



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Intelligent Decisions, Inc.

File: B-274626; B-274626.2

Date: December 23, 1996

Daniel B. Abrahams, Esq., and Raymond Fioravanti, Esq., Epstein Becker & Green, P.C. for the protester.

Stephen T. Yelverton, Esq., for Win Laboratories, Ltd., an intervenor.

James J. Roby, Esq., and John R. Caterini, Esq., Department of Justice and

Roger D. Waldron, Esq., General Services Administration, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of General Counsel,

GAO, participated in the preparation of the decision.

DIGEST

1. Under request for quotations which sought prices for computer systems and related software listed on Federal Supply Schedule, agency properly selected the vendor that offered the best system configuration that meets the agency's needs at the lowest overall cost.

2. Where record shows that challenged agency discussions with vendor ultimately selected to provide the agency's computer needs were in the context of a Federal Supply Schedule buy, protest contending that such communications were improper is denied since the agency may properly obtain additional information in order to determine that it was selecting the vendor that meets the agency's needs at the lowest overall cost.

DECISION

Intelligent Decisions, Inc. (IDI) protests the actions of the Department of Justice (DOJ) in connection with request for quotations (RFQ) No. DOJ-SAS-Q-C089 for personal computers, related software and hardware. IDI contends that DOJ improperly awarded a contract to WIN Laboratories, Ltd. (WIN) under the simplified acquisition procedures in Part 13 of the FAR. IDI also argues that DOJ improperly accepted a revised quotation from WIN after the time set for receipt of quotations,

failed to evaluate quotations on an equal basis because WIN was allowed to substitute a non-compliant motherboard, and held improper discussions with WIN to the detriment of other vendors.

We deny the protests.

In June 1996, DOJ identified a need for an estimated 2,000 to 4,000 personal computers to be used in its consolidated office network system, and the contracting officer concluded that she could fulfill the agency's computer needs through a Federal Supply Schedule (FSS) buy. As a result, the contracting officer and other DOJ officials met with officials from the General Services Administration's (GSA) FSS office to seek guidance on making large purchases under the FSS. At that June 18 meeting, GSA officials indicated that since a large buy was anticipated, DOJ could request price reductions from the vendors' schedule prices and enter into a blanket purchase agreement (BPA) with the FSS contractor that was selected to fulfill its needs.¹ Thereafter, DOJ's technical representative contacted 10 vendors (including WIN and IDI) holding Federal Supply Classification (FSC) group 70 schedule contracts encompassing various microcomputers and associated software. The technical representative states that he discussed the agency's need for an estimated quantity of 2,000 to 4,000 systems in several telephone conversations and

¹WIN's GSA schedule contract No. GS-35F-4312D and IDI's GSA schedule contract No. GS-35F-4153D authorize each contractor to enter into BPAs with procuring agencies. The BPA provision in clause H.5 of their FSS contracts states as follows:

"The contractor agrees to enter into blanket purchase agreements in accordance with FAR 13.2 with ordering activities, provided that:

- a. Only items covered by the contract are ordered under such agreements;
- b. The period of time covered by such agreements shall not exceed the period of the contracts; and
- c. Orders placed under such agreements shall be issued in accordance with all applicable regulations and the terms and conditions of the contract. (NOTE: THE MAXIMUM ORDER OF THE CONTRACT APPLIES SOLELY TO INDIVIDUAL ORDERS PLACED AGAINST THE BLANKET PURCHASE AGREEMENTS AND HAS NO BEARING ON THE CUMULATIVE OR TOTAL VALUE OF THESE ORDERS)." [Emphasis in original.]

face-to-face meetings with the vendors and requested that each vendor submit descriptive literature and price lists for various configurations of computer systems available from their schedule.²

On August 8, the agency issued the RFQ to six vendors, including WIN and IDI. The RFQ stated that only quotations under GSA schedule contracts would be considered for 2,000 computer systems containing either Intel Pentium 133 processors or Intel Pentium 166 processors. It provided for award on a best value basis, system costs and other factors considered, and listed the following minimum specifications:

- (a) Intel motherboard w/plug & play (PnP) BIOS, Energy*Star
- (b) 256k or larger pipeline burst cache
- (c) 32 meg 60 ns EDO memory
- (d) EIDE hard disk controller, Mode 4 capable
- (e) 1.2 gigabyte or larger hard drive, EIDE Mode 4
- (f) 3.5" floppy
- (g) 2 megabyte video, PnP
- (h) 17" monitor, at least 1280 x 1024, Energy*Star, Low Radiation MPR-II, 0.28mm dot pitch/stripe or smaller
- (i) Internal CD-ROM w/6X (900bps) or faster transfer rate, and 145ms or faster access time
- (j) Sound card (Sound Blaster 16 compatible)
- (k) Dual speakers
- (l) Microsoft mouse
- (m) Windows 95 (104-key keyboard)
- (n) 3COM 3C905-TX network interface card
- (o) Windows 95 w/CD-ROM and manual.³

²The record indicates that IDI was aware of DOJ's estimated needs, as evidenced by its June 26 submission to the agency in which the protester provided pricing for various system configurations "based upon the purchase of 2,000-4,000 units."

³A hearing was conducted for the purpose of receiving testimony from DOJ's technical representative and two WIN representatives. See Bid Protest Regulations, § 21.7, 61 Fed. Reg. 39039, 39042 (1996) (to be codified at 4 C.F.R. § 21.7). DOJ's technical representative testified that while the specifications should have listed Windows 3.1 software and the Windows 3.1 license, they did not. Video Recording (VR) at 10:18:27. He further testified that in his communications with each vendor--prior to the issuance of the RFQ--he had identified the Windows 3.1 software and the Windows 3.1 license as requirements that should be provided from their schedules. VR at 10:20:08.

The agency received six quotes by the August 12 receipt date. WIN's initial quotation (dated August 11 but received on August 12) for the Pentium 133 processor was \$1,679 each and \$1,868 each for the Pentium 166. Upon reviewing WIN's quotes, the technical representative discovered that the quotations did not include pricing for the Windows 3.1 software license. Because the agency had identified this as a requirement during the technical representative's communications with vendors prior to issuance of the RFQ, he contacted WIN and allowed the vendor to revise its quotations to include this requirement. That same day, WIN submitted revised quotations of \$1,832 each for the Pentium 133 and \$1,993 each for the Pentium 166. In its quotations, WIN offered to provide, after delivery of an initial 700 systems, Pentium processors with a 2.0 gigabyte hard drive (an upgrade from the requirement for 1.2 GB) and a video display of 2.5 megabyte VideoRAM with a 128-bit PCI adapter (an upgrade from the 2.0 MB VideoRAM, 64-bit PCI adapter). IDI's response to the RFQ contained quotes for different configurations for the Pentium 133 and Pentium 166 processors and included open market prices for certain items (which the agency did not evaluate because the RFQ called for FSS pricing only). For the Pentium 133 system, IDI's quote was \$2,000 each; for two different configurations of Pentium 166 systems, IDI quoted \$2,195 and \$2,334, respectively.

In reviewing the quotes received, DOJ compared the relatively small price differential between the Pentium 133 and Pentium 166 and the difference in performance of each system and decided to eliminate the Pentium 133 system from further consideration. Of the quotes received for the Pentium 166, WIN's was the lowest priced at \$1,993, with certain upgrades after delivery of the first 700 systems. The next lowest quotes were from International Data Products at \$2,047 each (offering a newer model Intel motherboard than either WIN or IDI quoted), followed by NYMA, Inc. at \$2,102 each, and IDI at \$2,195 and \$2,334, respectively.⁴ In its best value analysis, DOJ weighed WIN's offered upgrades for the Pentium 166 against the systems offered by the other five vendors and determined that WIN's system was equivalent to, or better than, the systems offered by the others and was the lowest priced. The contracting officer therefore concluded that WIN's quotation offered the best value to the government and selected WIN to fulfill its computer needs.⁵

⁴While six quotations were received and evaluated, we only discuss the quotations received from WIN and IDI.

⁵The DOJ representative testified that the agency wanted all the systems to have the offered upgrades so he asked WIN for a price quote if all the systems (not just those delivered after the first 700) contained these upgrades. WIN subsequently offered an upgraded 1.6 gigabyte hard drive (not a 2.0 gigabyte) for the same price of \$1,993 each.

On September 5, DOJ issued a "Confirming Order," No. 6FCJMD-0792, for an estimated quantity of 3,000 Pentium 166 systems to WIN under its GSA schedule contract for \$5,979,000. These protests followed.⁶

THE PROCUREMENT

DOJ maintains that it conducted an FSS buy, ultimately entering into a BPA with WIN pursuant to which it could place orders from time to time. IDI, on the other hand, argues that this acquisition was not an FSS acquisition, but was either a simplified acquisition under Part 13 of the FAR or a competitive negotiated procurement under Part 15. The protester alleges that regardless of which of these two FAR parts is applicable, the procurement was defective because DOJ treated vendors unequally and unfairly in that the agency held discussions only with WIN and improperly waived the requirement for an Intel-manufactured motherboard by allegedly accepting a WIN-modified motherboard.

We conclude that this procurement was an FSS buy. Non-mandatory, multiple award FSS contracts are indefinite delivery contracts for commercial firms to provide government agencies with a variety of commonly used supplies and services at stated prices for given periods of time. Government ordering activities can order supplies or services under simplified procedures from the FSS contractors to meet their requirements.⁷ FAR § 8.401(a). Here, the record indicates that DOJ determined that its requirements could be satisfied through the use of the FSS,⁸ then reviewed price lists and descriptive literature of competing systems, obtained quotes from FSS vendors, compared the features of WIN's offered Pentium 166 processor with those of other FSS vendors, and selected WIN after determining that its Pentium 166 processor represents the best value and meets the agency's needs at the lowest overall cost.

⁶Performance of WIN's contract has not been suspended based on the agency's determination that continued contract performance is in the best interest of the government.

⁷The terms "Federal Supply Schedules" and "Multiple Award Schedules" are used interchangeably throughout Subpart 8.4 of the FAR.

⁸Under the FAR, an agency is required to satisfy its requirements for supplies and services from or through a list of sources set forth in descending order of priority at FAR § 8.001(a). Purchasing from the FSS has a higher priority than purchasing through non-FSS commercial sources. FAR § 8.001(a)(1).

Notwithstanding these facts, the protester contends, on the basis of language included in the September 5 document--the indefinite quantity contract language and other standard contract clauses--that DOJ changed the nature of the procurement from that of an FSS buy to the award of an indefinite quantity contract under either simplified acquisition procedures or full and open competitive procedures. However, it is clear from the record that the agency intended to satisfy its needs through FSS purchases and that what DOJ did here was consistent with the regulations governing FSS transactions. While the September 5 document is not a fixed quantity order that is typically placed against an FSS contract and contains certain language typically found in an indefinite quantity contract, it also does not obligate the government to order any minimum quantity, a requirement of indefinite quantity contract. See FAR § 16.504(a)(1). Thus, under circumstances here, we think that DOJ, through this September 5 document, in effect entered into a BPA. A BPA, of course, is a mechanism for placing charge account orders for an agency's repetitive needs. FAR § 13.201. The FSS program envisions agencies entering into BPAs with FSS contractors. FAR § 13.202(c)(3).

IDI argues that DOJ has no authority to enter into a BPA within the context of an FSS buy. IDI points out that the authority to enter into a BPA under FSS procedures, once authorized by FAR § 8.406, was removed by Federal Acquisition Circular (FAC) No. 90-21 (October 25, 1994). GSA, commenting on this matter at our request, acknowledges that FAC No. 90-21 deleted FAR § 8.406 from the FAR; however, it takes the position that ordering agencies may enter into BPAs with FSS contractors pursuant to FAR § 13.202(c)(3) and clause H.5 of their FSS contracts. FAR § 13.202(c)(3) provides that "BPAs may be established with Federal Supply Schedule contractors, if not inconsistent with the terms of the applicable schedule contract" and, as previously indicated, section H.5 of WIN's and IDI's schedule contracts expressly authorizes the contractor to enter into a BPA with an ordering agency.⁹ Purchases under BPAs with FSS contractors are not limited to \$100,000. FAR § 13.204(b). These provisions clearly support GSA's position. Under the circumstances, we conclude that DOJ's actions were fundamentally consistent with an FSS buy.

DISCUSSIONS

Since we have concluded that this acquisition was an FSS buy, IDI's allegations that the agency held improper discussions with WIN and impermissibly allowed WIN to "revise its price and technical solution" are without merit.

⁹This BPA provision was added to WIN's and IDI's schedule contracts in October 1995 through bilateral modifications.

Quotations in response to an RFQ that reflect FSS contract prices are not offers that can be accepted by the government. Rather, they are informational responses that indicate the products on the FSS that vendors would propose to meet the agency's requirements and the prices of those products and related services that the government may use as the basis for issuing a delivery order to an FSS contractor. Crown Furniture Mfg. Inc., B-225575, May 1, 1987, 87-1 CPD ¶ 456. Thus, vendors responding to an agency's request for quotations for products on an FSS do not submit offers that define exactly what the vendor would supply at what price; that already is defined by their FSS contracts. Since such requests are merely intended to identify suitable products available on the FSS, the agency can seek additional information from vendors after the submission of quotations. Monroe Sys. for Business, Inc., B-271136, May 17, 1996, 96-1 CPD ¶ 242; Hugo Heyn Co., B-255329, Feb. 15, 1994, 94-1 CPD ¶ 113. Therefore, to the extent the agency needed clarification of whether WIN's quotation included, for example, the cost to provide the Windows 3.1 license, the agency properly could contact WIN and obtain the information it required. We think DOJ's requests for additional information were proper in the context of an FSS buy and we have no basis to object to the agency's actions.

EVALUATION

IDI also argues that WIN's Pentium 166 processor does not comply with the stated RFQ specifications because WIN does not list an Intel motherboard on its GSA schedule; therefore, it asserts, WIN unfairly was allowed to offer a non-conforming motherboard in contravention of the RFQ requirements.

The record, including the hearing testimony of WIN's representatives, establishes that the Intel Endeavor II system motherboard described in WIN's response to the RFQ, is the same motherboard listed on WIN's GSA schedule as part number DTS-01-002. The descriptive literature furnished by WIN prior to the issuance of the RFQ, which DOJ's technical representative reviewed, shows that the motherboard WIN would provide was an Intel motherboard. Nothing in the record indicates that WIN's nomenclature denotes that the Intel-manufactured motherboard was modified. As to the nomenclature used by WIN, the hearing testimony of WIN's representatives indicate that WIN routinely assigns its own internal identification numbers to parts made by other manufacturers, a common practice in the computer industry. Thus, contrary to the protester's allegation, the record shows that WIN

quoted an Intel-manufactured motherboard,¹⁰ and we find that the agency reasonably determined that WIN's Pentium 166 processor meets the stated specification requirements.

The protests are denied.

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¹⁰At the hearing, WIN representatives brought a demonstrator Intel motherboard and a demonstrator WIN motherboard for inspection by the parties. It appears that Intel assigns its own serial numbers on motherboards it manufactures and the configuration of the Intel-manufactured motherboard appears unique to Intel.