

DECISION

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

FILE: B-217378 **DATE:** March 29, 1985
MATTER OF: Intermem Corporation

DIGEST:

1. Where RFP required offerors to submit a cost proposal offering prices for acquisition of the product by (1) lease, (2) purchase, (3) lease with option to purchase, and (4) lease-to-ownership with title transfer at end of 3 years, and award was made on basis of purchase of product, protester's contention that it had not been treated fairly, since it had been advised by the procuring activity that award would not be on basis of purchase of product, is without merit. Protester has not met burden of proving its case since the only evidence is conflicting statements by the protester and the agency.
2. Even assuming that protester was orally advised by procuring activity that award would be made on basis of lease/rental, rather than purchase, and the protester acted on this advice to its detriment, protester is not entitled to relief, since oral instructions given before award of the contract are not binding on the government.
3. Where RFP provided that equipment could be acquired by either purchase or lease/rental, promise by government that protester would receive award since it had offered lowest evaluated price proposal for acquisition of equipment by lease/rental has no binding effect since government was legally obligated to award to firm offering lower evaluated price for acquisition of equipment by purchase.

Intermem Corporation (Intermem) protests the award of a contract to Control Data Corporation (Control Data) under request for proposals (RFP) NOO123-84-R-0023 issued by the Naval Regional Contracting Center for the purchase of extended semiconductor memory modules.

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The protest is denied.

The RFP required that each offeror submit a technical proposal describing its proposed system and a cost proposal offering prices under the following four acquisition methods: (1) lease, (2) purchase, (3) lease with option to purchase, and (4) lease-to-ownership with title transfer at the end of 3 years.

Two timely proposals were received--one from Control Data and the other from Intermem. Both proposals were determined to be technically acceptable. According to Intermem, it was advised by a representative of the procuring activity that (1) award would be made on the basis of the lowest evaluated lease with option to purchase proposal and (2) the purchase method would not be used due to the unavailability of funds. Intermem stated that on the basis of this information, it structured its proposal to assure that its lease with option to purchase was its lowest pricing alternative. However, the procuring activity subsequently obtained sufficient funds to purchase the system and, since Control Data's purchase proposal was the lowest evaluated price proposed, award was made to Control Data.

The protester contends that the procuring activity (1) misled it in connection with the basis for evaluation of the proposals and (2) failed to treat the offerors equally. Also, the protester contends that the procuring activity's refusal to correct the unequal treatment with a corrected statement of the evaluation basis and a new round of best and final offers was arbitrary.

The RFP, in addition to providing that each offeror was to propose the four acquisition methods mentioned above, provided the following:

"Award will be made on that otherwise acceptable proposal offering the lowest total evaluated cost over the systems life of the equipment, regardless of acquisition method; provided, however, that should an offered acquisition method require an expenditure of funds during any Governmental fiscal period greater than those available or reasonably expected to be available for the requirements during such period Government reserves the right not to make award on such offer. . . ."

While, initially, the agency did not have sufficient funds to purchase the system, the RFP did request that each offeror submit, as one of its price proposals, a price proposal based on purchase of the system. Also, in its request for best and final offers, the procuring activity requested that price proposals be submitted on the basis of all four acquisition methods. Thus, it is apparent that the procuring activity reserved the right to make the award on the basis of the lowest evaluated cost for the system consistent with available funding. The crux of Intermem's protest appears to be that the procuring activity should not have applied this criteria.

In support of its protest, Intermem cites several of our decisions which stand for the proposition that all offerors must be treated equally. Intermem argues that one of the elements of equal treatment is identical statements of the agency's requirements being provided to all offerors. In each of the cases cited, one of the offerors received favored or special treatment or, at least, was given a competitive edge as the result of some action taken by the government. In other words, the government did not follow its own criteria.

However, in the present case, the procuring activity denies that it told Intermem that award would be made on the basis of the lowest evaluated lease with option to purchase proposal. In this regard, we have held that a protester has the burden of affirmatively proving its case and we will not consider that this burden has been met when, as in the present case, the only evidence is conflicting statements by the protester and the agency. See Alchemy, Inc., B-207954, Jan. 10, 1983, 83-1 C.P.D. ¶ 18. We do not believe that Intermem's contrary affidavit is sufficient to refute the procuring activity's denial.

Thus, the evidence of record indicates that all of the offerors were treated equally in that they were told to offer a system with a cost proposal offering prices under four different acquisition methods and that the procuring activity, depending on funding, would choose the lowest evaluated system, regardless of the acquisition method. This was the basis upon which award was made.

However, even assuming that Intermem was advised that award would be made on the basis of the lowest evaluated lease with option to purchase proposal, oral instructions

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given before award of the contract are not binding on the government. See Mobility Systems and Equipment Company, B-208847, Sept. 24, 1982, 82-2 C.P.D. ¶ 275.

Finally, Intermem states that it was promised the award since it had offered the lowest evaluated price proposal for lease/rental of the equipment. Even if this promise was made, it could have no binding effect because the government was legally obligated to make award to that firm offering the lowest price consistent with available funding, which was Control Data. See Freund Precision, Inc., B-209785, Jan. 24, 1983, 83-1 C.P.D. ¶ 83.

for *Seymour Efron*
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