B-190968

APR 5 1978

General Louis H. Wilson
Commandant, United States Marine Corps

Dear General Wilson:

Enclosed is a copy of our decision of today
in the matter of Whitlow Computer Systems, Inc.,
B-190968, in which the protest is denied.

While in this matter we did not find any prej-
udicial impropriety sufficient enough to sustain
the protest, we noted the Marine Corps' excess reliance
on the incumbent contractor resulting in its substantial
influence on the statement of minimum needs contained
in the specifications. We recommend that appropriate
action be taken to avoid such excess reliance in future
competitive procurements.

Please advise us of the action taken on this
recommendation.

Sincerely yours,

R.F.KELLER

Deputy] Comptroller General
of the United States

Enclosure

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

FILE: B-190968

DATE: April 5, 1978

MATTER OF: Whitlow Computer Systems, Inc.

DIGEST:

1. Agency argues that protest is untimely filed because (1) more than 10 working days before protest to GAO, agency advised protester that another offeror's proposal satisfied RFP's technical requirements as interpreted by agency, and (2) protester's familiarity with that offeror's standard commercial product implied protester's full knowledge of that offeror's proposal. Since protester did not review that offeror's proposal, GAO has no basis to conclude that protester could have had full knowledge of its contents; thus, protest is timely because protester had no basis of protest at time of agency's advice.

2. Offerors erroneously believed that RFP required certain automatic secondary allocation capability and both proposed systems with that capability; however, RFP did not require it and agency did not need it. In circumstances, GAO will not object to award based on RFP because needs of Government are satisfied and there is no showing that cost to Government was increased by offerors' erroneous interpretation of RFP.

3. Contentions--based on (1) protester's knowledge of another offeror's standard commercial sort system, and (2) conflicting views of agency's technical personnel--that other offeror's proposal failed to satisfy two of RFP's mandatory technical requirements are without merit. GAO's in camera technical review of other offeror's proposal provides no basis to disturb agency's determination that such proposal was technically acceptable.

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Whitlow Computer Systems, Inc. (Whitlow),
protests the award of a contract to Trans-American
Computer Associates, Inc. (Computer Associates),
under request for proposals (RFP) No. M00027-77-
R0029 issued by the United States Marine Corps for
a computer sort system. Whitlow contends that the
Marine Corps should have rejected Computer Associ-
ates' proposal as technically unacceptable for
failure to satisfy three mandatory technical require-
ments of the RFP. The Marine Corps contends that
Whitlow's protest is untimely and, alternative-
ly, that (1) Computer Associates' proposal was
technically acceptable and its acceptance did not
prejudice Whitlow, and (2) any specification defects
resulted from Whitlow's influence while the speci-
fications were being drafted.

BACKGROUND

In 1972, the Marine Corps installed Whitlow's
computer sort system in some of its installations.
By June 1975, eight installations employing 11
computers were using the Whitlow system. In 1977,
the Marine Corps decided to use the Whitlow system
on all 21 of its computers and a delegation of
procurement authority from the General Services
Administration for the sole-source procurement was
requested. When Computer Associates advised the
Marine Corps that its computer sort system would
satisfy the requirements, the subject competitive
RFP was issued; however, the statement of the
Marine Corps' minimum needs in the specifications
reflected substantial influence from the character-
istics of the installed Whitlow system.

Two proposals were received in response to the
RFP and, after evaluation, both were considered
technically acceptable. Somehow Whitlow discovered
that Computer Associates' proposal was considered
technically acceptable by the Marine Corps and that
determination was orally protested to the Marine
Corps based on Whitlow's understanding that Computer
Associates' standard commercial sort system was unable

to meet three mandatory technical requirements; how-
ever, Whitlow had no knowledge of the sort system
actually proposed by Computer Associates. In a
meeting with the Marine Corps on November 7, 1977,
Whitlow was advised that Computer Associates' pro-
posal was technically acceptable and the oral
protest was denied. Subsequently, best and final
offers were received from both firms and later
award was made to Computer Associates based on its
low-priced, technically acceptable proposal; upon
notification of such award, Whitlow protested here
on December 23, 1977.

TIMELINESS OF PROTEST

The Marine Corps argues that in the November 7,
1977, meeting Whitlow was first advised of the techni-
cal acceptability of Computer Associates' proposal and
of the Marine Corps' interpretation of the specifi-
cations and that on November 14, 1977, Whitlow was
again advised that Computer Associates' proposal was
considered technically acceptable. The Marine Corps
contends that since Whitlow admits familiarity with
Computer Associates' techniques, it can be inferred
that Whitlow had full knowledge of the substance of
Computer Associates' proposal. Therefore, the Marine
Corps concludes that the "initial adverse agency" ac-
tion took place not later than November 14, 1977;
thus, in order for Whitlow's protest to be timely
under GAO Bid Protest Procedures, Whitlow should
have filed the protest here within 10 working days
of such action, but did not. Therefore, the Marine
Corps argues that Whitlow's protest is untimely and
should not be considered on the merits.

The thrust of the Marine Corps timeliness argu-
ment rests upon the presumption that Whitlow could
ascertain whether Computer Associates proposed its
standard commercial sort system or one tailored to
the needs of the Marine Corps as specified in the RFP.
Since Whitlow was not permitted to review Computer
Associates' proposal--even after award--we cannot

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conclude that Whitlow could have had full knowledge
of its contents. Without such knowledge, the November
meetings could not have provided a basis for prc est.
Accordingly, Whitlow's protest is timely and we will
consider the merits of Whitlow's protest.

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TECHNICAL ACCEPTABILITY OF
COMPUTER ASSOCIATES' PROPOSAL

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Whitlow believes--based on its knowledge of
Computer Associates' standard commercial soit
system--that the awardee's proposed system should
have been rejected as technically unacceptable
because (1) it did not provide for automatic
secondary allocation of sortout data sets, (2) it
did not provide the means of predetermining the
utilization of system resources, and (3) it did not
provide user exits in which the user can supply
parameters to dynamically control the sort.

Sortout Data Set Capability

In section "F," item 4, the RFP provided that
the computer sort system "[m]ust provide for
secondary allocation for * * * SORTOUT data sets."
Whitlow contends that item 4 called for "automatic"
data set sortout capability bec use the operating
system of the hardware--that wo..ld host the desired
sort system--provides "nonautom tic" secondary
allocation of sortout data sets via the hardware's
job control language and compatibility with the
hardware's operating system was required by item 1,
section "F," of the RFP. In support of Whitlow's
interpretation of item 4, at the informal bid pro-
test conference held on the matter at GAO, one of
the technical personnel of the Marine Corps stated
that, in his view, item 4 required "automatic" data
set sortout capability.

In contrast to Whitlow's contention, the
Marine Corps contends--contrary to the view of the
technical adviser--that (1) the wc.d "automatic"
does not appear in item 4, (2) automatic data set
sortout capability was not a requirement of the
Marine Corps, and (3) since secondary allocation

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of sortout data sets is provided by the hardware's
operating system, a portion of item 4 merely over-
lapped or repeated an inherent requirement of item
1. The Marine Corps also contends that on November 7,
1977, Whitlow was advised that the "automatic" feature
was not required.

From the language of items 1 and 4, we
believe that the automatic feature was not required.
However, after our independent technical review of
the requirements of items 1 and 4 and our in camera
review of Computer Associates' proposal, we find that
both offerors included the automatic feature in their
respective proposals. While Whitlow's system was not
the same as Computer Associates' system--which provides
instructions in its system documentation for the coding
of the job control language of the hardware to auto-
matically provide secondary allocations for sortout
data sets--we have no basis to conclude that Computer
Associates' proposal should have been considered
technically unacceptable with regard to item 4.

In sum, the Government's minimum needs are sat-
isfied and there is no indication that the Government
would pay any additional amount for the "automatic"
feature. Since both offerors believed item 4 required
the automatic feature and both proposed the automatic
feature, we cannot conclude that Whitlow was prejudiced
on this score.

Means for Predetermining Resource Utilization

Under section "F," item 7, of the RFP
the computer sort system must provide the means of
predetermining the utilization of system resources
using statistics and data on file characteristics,
record bias, sort efficiency, etc. Whitlow contends--
based on information made available to it by Com-
puter Associates--that the awardee's proposal did
not provide for the collection of certain file
characteristics, without which the predetermination
of resource utilization would be impossible. In
support of its position, Whitlow also relies on

the statement at the informal conference by one of
the Marine Corps' technical advisers that the awardee's
proposed system could not make the required predeter-
mination.

The Marine Corps explains, in written comments
after the conference, that the awardee's sort--
after being run one time--is capable of providing
the required resource utilization data for future
production runs and that Whitlow was advised on
November 7, 1977, that this means of predetermin-
ing resource utilization satisfied the requirements
of item 7. The Marine Corps also explains that
while Whitlow's sort system includes a simulation
program that allows a programmer to specify the
approximate file characteristics and operating
environment to predetermine approximate resource
utilization, the Marine Corps did not require a
separate program and Whitlow was so advised. The
Marine Corps concludes that Whitlow had an oppor-
tunity to modify its proposal but elected not to
do so.

We note that Whitlow's arguments are based
on what it believes is contained in the awardec's
proposal, which Whitlow has not seen. We have
reviewed in camera Computer Associates' proposal
from a technical standpoint and find that it did
provide a means of predetermining system resource
utilization. That means includes running one sort
representing a given class of sorts to obtain
certain data and analyzing that data in combina-
tion with (1) information obtained from the data
file collected by the host hardware system, and (2)
charts and graphs contained in Computer Associates'
software documentation package. Accordingly, we
have no basis to disturb the Marine Corps' deter-
mination that the awardee's proposal is technically
acceptable with regard to item 7.

User Exits to Control Sort

In section "F," item 9, the RFP required that
the computer sort system must provide user exits
in which the user can supply parameters to dynami-
cally control the sort. Whitlow contends that since
item 1 requires sort compatibility with the host
hardware operating system, which contains standard user
exits, item 9 must have required the desired sort system
to provide nonstandard user exits, as Whitlow's does.
Based on Whitlow's knowledge of Computer Associates'
standard commercial sort system and certain state-
ments made by one of the Marine Corps' technical
representatives at the informal conference, Whitlow
believes that Computer Associates did not propose
to provide the required nonstandard user exits.

In response, the Marine Corps explains that
the awardee's proposed sort system supports all
the standard user exits as required by item 1 and
also allows parameters to be changed at the time of
sort execution by using a particular data definition
card. In the Marine Corps' technical judgment, the
awardee's proposal satisfies the requirements of item
9 and item 9 properly states the Marine Corps' produc-
tion processing minimum requirements.

We have reviewed, in camera, Computer Associ-
ates' proposal to determine whether the Marine
Corps' determination was reasonably based. We
found that the awardee proposed to support all stan-
dard user exits and, in addition, to permit the
modification of sort parameters for control purposes
at the time of program execution. Although the
Whitlow sort system may be capable of providing
substantially more nonstandard user exits, we have
no basis to conclude that the Marine Corps' deter-
mination--regarding the compliance of Computer
Associates' proposal with the requirements of
item 9--was unreasonable.

CONCLUSION

Protest denied.

By letter of today, however, we are bringing
to the attention of the Commandant of the Marine
Corps a basic procurement deficiency noted in this
matter--the agency's apparent excess reliance on
an incumbent contractor in establishing the agency's
minimum needs. As summarized by one of the Marine
Corps' technical personnel at the informal conference,
"the Corps needed a Volkswagen and issued specs for
a Cadillac." In this case we did not find any prejudice
with regard to the specifications. However, appropriate
action should be taken to avoid excess reliance on
incumbent contractors in drafting specifications.

Deputy Comptroller General
of the United States