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

FILE: B-204047   DATE: December 31, 1981

MATTER OF: Four-Phase Systems, Inc.

DIGEST:

1. Protest filed within 10 working days
    after protester learned that its pro-
    posal was rejected is timely notwith-
    standing that protester questions RFP
    requirements. Requirement was ambiguous
    and protester filed its protest once
    agency's interpretation was known.

2. Requirement that offerors' systems per-
    mit simultaneous performance of multiple
    supervisory functions is not unreasonable
    since agency anticipates that heavy work
    load otherwise will result in backlog.

3. Offeror who based proposal on mistaken
    belief that simultaneous execution of
    supervisory functions was not required
    cannot complain of rejection of its pro-
    posal where it was afforded opportunity
    to make its proposal acceptable by
    explaining how comparability would be
    provided but failed to do so.

        Four-Phase Systems, Inc. protests the Department of
Commerce's rejection of the proposal it submitted in
response to request for proposals (RFP) SA-80-TPB-0063
for data entry systems. Commerce rejected the proposal
because it was discovered during benchmarking that the
system offered would not permit multiple supervisory
functions (commands used to process accumulated data)
to be performed simultaneously -- a feature which Commerce
says the RFP required. Four-Phase says that this capability
was not required by the RFP, that if such a requirement
is to be imposed it would constitute an undue restriction
on competition, and that in any event, Four-Phase could
provide the feature desired were it to receive award.

We find no legal merit to the protest.

The dispute focuses on paragraph F.4.1.5.2. of the solicitation. That paragraph deals principally with codes used by supervisory personnel to gain access to the system in order to perform special functions and states:

"It shall be necessary for the supervisor of a system to enter a secure code in order to perform supervisory functions. These include but are not limited to tape drive and printer operations and communications. The secure code shall be made up of a string of character codes and used in order to perform supervisory functions. Its use shall be possible at any keystation [terminal]. However, if the system is limited to a single supervisory console (keystation), it shall be possible to select a minimum of six (6) concurrent supervisory functions (commands) from this single console."

The protester did not interpret this provision as requiring that its system be designed to permit commands to perform supervisory functions simultaneously from multiple keystations. It proposed a system which would allow the supervisor's code to be accepted by the system from any keystation the supervisor might select.

Commerce on the other hand indicates that it intended to require simultaneous performance of supervisory functions even if the multiple terminal approach was offered. It explains that the equipment being acquired is to be used by the Census Bureau and that it is anticipated that the Census workload at times will be so great that serious backlogs will develop unless supervisory functions can be performed simultaneously. It rejected Four-Phase's proposal following a benchmark and post-benchmark discussions during which the protester was unable or unwilling to demonstrate that its system would be able to perform multiple supervisory functions simultaneously.

At the outset, Commerce asserts that the protest is untimely because the protester questions a provision of the RFP but did not file its protest prior to the closing date for receipt of initial proposals. Commerce points out in this connection that section 21.2(b)(1) of our Bid Protest Procedures provides that "Protests based upon

alleged improprieties in any type of solicitation which
are apparent prior to * * * the closing date for receipt
of initial proposals" shall be filed by that time.   4
C.F.R. § 21.2(b)(1)(1981).

We do not believe that rule applies in this case.
The timeliness of Four-Phase's protest in this respect
must be determined by examining the nature of the
allegation said to be untimely, i.e., Four-Phase's
complaint that Commerce imposed additional requirements
during benchmarking by insisting on a new interpreta-
tion of the RFP, one which was not apparent to Four-Phase
prior to that time. If a new requirement was imposed,
a protest concerning it would have been timely filed
at any time before the next following closing date for
receipt of an amended proposal. 4. C.F.R. § 21.2 (b)(1).
Four-Phase protested to Commerce within the time allowed
it to correct deficiencies in its proposal after bench-
marking. As permitted under 4 C.F.R. § 21.2(a), it
filed its protest to our Office within 10 working
days after learning that its position (and proposal)
had been rejected. Accordingly, we treat the protest
as timely.

Moreover, we agree with Four-Phase that Commerce's
intention to require concurrent processing of supervisory
functions was unclear prior to benchmarking and was
made clear only at that time. The questioned paragraph
deals with the use of codes to control access to the
system. The word "concurrently" is used in the disputed
paragraph only in referring to systems which would
limit supervisory functions to a single terminal. As
a result, the RFP appears to allow systems such as
Four-Phase proposed which permit a supervisor to use
the system by entering a secure code from any one
keystation the supervisor selects.

In response to Four-Phase's belief that the require-
ment for simultaneous execution of supervisory functions
is unduly restrictive, Commerce has submitted documenta-
tion supporting its position that, unless it has such
capability, serious backlogs will occur in processing
its anticipated workload. Commerce projects that at
any one time it must process at least 10 active, distinct
jobs on a system. It indicates that because the different
jobs overlap, it must be able to perform printing, editing,

sorting and similar functions on some jobs without inter-
rupting data entry on others and estimates that, unless
such functions can be performed on at least six jobs at
one time, interruptions will occur.

We believe Commerce has established prima facie sup-
port for its position that simultaneous execution of super-
visory functions is necessary if its needs are to be met.
It is therefore incumbent upon Four-Phase to show that
Commerce's position is unreasonable. Constantine N. Polites
& Co., B-189214, December 27, 1978, 78-2 CPD 437; Sparklet
Devices, Inc. -- Reconsideration, B-199690.2, October 8,
1981, 81-2 CPD 285.

Four-Phase has not done so. Instead, it argues that
as a leader in the data entry industry, it should be able
to compete without changing its sytem. Four-Phase's parti-
cular circumstances, however, cannot be given weight in
examining the reasonableness of Commerce's requirements,
since Commerce may insist on meeting its legitimate needs,
even if this has the effect of preventing one or more vendors
from competing. 45 Comp. Gen. 365 (1965); Informatics, Inc.--
Reconsideration, 56 Comp. Gen. 663 (1977), 77-1 CPD 383.

Finally, we do not believe Four-Phase's proposal was
improperly rejected.

In this respect, the record shows that Commerce, fol-
lowing the Four-Phase benchmark, wrote the protester in
order to afford it an opportunity to correct several defi-
ciencies in its proposal. Among the problems addressed was
the operation of supervisory functions. Four-Phase was
asked to furnish information showing how it could provide
the capability to execute multiple supervisory functions
simultaneously.

Although Four-Phase did furnish such data with respect
to other deficiencies identified in Commerce's letter, it
responded to the simultaneous function requirement in effect
by protesting Commerce's interpretation of RFP paragraph
F.4.1.5.2. and by offering, in the alternative, to provide
concurrent performance of supervisory functions after award.
It did not provide any technical information as to how
necessary changes in its system software might be made. In
its protest to our Office, Four-Phase has indicated that it
was not willing to underwrite the cost of such changes
unless it first knew that it had been selected.

We do not believe Four-Phase was entitled to defer discussing how Commerce's minimum needs could be met. Once an offeror is actually aware of an agency's requirement, it fails to respond to it at its own risk. The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15; ADP Network Services, Inc., B-193817, March 7, 1979, 79-1 CPD 163. Four-Phase was aware from the time of benchmarking (conducted during the week of May 26, 1981) of Commerce's concern with this requirement. It was advised of the deficiency in writing on June 8, 1981, met with Commerce contracting personnel on June 15, and by letter dated June 16, was afforded until June 25 to submit a response. While, as Four-Phase suggests, the time and expense involved might have precluded actually implementing the needed changes in its systems before Four-Phase was to respond to Commerce's last mentioned letter, we believe Four-Phase could have discussed in detail how it proposed to provide simultaneous supervisory access and what technical problems had to be overcome so that this capability could be furnished.

Commerce did find that other information which Four-Phase furnished with its response satisfied other remaining deficiencies and might well have reached a similar conclusion concerning simultaneous execution had Four-Phase provided a basis on which it could have done so. Commerce was not required to rely simply on Four-Phase's statement that it would provide the required feature after award. Informatics, Inc., B-194926, July 2, 1980, 80-2 CPD 8. Where, as here, other offerors remained within the competitive range, rejection of Four-Phase's proposal after it failed to provide technical information showing how necessary changes to its system would be made was reasonable.

The protest is denied.

Harry R. Van Cleve

For Comptroller General
of the United States