



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** The Library of Congress--Request for  
Reconsideration  
**File:** B-237486.2  
**Date:** May 17, 1990

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John J. Kominski, Esq., and Robert A. Lincoln, Esq., The Library of Congress, for the agency.  
Thomas L. McGovern, III, Esq., Hogan & Hartson, for Microlog Corporation, the protester.  
Paul E. Jordan, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Prior decision sustaining protest on basis that the agency improperly reopened negotiations with one offeror without providing the same opportunity to the other offeror in the competitive range is affirmed where the agency request for reconsideration misconstrues our decision rationale, and does not establish any factual or legal errors in the prior decision.

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### DECISION

The Library of Congress requests reconsideration of our decision in Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227, in which we sustained Microlog's protest that it had been unfairly treated during the evaluation process.

We affirm our decision.

In the original protest, Microlog contended that the Library had failed to treat all offerors equally and had unfairly evaluated Microlog's proposal. We sustained the protest on the basis of our finding that the agency had reopened negotiations with the awardee, AT&T Federal Systems, without conducting discussions with the other offeror in the competitive range, Microlog. We therefore recommended that the Library reopen discussions with all offerors in the competitive range, obtain a new round of best and final offers (BAFOs), and prepare an appropriate technical

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evaluation and award decision. We also awarded the protester the costs of filing and pursuing the protest.

In its request for reconsideration, the Library again argues that the discussions which it held with AT&T were merely clarifications and, thus, it was not required to conduct discussions with Microlog.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation § 15.601; Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. Discussions are distinguishable from a request for clarifications, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. Id.

Our finding that discussions had been conducted with AT&T, but not with Microlog, was based on the contracting officer's activities on September 20, 1989. On that date, the contracting officer wrote each offeror, listing the proposed equipment selected by the Library, and requested each to advise her whether it agreed with the listed prices. The contracting officer then made a final evaluation of the offerors' prices. According to the contracting officer's award recommendation memorandum, Microlog's evaluation was based on its BAFO, while AT&T's evaluation "was a little complicated." The contracting officer first observed that certain of AT&T's one-time charges and maintenance costs, as reflected in a current AT&T contract, had decreased since AT&T submitted its proposal. She then telephoned AT&T to advise it to resubmit its proposal at the lower prices, and used the lower prices in her evaluation.<sup>1/</sup> We found that the telephone contact with AT&T constituted reopening of discussions since AT&T had been given the opportunity to modify its proposal. See Motorola, Inc., B-225822, supra.

In reiterating its argument that the telephone call was merely a request for clarification and not discussions, the Library again cites several cases in support of its position. In our original consideration and rejection of this argument, we reviewed these cases, found them all to be inapposite or obviously distinguishable from the situation

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<sup>1/</sup> Notwithstanding the contracting officer's own statement of what transpired, the Library explains that the contracting officer requested AT&T to reduce its prices in a letter dated September 20, 1989. The Library has never submitted any such letter to our Office.

in Microlog's protest and, accordingly, did not discuss them in our decision.

For example, Weinschel Eng'g Co., Inc., 64 Comp. Gen. 524 (1985), 85-1 CPD ¶ 574, concerned post-BAFO contacts which constituted clarifications in that, unlike the instant case, an opportunity was not provided for revision of the contacted offeror's proposal. All Diesel Power, Inc., 66 Comp. Gen. 19 (1986), 86-2 CPD ¶ 386, concerned a situation in which the agency conducted discussions with both offerors in the competitive range, and GTE Sylvania, Inc., 57 Comp. Gen. 715 (1978), 77-2 CPD ¶ 422, concerned post-BAFO discussions with the awardee for the purpose of ensuring cost realism in a cost-reimbursement contract.

The only case cited by the Library which could be considered relevant is Environmental Enters., Inc., B-193090, Mar. 9, 1979, 79-1 CPD ¶ 168. That case is distinguishable from the instant case in that post-BAFO communications regarding a slight price reduction were made with the low priced offeror which had already been selected for award. Here, AT&T was the higher priced offeror and while it had been recommended for award by the contracting officer, that recommendation was not approved until 5 days after she requested the price reduction in question. We see no basis to modify our original finding that the contracting officer improperly reopened discussions with AT&T without providing a similar opportunity to Microlog.

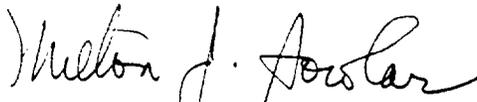
The Library also alleges that our decision was based upon an erroneous determination of fact. Specifically, the Library takes issue with our statement: "[m]oreover, it was the anticipated lower price which formed the basis of the contracting officer's price score for AT&T and ultimately the recommendation for award." Microlog Corp., B-237486, supra, 90-1 CPD ¶ 227 at 5. The Library explains for the first time that only .5 of a point was awarded to AT&T for its anticipated lower price. Thus, its combined cost/technical score of 96.5 would have been 96 had AT&T's original BAFO been the basis of the evaluated price. Since Microlog's combined score was only 93, the Library argues that the difference in score attributed to the anticipated price could not have "formed the basis of . . . the recommendation for award."

The Library has misconstrued our decision. Our rationale for sustaining the protest was our finding that the Library reopened discussions with AT&T without conducting them with Microlog. After stating that rationale, we made the observation that the information the contracting officer hoped to obtain from AT&T formed the basis of her price

evaluation for AT&T and, as such, ultimately her award recommendation. There can be no doubt that, regardless of the actual impact on the score, the contracting officer based her evaluation score on an anticipated and, in fact, never offered price.<sup>2/</sup> Further, while .5 of a point was not crucial to the award recommendation, it is plain that we correctly determined that the contracting officer's recommendation was based on a combined score, which was in turn based on information stemming from her telephonic request that AT&T reduce its price. Moreover, as we observed in our prior decision, where discussions have been conducted with one offeror to the exclusion of others in the competitive range, discussions should be reopened even where the other discussions do not directly affect the offerors' relative standing. Microlog Corp., B-237486, supra, 90-1 CPD ¶ 227 at 4, citing Federal Data Corp., B-236265.2, Jan. 25, 1990, 69 Comp. Gen. \_\_\_\_, 90-1 CPD ¶ 104.

Since the Library has presented no argument or information establishing that our prior decision is legally or factually erroneous, we affirm our prior decision. See 4 C.F.R. § 21.12(a) (1989). We also affirm the protester's claim for costs, including those incurred during this reconsideration.

The prior decision is affirmed.



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<sup>2/</sup> The contracting officer expected AT&T to reduce its price from \$127,575 to \$123,745. However, the BAFO submitted by AT&T in response to the contracting officer's telephone call reflected a total price of approximately \$117,250. After award of the contract and the Library's identification of an apparent mistake, this price was corrected to approximately \$127,400.