, Inc. (Cambridge) of a mandatory requirements contract for DEC PDP-10 replacement memory under RFP GSC-CDPR-T-0028, items 18 and 19. Among other allegations, Ampex asserts that discussions were improperly conducted with Cambridge after the closing date for best and final offers. Essentially the evidence is not in dispute.

Although Cambridge initially proposed a uniform rental rate for the term of the lease, it departed from that approach in its best and final offer submitted July 7, 1977, by proposing a dual rate structure. This would have required that a using activity pay rent at a significantly higher rate during the first 6 months of the lease, over what it would pay thereafter.

After evaluating this proposal, GSA informed Cambridge that it believed a substantial change in lease rates during a fiscal year could create problems in agency funding and payment procedures. Although the closing date for receipt of best and final offers

had passed, Cambridge submitted a new set of prices by letter dated August 15, 1977, based upon a uniform rate structure. However, in doing so Cambridge included the cost of providing internal interleaving as part of the basic rental price, rather than as an "optional" item in accord with its earlier proposals. GSA found this unacceptable because it resulted in charging interleaving costs "at each memory increment size shown rather than [as] a single one time charge." This, as we understand GSA, reflected its concern that the Government would be charged twice for interleaved capability in those instances where the capability of the equipment was expanded after being installed. Subsequently, Cambridge submitted a second revised price list dated October 26, 1977.

Items 18 and 19 were awarded on December 19, 1977, based on Cambridge's offer of July 7, 1977, and its "letter of August 15, 1977." The October 26, price list is not cited, but is attached. At this point, GSA confesses to a "clerical" error in the award, contending that the parties meant to delete the cost of internal interleaving from both the rental and purchase prices. The October 26 prices deducted the cost of interleaving only from the purchase price. GSA states that this "oversight" was corrected by Modification No. 3, dated April 6, 1978. No equipment has been ordered under the contract.

GSA views its conduct of the procurement as proper, asserting that Cambridge merely realigned its pricing proposal without changing the raw dollar amounts involved. Moreover, GSA contends, the Government may take advantage of a unilateral price reduction, such as that reflected in Modification No. 3. GSA also argues that Ampex was not prejudiced in any event, because the Cambridge offer was low even if the cost of the interleaving were charged at each increment size in evaluating the August 15 schedule.

However, it is clear that the dual pricing format in the July 7 best and final Cambridge proposal was unacceptable to GSA, in that GSA was unwilling to make award on that basis. Also and apart from the reasons

given by GSA to Cambridge at the time, it is apparent that the pricing structure proposed would have allowed Cambridge to recoup a significant portion of its capital investment early during the leasehold period, while encouraging the user to retain the equipment. Even though the solicitation anticipated evaluation of offers on a lease with purchase after 18 months, the Cambridge schedule would have accorded the Government purchase option credits amounting to 60 percent of the purchase price after only 6 months. The rates proposed for the first 6 months were between three and four times those which would have obtained thereafter.

We do not agree with GSA's contention that what was done was nothing more than an acceptance of a lower price more favorable to the Government. It is true as GSA states that the Government may accept a unilateral reduction in price if extended by the low offeror. We do not believe that this rule applies, however, if the result would be to make a previously "unacceptable" proposal acceptable to the procuring activity. Cf. 50 Comp. Gen. 739, 747 (1971).

Moreover, it is speculative whether lower prices were obtained. Under the RFP, GSA proposed to determine the lowest evaluated price by averaging all of the prices submitted by the offeror under each line item for the various size units included in each line item. Item 18 included 8 units of varying size; item 19, 32 units. Offerors were required to submit prices for each capacity unit listed, with award on an all-or-none basis. By allowing Cambridge to amend its proposal, GSA permitted it to substantially increase the rental rates which would apply to all items after the first 6 months. In a few instances, the actual out-of-pocket cost to rent memory for 18 months was increased, as was the cost to continue to rent thereafter, if the purchase option were not exercised.

In the circumstances, we do not agree that the changes permitted were limited to correction of a clerical error, nor were they merely a clarification of the Cambridge proposal. They reflect in our opinion continued discussions after the closing date for best and final

offers, discussions designed to make Cambridge's proposal acceptable to GSA without according Ampex a similar opportunity to modify its proposal. CF., e.g., Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346; University of New Orleans, B-184194, September 19, 1977, 77-2 CPD 201.

Accordingly, Ampex's protest is sustained.

By separate letter of today we are bringing our decision to the attention of the Administrator of General Services and advising him of our recommendation that GSA terminate the existing contract for the convenience of the Government and reopen negotiations with the parties regarding items 18 and 19. In view of the need for further discussions, we also suggest that GSA review two other aspects of this procurement.

Ampex argues that the Cambridge proposal is unbalanced, pointing out that Cambridge's price per module (per 32K or 128K increment) varies considerably with the size of the unit involved. GSA responds that price variations with size are common. Nowhere in the record has GSA demonstrated that the weighting factors implied in evaluating offerors' proposed pricing reflect GSA's reasonable expectations regarding the number and sites of units the Government will purchase. An evaluation formula which does not reflect anticipated requirements denies the Government the benefits of full and free competition, and gives no assurance that award will result in the lowest cost to the Government. South-eastern Services, Inc. and Worldwide Services, Inc., 56 Comp. Gen. 668, 77-1 CPD 390 (1977), aff'd sub nom B-187872, August 22, 1977, 134. In the circumstances, we are concerned that GSA's evaluation criteria may encourage unbalanced proposals.

Our second concern has to do with Ampex's assertion that the Cambridge memory proposed is not compatible without interleaving. GSA has not answered this contention. To the extent, as Ampex states, that the so-called interleaving "option" will be exercised, the cost of interleaving should not be excluded from the cost evaluation of the proposal.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176 (1970), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.



Comptroller General
of the United States