



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Norden Systems, Inc.

File: B-246047.2

Date: February 28, 1992

Robert L. Marconi, Esq., for the protester.
Vera Meza, Esq., and Dayn T. Beam, Esq., Department of the Army, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where ambiguity in contract, arising from agency's inclusion of awardee's proposed delivery schedule which provided for later exercise of options than dates provided elsewhere in contract schedule, is resolved through post-award deletion of the awardee's proposed schedule, protest that awardee obtained an unfair advantage as a result of acceptance of noncompliant offer is denied since protester suffered no competitive disadvantage.

DECISION

Norden Systems, Inc. protests the award of a supply contract to LTV Aerospace and Defense Company (LTV) under request for proposals (RFP) No. DAAH01-91-R-0044, issued by the Army Missile Command (MICOM). Norden contends that the agency failed to resolve qualifications in LTV's proposal, which constituted unequal treatment of the offerors.

We deny the protest.

The original RFP, issued on March 22, 1991, was for the supply of basic and optional quantities of payload interface modules (PIMs) in support of the Multiple Launch Rocket Systems. The basic quantity (72 units) was to be delivered 480 days after contract award, and the optional quantities were to be delivered 480 days after exercise of each option. Under paragraph I-4 of the RFP, the government could

exercise the first option (105 units) not later than January 31, 1992, and the second option (44 units) not later than January 31, 1993. LTV and Norden submitted proposals by the July 5, 1991, closing date.

After evaluating the proposals, on August 15, the agency sent each offeror a letter listing needed corrections and clarifications. The letter also included a revised delivery schedule. Under this schedule, basic and optional quantities were due in 15-unit increments beginning on day 480 and continuing in like increments every 30 days thereafter. The agency letter to LTV also requested clarification of the period the offeror intended to use certain government-furnished property (GFP). In response, LTV agreed to the revised schedule and, in conjunction with its stated need for GFP, provided a delivery schedule reflecting production under a current contract and proposed production under the contract to be awarded.

By letter of August 20, MICOM advised the offerors that it was merging the RFP with a second RFP (issued August 12) for a quantity of 155 PIMs, to be delivered 780 days after award. On August 23, LTV provided a revised proposal for the added quantity and added a revised delivery schedule pertaining to use of GFP, again showing current and proposed production. LTV notified the agency that the price and schedule were based on an adjustment of the periods in which the government could exercise the options since the RFP "did not accommodate" the schedule for the added 155 units. While LTV did not explain the adjustments, the revised schedule showed exercise of the first option quantity 1 month later than the RFP's "not later than" date and delivery of the option quantity (105 units) beginning several months after the schedule provided in the RFP. The schedule also reflected exercise of the second option earlier than the RFP's "not later than" date and early delivery of sufficient units for the option. According to the agency, the revised schedule was not relied upon or considered during the evaluation.

During subsequent telephone discussions, both offerors agreed that all outstanding issues concerning their proposals had been resolved. The agency also advised the offerors that the required delivery schedule would be that covered in the agency's August 15 and 20 letters. In its September 5 BAFO, LTV confirmed that all issues previously discussed had been fully resolved and that it was not making any additional changes or modifications to its proposals. LTV's BAFO prices were submitted on a government form which set forth required times for delivery of all base and option quantities.

On September 13, MICOM awarded LTV the contract as the responsible offeror with the lowest priced, conforming offer. The contract delivery schedule in Section F of the contract and the times for exercise of options in Section I were those provided in the amended RFP. On its own initiative, the agency also attached a copy of the delivery schedule from LTV's August 23 letter, with the following notation: "The delivery schedule at attachment 08 was proposed by the contractor and is included for planning purposes." According to the agency, it mistakenly assumed that the proposed schedule was consistent with the RFP delivery schedule.

When Norden became aware of the attached schedule, it filed a protest with our Office, alleging that MICOM had relaxed the delivery schedule for LTV. Upon review of LTV's August 23 letter, Norden also protested LTV's "assumptions" regarding option exercise. Subsequently, MICOM entered into a no-cost, bilateral modification of the contract with LTV to delete the attached schedule.


Norden contends that LTV took exception to the required delivery schedule by making assumptions about the option exercise dates, and failed to clarify or eliminate the exception in its BAFO. Norden asserts that MICOM did not treat it equally and maintains that if Norden had been given the opportunity to base its offer on the same assumptions as LTV, it could have lowered its option prices, resulting in a total price lower than LTV's.

LTV's August 23 proposal included pricing and a delivery schedule based upon unclear assumptions on changes in the exercise of options, but the agency never changed the option provision and delivery schedule in the RFP. While MICOM conducted oral discussions with LTV after submission of the August 23 proposal, and both LTV and MICOM agreed that all "outstanding issues" were resolved, it does not appear that LTV's proposed schedule was discussed. Further, LTV's BAFO took no exception to the RFP delivery schedule or when the government could exercise the options, and agreed to the required time for delivery after exercise of the options. The contract as awarded to LTV, however, contains the required delivery schedule and option exercise dates as well as the noncompliant schedule submitted by LTV. Thus, Norden

is correct that the contract, as awarded, was ambiguous with respect to the options.¹ However, to the extent that the contract as initially awarded properly can be read as reflecting LTV's nonconforming delivery and option exercise terms, under the circumstances of this case we do not find that Norden is entitled to any relief.

In general, if our Office determines that an award does not comply with statute or regulation, we will presume prejudice unless we find, based upon the record, that the protester clearly would not have been the successful offeror absent the violation. Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Here, there was no prejudice to Norden as a result of the agency's actions. According to Norden, it could have offered a lower price if it could have proposed on the basis of LTV's apparent changes in the agency's option exercise dates. However, as indicated by the agency's deletion of the noncompliant schedule, the agency's needs have not changed--they remain the same as those on which Norden based its proposal. Thus, we fail to see how Norden suffered any competitive harm by the agency's initial and apparently inadvertent acceptance of the LTV schedule.

The protest is denied.


James F. Hinchman
General Counsel

¹The agency argues that addition of the schedule had no effect on the contract because the order of precedence clause, Federal Acquisition Regulation § 52.215-33, incorporated by reference in the RFP, would operate to make the contract "schedule" take precedence over any "attachment." Since the contract schedule encompasses Section A, which attached the LTV schedule, and Section F, covering the contract delivery schedule, the order of precedence clause does not resolve the ambiguity.