



Comptroller General  
of the United States

Washington, D.C. 20548

REDACTED DECISION\*

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## Decision

**Matter of:** 4th Dimension Software, Inc.; Computer Associates International, Inc.

**File:** B-251936; B-251936.2

**Date:** May 13, 1993

James A. Dobkin, Esq., J. Robert Humphries, Esq., and Shavit Matias, Esq., Arnold & Porter, for 4th Dimension Software, Inc.; and William W. Goodrich, Jr., Esq., Matthew S. Perlman, Esq., and Thomas W.A. Barham, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Computer Associates International, Inc., the protesters.

Gerald F. Doyle, Esq., and Ron R. Hutchinson, Esq., Doyle & Bachman, for LEGENT Corporation and Goal Systems International, Inc., interested parties.

Jo H. DuBose, Esq., Defense Logistics Agency, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Timely protest initially filed with, and then withdrawn from the General Services Administration Board of Contract Appeals (GSBCA) in order to pursue the protest at the General Accounting Office (GAO) so as to consolidate the protest with another protest that was filed earlier at GAO by a different firm, may be considered by GAO, despite the fact that the GSBCA had not actually dismissed the protest until after it was filed at GAO.

2. Protester, which submitted a proposal on a multiple award contract for software, is not an interested party under the General Accounting Office Bid Protest Regulations

\*We issued a decision responding to 4th Dimension's and Computer Associates' protests on May 13, 1993. 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993. Because the decision incorporated protected information, it was issued subject to the terms of a General Accounting Office protective order and was released only to the parties admitted to the protective order. The protected information has been redacted from the following version of the decision.

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eligible to protest the award of a bid lot on which it did not submit a proposal.

3. The General Accounting Office will not generally review an allegation that two offerors colluded in violation of the Certificate of Independent Price Determination and the antitrust laws.

4. A contracting agency must conduct discussions with all offerors in the competitive range and request best and final offers (BAFO), where during communications with the offerors after receipt of initial proposals--which the agency labeled clarifications--the agency sought and obtained information essential for determining the acceptability of the awardees' proposals and/or provided the awardees with an opportunity to revise or modify proposals, but did not request BAFOs.

5. An award based on a proposal that does not comply with material solicitation specifications is improper; where an agency essentially changes or relaxes its requirements in accepting a proposal that takes exception to the specifications, it must issue a written amendment to notify all offerors of the changed requirements and to afford them an opportunity to revise their proposals in response to the changed requirements.

6. A contracting agency may properly assess proposal risk, arising from the offeror's approach or demonstrated lack of understanding, where such consideration is consistent with and intrinsic to the solicitation evaluation criteria, even though the solicitation did not expressly state that proposal risk would be evaluated.

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#### **DECISION**

4th Dimension Software, Inc. and Computer Associates International, Inc. protest various awards to LEGENT Corporation and Goal Systems International, Inc. under request for proposals (RFP) No. DLAH00-92-R-0121, issued by the Defense Logistics Agency (DLA) for Federal Information Processing software and support services for a system upgrade and the consolidation of DLA computer sites. Among other things, the protesters assert that DLA conducted discussions, but failed to request best and final offers (BAFO), and that the source selections were improper.

We sustain the protests on the basis that DLA conducted discussions without requesting BAFOs.

On June 15, 1992, DLA issued the RFP contemplating the award, without discussions, of one or more firm, fixed-price

requirements contracts. The RFP requested proposals for commercial-off-the-shelf software, documentation, training and maintenance in four functional areas referred to as "bid lots," that were designated by a bid lot number.

The RFP stated that all proposals were required to satisfy the specifications and included a mandatory technical questionnaire for each bid lot, which offerors were required to answer as part of the technical proposals. Offerors were to submit separate proposals for each bid lot, which were evaluated separately with respect to the following three areas listed in descending order of importance: technical, management, and cost. For each bid lot, the RFP listed numerous evaluation factors and subfactors with regard to each evaluation area. Awards were to be made on a lot by lot basis to the responsible offerors whose combined technical and cost proposals were considered most advantageous to the government.

Seven offerors submitted 17 separate proposals by the closing date of July 24, 1992. Offerors for bid lots 1 and 4 included 4th Dimension, Computer Associates and LEGENT. Offerors for bid lot 2 included 4th Dimension, Computer Associates and Goal. The sole offeror for bid lot 3 was LEGENT. On August 3, 1992, Goal became a subsidiary of LEGENT under a merger agreement.<sup>1</sup>

With regard to each evaluation factor under the technical and management areas, DLA evaluators rated the proposals, assigning a rating of "strength," "adequate," or "weakness." For each factor, the evaluators also assigned a risk assessment of "high," "moderate," or "low," based on the evaluators' judgments of how likely it was that an offeror could perform in accordance with its proposal without disruption of schedule, increased cost, degraded performance or above-normal monitoring by the government. The evaluators then rated each software package as superior, acceptable, marginally acceptable or unacceptable, and designated an overall proposal risk rating.

DLA completed its initial evaluation of proposals by August 13 and sent offerors written questions regarding their proposals. DLA labeled these written questions "Clarification Requests." The offerors submitted written responses to these questions by August 25. On September 3, DLA completed final evaluations of the proposals. On December 31, DLA awarded a contract for bid lots 1, 3 and 4

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<sup>1</sup>LEGENT and Goal continued in this procurement as separate entities.

to LEGENT and a contract for bid lot 2 to Goal, determining on a lot by lot basis that these firms' proposals represented the best value to the government considering the technical, management and price factors.

4th Dimension protested to our Office on January 7, 1993, within 10 calendar days of award. DLA suspended contract performance in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (1988). Computer Associates, which was apprised of the awards on January 5, first filed a protest with the General Services Administration Board of Contract Appeals (GSBCA) on January 15, 1993. Upon learning of 4th Dimension's earlier filed protest with our Office--which had the effect of staying contract performance--Computer Associates sought leave to withdraw its GSBCA protest on January 21 and, on that same date, filed a protest with our Office on the same grounds as protested to the GSBCA. In response to Computer Associates's request for withdrawal, the GSBCA dismissed Computer Associates's protest on January 25.

#### PRELIMINARY ISSUES

LEGENT and Goal argue that Computer Associates's January 21 protest to our Office should be dismissed because the firm initially protested the procurement on the same grounds to the GSBCA and that protest had not been dismissed when Computer Associates protested to our Office. In this regard, the awardees state that CICA prohibits the maintenance of protests at both the General Accounting Office (GAO) and the GSBCA.

While 31 U.S.C. § 3552 and 4 C.F.R. § 21.3(m)(6) (1993) generally prohibit the filing of protests with GAO where the same matter had been previously protested to the GSBCA, we will consider timely protests that were previously filed at the GSBCA, where the protester acted to withdraw the protest at the GSBCA before filing at GAO (even if the GSBCA had not yet actually dismissed the protest), so long as the circumstances show that the protester was not attempting to maintain protests in both forums. Computer Based Sys., Inc., 70 Comp. Gen. 172 (1991), 91-1 CPD ¶ 14. In Computer Based Sys., Inc., the protester first protested to the GSBCA and, upon learning that the GSBCA would likely dismiss the protest for lack of jurisdiction, the protester affirmatively acted to withdraw the GSBCA protest and then timely filed a protest with GAO on the same grounds. We found that the protest, when filed at GAO, was in effect no longer before the GSBCA, such that our Office could consider it.

LEGENT and Goal argue that the present case is different from Computer Based Sys., Inc., and similar cases where we considered protests previously filed at and withdrawn from the GSBICA, in that Computer Associates's reelection of forums was motivated by a desire to take advantage of the stay of contract performance caused by 4th Dimension's earlier filed protest. LEGENT and Goal argue that the only situations where we have previously permitted consideration of protests first filed at the GSBICA were where the GSBICA assertedly lacked jurisdiction.

We do not believe that the CICA prohibition of simultaneous protests in two forums is contravened in this case because of Computer Associates's motivations in seeking dismissal of its initial GSBICA protest. 4th Dimension filed the first protest of these awards with GAO and, over a week later, Computer Associates, unaware of the GAO protest, protested to the GSBICA. Upon learning of the earlier filed protest, Computer Associates promptly withdrew its GSBICA protest and timely filed at GAO.<sup>2</sup> The firm did not seek to maintain protests in both forums, and the effect of withdrawing the GSBICA protest and filing at GAO was to consolidate the protests of these awards for consideration by GAO. Under the circumstances, we decline to dismiss Computer Associates's protest because it was first filed at the GSBICA. Computer Based Sys., Inc., supra.<sup>3</sup>

We do dismiss certain aspects of 4th Dimension's protest. Specifically, 4th Dimension is not an interested party eligible to protest that DLA failed to determine the reasonableness of LEGENT's price on bid lot 3, inasmuch as LEGENT submitted the only offer on that lot. Under the bid protest provisions of CICA, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be

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<sup>2</sup>If GSBICA had maintained jurisdiction over Computer Associates's protest, our Office would have dismissed 4th Dimension's protest. 4 C.F.R. § 21.3(m) (6).

<sup>3</sup>We note that the GSBICA has taken a similar position for protests filed at and withdrawn from the GAO prior to the GSBICA filing, where neither the agency nor GAO has processed or made rulings on the GAO protest. Syscon Corp., GSBICA No. 10890-P (1990), 91-1 BCA ¶ 23,523, 1990 BPD ¶ 391.

in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Since 4th Dimension did not submit a proposal on bid lot 3, or even allege that it would do so if the award was canceled and the requirement resolicited, it lacks the direct economic interest required to maintain a protest on this bid lot.<sup>4</sup>

We also dismiss 4th Dimension's protest that LEGENT and Goal, prior to their merger, may have agreed not to submit competing proposals for DLA's requirements and thereby colluded to restrict competition in violation of the RFP's Certificate of Independent Price Determination and the antitrust laws, and that DLA should have investigated the matter for possible referral to the Department of Justice. Generally, such allegations are outside the scope of the bid protest process. The determination of whether a bidder falsely certified under the Certificate of Independent Price Determination initially involves an affirmative determination of responsibility by the contracting officer not reviewable by our Office in these circumstances. Where the contracting officer suspects such a violation, he or she is required to refer the matter to the Department of Justice; the interpretation and the enforcement of such laws are functions of the Department of Justice and the federal courts, not our Office. See Convention Mktg. Servs., B-245660.3; B-246175, Feb. 4, 1992, 92-1 CPD ¶ 144; Florida Transp. Servs., Inc.--Recon., B-235559.2, Sept. 6, 1989, 89-2 CPD ¶ 214; see generally Federal Acquisition Regulation (FAR) Subpart 3.3. Where a contracting officer does not suspect such violations and/or does not refer the situation to the Department of Justice, competing offerors may do so. See Acme Prods., Inc., B-231846, July 13, 1988, 88-2 CPD ¶ 47.

#### DISCUSSIONS

The protesters assert that DLA conducted discussions with some offerors, including both awardees, as a result of DLA's solicitation of "Clarification Requests" after receiving

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<sup>4</sup>We note that while 4th Dimension alleges that LEGENT submitted an unreasonably priced proposal on bid lot 3, where no competition existed, in order to subsidize low prices on the other bid lots, [DELETED]. Thus, it seems extremely unlikely that LEGENT's price on bid lot 3 can be considered unreasonable. Although counsel for 4th Dimension was provided LEGENT's cost proposal under a protective order, 4th Dimension offers no further comment on this matter, but merely states its general allegation.

proposals and conducting initial evaluations. The protesters argue that DLA was required, under such circumstances, to request BAFOs from all offerors after conducting meaningful discussions, and that DLA's failure to request BAFOs violated applicable regulations and prejudiced the protesters.<sup>5</sup> We agree and sustain the protests on this basis.

FAR § 15.610(a) permits contracting agencies to make award on the basis of initial proposals without discussions, where the solicitation announces this possibility. Where discussions are held with one offeror, however, the agency is required to conduct discussions with all other offerors whose proposals are in the competitive range, which is composed of those proposals that, as submitted, either are acceptable or are susceptible of being made acceptable through negotiations. FAR § 15.610(b); HFS, Inc., B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188; Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227; Kinetic Concepts, Inc., B-232118, Oct. 26, 1988, 88-2 CPD ¶ 428. Discussions are material communications related to an offeror's proposal and distinguishable from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. Microlog Corp., supra. It

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<sup>5</sup>LEGENT and Goal argue that this issue is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), because the protesters raised this issue more than 10 working days after they assertedly should have known that BAFOs would not be requested. LEGENT and Goal allege that the protesters should have known that DLA would not request BAFOs when it requested offerors to extend the acceptance periods of their offers from November 24 to December 31. We disagree. Since agencies must request BAFOs after conducting discussions and since DLA did not notify the protesters after the alleged occurrence of discussions that it would not request BAFOs, the soonest any offeror could have known that DLA would not request BAFOs after discussions was when they learned of the awards. Computer Associates protested this issue within 10 working days of receiving notice of the awards, so its protest is timely under 4 C.F.R. § 21.2(a)(2). 4th Dimension asserts that the Clarification Requests that it responded to did not constitute discussions, so it had no reason to know that DLA conducted discussions with other offerors until it received the agency report, which included the record of communications between DLA and other offerors. Since 4th Dimension raised this issue in its comments on the agency report, which it filed in our Office within 10 working days of receiving the report, this protester also timely raised the issue under 4 C.F.R. § 21.2(a)(2).

is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. ABT Assocs., B-196365, May 27, 1980, 80-1 CPD ¶ 362; The Human Resources Co., B-187153, Nov. 30, 1976, 76-2 CPD ¶ 459.

The difference between clarification and discussion is defined by FAR § 15.601 as follows:

"'Clarification' . . . means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. . . . Unlike discussion . . . clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision."

"'Discussion' . . . means any oral or written communication between the [g]overnment and an offeror, (other than communications conducted for the purpose of minor clarification) whether or not initiated by the [g]overnment, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal."

See The Human Resources Co., supra (if the communications provide an offeror with an opportunity to make a substantive change in its proposal, e.g., revising or modifying the proposal to make its unacceptable proposal acceptable, the communications are discussions, not clarifications); New Hampshire-Vermont Health Serv., 57 Comp. Gen. 347 (1978), 78-1 CPD ¶ 202 (same). If discussions are conducted, the agency must request BAFOs from those offerors still in the competitive range, even where the discussions do not directly affect the offerors' relative standing. FAR § 15.611(a); HFS, Inc., supra; Microlog Corp., supra; Kinetic Concepts, Inc., supra.

DLA argues that its communications with offerors were limited to the clarification of proposals and did not constitute discussions. We disagree.

DLA's evaluation documents show that evaluators were uncertain as to whether, or to what extent, various aspects of the offerors' proposals satisfied agency requirements. These documents include notes stating that the rating for the respective evaluation factor may change as a result of



the offeror's response to a clarification question; indeed, some notes on evaluation worksheets demonstrate that acceptability or unacceptability was determined on the basis of responses to clarification questions. A large proportion of the numerous "Clarification Requests" solicited information to address material matters of proposal compliance with the solicitation requirements. Many requests asked how the offeror's proposal would address specific agency requirements or asked whether certain products were included in the proposal.<sup>6</sup>

The responses to the clarification requests demonstrate that the communications between DLA and the offerors were to seek and obtain "information essential for determining the acceptability of" proposals and that they provided offerors with the opportunity to revise or modify their proposals. In some cases, proposal revisions or modifications were made to the awardees' proposals in their responses to the "Clarification Requests." In many other cases, the responses supplemented the offeror's technical proposal by identifying whether a particular capability was being offered as a part of the proposal or how the offered software meets the specification requirements; these explained capabilities were sometimes noted by the evaluators as a strength or weakness in the evaluation documentation of the "Clarification Request" responses. See Industrial Lift Truck Co. of N.J., Inc.; Doering Equip., Inc., 67 Comp. Gen. 525 (1988), 88-2 CPD ¶ 61 (information solicited from an offeror which determined compliance with one mandatory requirement is discussions, not clarifications); Canadian Com. Corp., B-246311, Feb. 26, 1992, 92-1 CPD ¶ 233 (same).

Moreover, Legent's and Goal's responses to some clarification requests demonstrated instances of apparent noncompliance with the specification requirements. Where a contracting agency changes or relaxes its requirements by accepting a proposal that takes exception to the specifications, it must issue a written amendment to notify all offerors of the changed requirements and to afford them an opportunity to revise their proposals in response to such changed requirements. FAR § 15.606; Applied Mathematics, Inc., 67 Comp. Gen. 32 (1987), 87-2 CPD ¶ 395; IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378.

We discuss below several illustrative examples of "Clarification Requests" that constituted discussions (one for each bid lot), including examples that show that the awardees'

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<sup>6</sup>Such questions were generally followed by the sentence, "Please clarify."

proposals, as clarified by the responses to the "Clarification Requests," were also apparently noncompliant with the specifications. One of the examples involves an instance where the agency thought that the awardee's proposal was noncompliant with a specification requirement and the awardee's response to the "Clarification Request" confirmed that its proposal did not comply; another example is an instance where the agency was concerned about the awardee's compliance with a specification requirement and it was still unclear, after the awardee responded to the "Clarification Request," whether the proposal complied with a specification requirement because the response was unclear; and one is an instance where the awardee actually modified its proposal to make its unacceptable proposal acceptable.

The first example involves the DLA inquiry as to whether LEGENT's bid lot 4 proposal complied with section C.3.4 of the RFP specifications. That section of the RFP requires that the proposed information management system have "the ability to transfer rapidly large quantities of data over existing communications facilities." Section C.2.1 of the RFP specifications described the existing data processing environment to include mainframe computers at the Information Processing Centers (IPC), UNIX-based<sup>7</sup> super minicomputers at the Information Centers (IC) and personal computers (PC). From our review, we think that these specifications require the offered software to transfer rapidly large quantities of data over all existing communications facilities, which would include communications between the super minicomputers and the mainframe computers.<sup>8</sup>

[DELETED]. Thus, these clarification requests constituted discussions since they were intended to obtain information essential for determining the acceptability of LEGENT's proposal. See The Human Resources Co., supra.

[DELETED].

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<sup>7</sup>"Unix" is an easy-to-use multi-user, multi-programming operating system that was originally developed by Bell Laboratories. See Webster's New World Dictionary of Computer Terms, at 395-396 (3rd Ed. 1988).

<sup>8</sup>We also note that technical evaluation factor 8 in section M of the RFP stated that "[s]pecial emphasis will be placed on the ability of the proposed Information Management product to move large quantities of data rapidly among DLA sites."

"[DELETED]."

"[DELETED]."

Notwithstanding the foregoing response--which showed that LEGENT's proposal was noncompliant--the agency made the lot 4 award to LEGENT without further addressing LEGENT's compliance with this requirement and without amending the RFP to relax the stated agency requirement concerning the transfer of data to the ICs. As stated above, award should not be made to an offeror who fails to satisfy a stated mandatory RFP requirement; such an award constitutes a relaxation of the RFP requirements, which requires the issuance of a written amendment to the RFP and opportunity for the offerors to respond to the revised requirements. See IRT Corp., supra

Another example of the discussions with LEGENT involves DLA clarification request No. 10 with regard to Lot 1 concerning section C.3.1 of the RFP. This section states, in part, that "[t]he [console management] system must also retrieve the Universal Standard Time and be able to synchronize all system clocks to the Universal Standard Time." The RFP technical questionnaire requested offerors to describe how their products would automatically retrieve Universal Standard Time. With regard to this requirement, LEGENT's proposal provided the following response:

"[DELETED]."

"[DELETED]."

[DELETED].

"[DELETED]."

The communications between DLA and LEGENT requesting information concerning its proposal's compliance with the requirement that the system retrieve Universal Standard Time and synchronize system computers constituted discussions, since the question was asked to determine whether LEGENT's unclear proposal satisfied this material requirement.

Also, DLA improperly made award to LEGENT, even though there was still concern whether LEGENT's proposal offered [DELETED] to satisfy the Universal Standard Time requirements. LEGENT's response to the "Clarification Request" stated:

"[DELETED]."

"[DELETED]."

This response does not address DLA's stated concern [DELETED]. Indeed, the record shows that the evaluators, after considering LEGENT's response, remained concerned about what LEGENT was offering to satisfy this requirement.<sup>9</sup> Nevertheless, DLA awarded this lot to LEGENT, even though it did not clearly offer all that was required to comply with the RFP.<sup>10</sup> See Mine Safety Appliances Co.; Interspiro, Inc., B-247919.5; B-247919.6, Sept. 3, 1992, 92-2 CPD ¶ 150 (agency should not accept a proposal where there is reason to doubt whether the offeror is agreeing to meet a material solicitation requirement).

A final example of discussions involves DLA's clarification request regarding Goal's cost proposal on bid lot 2. [DELETED].

"[DELETED]."

[DELETED]. Since an offer of other than a fixed-price or finitely determinable price was unacceptable under the RFP, the communications that resulted in obtaining the required firm, fixed-price constituted discussions. See FAR § 15.601; PRC Info. Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11; Computer Mach. Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358.

As the foregoing examples demonstrate,<sup>11</sup> DLA conducted discussions for bid lots 1, 2 and 4. Not only was the information requested and supplied in the "Clarification Requests" necessary to determine the acceptability of the proposals, but the awardees were essentially provided with the opportunity to revise their proposals. Thus, both prongs of the FAR § 15.601 test for discussions were met.

In addition, the discussion question responses show instances where the awardees' proposals apparently did not comply with material solicitation requirements. Such noncompliant or unclear proposals should not have been the basis for award without amending the solicitation to allow all

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<sup>9</sup>In briefing the source selection authority, the evaluators stated with regard to LEGENT's lot 1 proposal, [DELETED].

<sup>10</sup>[DELETED].

<sup>11</sup>Our review disclosed numerous other examples of "Clarification Requests" that constituted discussions.

offerors to submit proposals on the relaxed requirements. IRT Corp., supra.

The protesters were prejudiced by DLA's actions because the outcome of the competition may well have been different had the protesters been provided with an opportunity to revise their proposals, including price, and to submit BAFOs. HFS, Inc., supra; Microlog Corp., supra. In this regard, it is not uncommon for offerors to make significant proposal revisions, including substantial price reductions, even when the government's requirements have not changed. Id. Both protesters attest that they would have significantly revised their proposals if given the opportunity; in fact, after its responses to the clarification requests, Computer Associates submitted a significant revision to its proposals, which DLA refused to accept, and it appears that, had Computer Associates been permitted to make the requested revisions, its proposals may have received higher ratings--it was downgraded in the area concerning which it tendered the revision. Finally, the awards on the basis of proposals that do not comply with the solicitation requirements also prejudiced the protesters, since the protesters may have altered their proposals to their competitive advantage had they been given the opportunity to respond to DLA's relaxed requirements. IRT Corp., supra.

#### OTHER TECHNICAL EVALUATION ISSUES

The protesters assert that DLA gave "risk" significant weight in the selection process, even though the RFP did not identify risk as an evaluation factor or subfactor, and that this risk assessment was inconsistent with the RFP's stated evaluation criteria. We disagree.

Defense agencies are required by statute to set forth, at a minimum, all significant evaluation "factors (and significant subfactors) . . . (including cost or price, cost- or price-related factors, and noncost- or nonprice-related factors)," and their relative importance. 10 U.S.C. § 2305(a)(2)(A) (1988 and Supp. III 1991); see also FAR § 15.605(e). However, agencies are not required to specifically identify each element to be considered during the course of the evaluation where a particular element, not specifically identified in the solicitation, is intrinsic to the stated factors or subfactors. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16. An agency is not precluded from considering any proposal risk arising from an offeror's approach or demonstrated lack of understanding that is intrinsic to the stated evaluation

factors. See Communications Int'l Inc., B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194; Advanced Sys. Tech., Inc.; Eng'g and Prof. Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153.

Here, the record confirms that DLA assessed risk for each of the evaluation factors and subfactors stated in the RFP as well as assigning an overall proposal risk for each software package. This was a legitimate method for assessing and expressing the relative merits of the proposals with regard to the stated evaluation factors, since it was an assessment by the agency of an offeror's probability of success for each evaluation factor. Therefore, the agency's use of proposal risk was consistent with and intrinsic to the evaluation factors. See Communications Int'l, Inc., supra. Thus, this protest basis is denied.

4th Dimension finally cites two instances where it alleges that Goal's lot 2 proposal is noncompliant with the RFP specifications and therefore unacceptable. 4th Dimension first asserts that Goal's product incorporates "soft hooks" routines using system standard exits, and that this is technically unacceptable because it allegedly compromises the integrity of the operating system in violation of the RFP.<sup>12</sup> We find that the RFP does not suggest that Goal's proposed use of system standard exits compromises operating system integrity as prohibited by the RFP; in fact, the RFP evaluation criteria expressly recognize that interfacing with system standard exits is an acceptable technical solution to the RFP requirements.<sup>13</sup> On this record, we cannot say that DLA acted unreasonably in finding Goal's product acceptable under this specification.<sup>14</sup>

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<sup>12</sup>The RFP specification in question reads:

"The contractor's product(s) shall not compromise the performance, operability, and/or integrity of any product by any means."

<sup>13</sup>In the evaluation criteria, it is also stated that "undesirable system programming techniques," e.g., "exclusive control of system standard exits," will be evaluated. The evaluation criteria are not "go/no go" factors, but are to be considered qualitatively.

<sup>14</sup>Since we sustain this protest on other grounds and recommend the reopening of negotiations, DLA could use the opportunity to clarify the specifications with regard to what is meant by compromising the integrity of products.

4th Dimension also alleges that Goal's proposal does not meet the RFP specification requiring proposed products to "provide dynamic modification of job scheduling criteria," inasmuch as Goal's software does not offer "unlimited" modification of job scheduling criteria. However, the RFP did not require "unlimited" modification of criteria and 4th Dimension has not shown that the level of modification permitted by Goal's software is inconsistent with the RFP requirements. In this regard, 4th Dimension concedes that Goal's software does offer some level of dynamic modification of job scheduling criteria. Thus, we have no basis on which to conclude that Goal's proposal is unacceptable under the specification.

#### RECOMMENDATION

We recommend that DLA amend the solicitation to reflect any changes in the agency's requirements, particularly with regard to those instances where the awardees may not comply with the RFP specifications, and reopen discussions with all offerors in the competitive range.<sup>15</sup> Upon completion of discussions<sup>16</sup>, DLA should request BAFOs and proceed with the source selection process. If, after BAFOs are evaluated, any offer other than that of an awardee is determined to be most advantageous to government under the RFP for a lot, the contract for that lot should be terminated and award made to the successful offeror. We also find that the protesters are entitled to recover the reasonable costs of filing and pursuing these protests, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protesters should submit

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<sup>15</sup>In view of our recommendation, we need not consider the other protest allegations. For example, 4th Dimension alleges that, when evaluating product direction and support, DLA failed to consider the effect of the merger of LEGENT and Goal on the future supportability of the products which they offered in their respective proposals; however, since this matter can be explored, as necessary, during discussions, no useful purpose would be served here in deciding DLA's consideration of this issue. Similarly, the protesters' numerous contentions about the reasonableness of the source selections themselves and the evaluation of the protesters' products will not be considered, since the offerors will be provided the opportunity to revise their proposals and submit BAFOs.

<sup>16</sup>Since DLA did not intend its actions to constitute discussions, it should examine its communications with all offerors to ensure that it has conducted meaningful discussions in accordance with FAR § 15.610(c).

their certified claims for protest costs directly to the agency within 60 days of this decision. 4 C.F.R. § 21.6(f)(1).

The protests are sustained in part.

Comptroller General  
of the United States