



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Computer One, Inc.--Reconsideration

File: B-249352.7

Date: September 27, 1993

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for the protester.

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the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Requests for reconsideration are denied where protester has
not shown that earlier decisions contained errors of fact or
law, or information not previously considered, warranting
reversal or modification of those decisions.

DECISION

Computer One, Inc. makes two requests for reconsideration.
First, Computer One requests reconsideration of our
decision, Computer One, Inc.--Recon., B-249352.3;
B-249352.4, Mar. 23, 1993. In that decision, we:
(1) denied as untimely Computer One's earlier request for
reconsideration of our decision, Computer One, Inc.,
B-249352.2, Feb. 23, 1993, 93-1 CPD ¶ 252, denying Computer
One's protest of the award of a subcontract for computer
supplies and services to Holman's, Inc. under request for
proposals (RFP) No. 4-241-80893X, issued by the University
of California in its capacity as prime management and
operating contractor to the Department of Energy (DOE) at
its Los Alamos National Laboratory facility; and
(2) dismissed what Computer One considered to be "new basis
for protest," B-249352.4, for failing to state a valid basis
of protest. Second, Computer One requests reconsideration
of our April 8 dismissal of another protest, B-249352.5, of
the award to Holman for failure to state a valid basis of
protest. On August 6, we consolidated the two requests for
reconsideration in a single decision under this file number.

Both requests are denied.

BACKGROUND

The RFP provided that award would be made to the offeror whose proposal presented the best combination of technical excellence and price with technical excellence being substantially more important. Following submission of best and final offers, the evaluation results, together with 3-year base price totals, were as follows:

| | <u>Technical Score</u> | <u>Price</u> |
|--------------|------------------------|--------------|
| Holman's | 363 | \$20,952,565 |
| Computer One | 345 | \$22,217,215 |
| Offeror C | 314 | \$20,514,035 |
| Offeror B | 279 | \$21,890,368 |
| Offeror A | 265 | \$21,842,898 |

Since Offeror C's low price was only 2 percent below Holman's higher technically rated offer, the source selection committee chose Holman's for award because of the RFP's preference for technical excellence and Holman's high technical score. We denied Computer One's protest of the evaluation of proposals finding that the record supported the reasonableness of the technical evaluation and selection decision since it was consistent with the solicitation's evaluation scheme favoring technical excellence. Computer One, Inc., supra.

REQUEST FOR RECONSIDERATION OF B-249352.3; B-249352.4

Regarding the first request reconsideration--our denial of Computer One's request for reconsideration of the denial of Computer One, Inc., supra--Computer One admits receiving a copy of our decision on March 1, but did not file a request for reconsideration until March 16--more than 10 working days later.¹ Accordingly, we denied the request because it

¹Computer One elected to send its request for reconsideration by facsimile on March 15, approximately 30 minutes before close of business. Computer One advises that its facsimile machine made 15 attempts before before it succeeded in transmitting the request to this Office. The request began arriving at 5:41 p.m., 11 minutes after our Office closed, with the last page printed at 5:46 p.m., and was, thus, not filed until the Office opened on March 16. Our Bid Protest Regulations provide that the "[t]ime for filing any document or copy thereof with the General Accounting Office expires at 5:30 p.m., Eastern Standard Time . . . on the last day on which such filing may be made." 4 C.F.R. § 21.0(e) (1993), East West Research, Inc.--Recon., B-238039.2, Feb. 27, 1990, 90-1 CPD ¶ 243. We
(continued...)

was filed untimely. See Bid Protest Regulations, 4 C.F.R. § 21.12(b) (1993).

Computer One asserts that the timeliness of its request for reconsideration should be determined not from its March 1 receipt of our decision, but on the basis of its March 12 receipt of additional information--correspondence between DOE's Inspector General and a Congressional subcommittee concerning an investigation of the business integrity of the University of California as this information formed "a substantial basis for making the request for reconsideration."² We disagree.

While the correspondence is mentioned in Computer One's request for reconsideration, we do not find that it formed the basis for the request. Computer One appears to reference the correspondence, which concerns an investigation of the University's knowledge of and response to questionable activities of an official at another University-run laboratory, to bolster the protester's argument that the University withheld relevant information during the course of the protest. Since the correspondence

¹(...,continued)

require that the entire text of a document be received prior to the deadline established by our Bid Protest Regulations. See Mead Data Central, 70 Comp. Gen. 300 (1991), 91-1 CPD ¶ 330 (entire facsimile not received until after deadline); Integrated Sys. Group, Inc., GSBCA No. 11075-P, Feb. 21, 1991, 91-2 BCA ¶ 23,790, 1991 BPD ¶ 42; recon. denied, GSBCA No. 11075-P-R, Mar. 11, 1991, 1991 BPD ¶ 53. Further, in electing to use facsimile transmission to file, the protester bears the risk of non-receipt or delayed receipt for any reason--including equipment malfunctions and transmission difficulties. See Sunbelt Properties, Inc.--Recon., B-249666.2, Aug. 28, 1992, 92-2 CPD ¶ 134. See also discussion at pp. 4-5, infra.

²Computer One also asserts that information related to funding limitations, received on March 15, formed a basis for its initial request for reconsideration. An examination of the request, however, shows that, Computer One presented the information under the heading "NEW BASIS FOR PROTEST." We considered and dismissed Computer One's new basis of protest as a speculative allegation that did not constitute a valid basis of protest. We see no merit in Computer One's contention that the alleged existence of funding limitation is somehow a basis for reconsideration "as it shed additional light on the procuring activity though all facts had not been developed nor available at the time," especially when the protester labels it a protest.

has nothing to do with the issue of whether or not the University provided all relevant documents concerning this particular procurement, it was not necessary for Computer One to obtain the correspondence to know the basis of its reconsideration request (i.e., improper withholding of information), and the timeliness of this issue is not related to Computer One's receipt of the correspondence.

Computer One also asserts that we should reconsider its earlier request for reconsideration under the "good cause" or "significant issue" exceptions to our timeliness requirements. 4 C.F.R. § 21.2(c). The good cause exception is limited to circumstances where some compelling reason beyond the control of the protester prevents the protester from submitting a timely protest. All Am. Moving and Storage--Recon., B-243630.2, Aug. 21, 1991, 91-2 CPD ¶ 184; Commercial Energies, Inc., B-242261.2, Mar. 21, 1991, 91-1 CPD ¶ 312. There has been no showing that such a compelling reason existed here. Computer One's "good cause" argument is that Computer One reportedly tried for approximately half an hour before close of business at our Office on the afternoon of March 15 to send its request for reconsideration via facsimile, but was unsuccessful either because of problems with our equipment or the transmission lines.

We do not consider Computer One's inability to successfully send a facsimile to our Office shortly before closing to fall within the good cause exception to our timeliness rules. Far from being a compelling reason beyond the control of the protester, we think it clearly foreseeable that a number of protesters might try to file before the close of business and that the number of protesters could exceed the number of facsimile lines available.

The protester's counsel was advised on at least two occasions of the risks inherent in waiting until late in the business day to initiate a filing by facsimile. First, by letter dated October 15, 1992, counsel was sent our "Notice Regarding Facsimile Transmissions," which provides in pertinent part:

"Our Office hours remain 8:30 a.m. until 5:30 p.m., eastern time, Monday through Friday. For purposes of our bid protest procedures, documents are considered filed when a time/date stamp is placed on the document. Facsimile transmissions will be time/date stamped upon receipt of the entire text of the filing. Transmissions received after business hours--including transmissions in which the last page is received after business hours--will be time/date stamped as received on the next business day.

"As with any method of filing submissions, parties bear the responsibility for ensuring that their materials are received in our Office within applicable time constraints. Since occasional equipment failures are inevitable, parties are advised to allow sufficient time to use an alternate delivery method when filing time is critical."

Second, on or about March 11, 1993, protester's counsel was orally advised by GAO that any reconsideration request had to be received in this Office by 5:30 p.m. on March 15 and that parties bear the risks inherent in any problems with facsimile transmissions. The requestor, relying on telefax equipment to file at our Office, did so at its own risk, providing no basis for waiving our timeliness rules in this case. Danville-Findorff, Inc.--Recon., B-242934.2, Mar. 21, 1991, 91-1 CPD ¶ 313.

As to Computer One's assertion that this case falls within the significant issue exception, we will not consider the merits of an untimely protest by invoking the significant issue exception unless the protest raises an issue of first impression or one that would be of widespread interest to the procurement community. Keco Indus., B-238301, May 21, 1990, 90-1 CPD ¶ 490.

We understand the protester's argument to be that it was denied relevant documents and that the agency filed submissions based on the withheld documents. The protester pointed out this "issue" in its December 7, 1992, comments on the agency report. The protester contends that this is significant because it amounts to a denial of due process as it is allowing the agency to make after-the-fact justifications for its award decision. To the extent that this speculation may be a protest, the issue has been addressed by our Office. JJH, Inc., B-247535.2, Sept. 17, 1992, 92-2 CPD ¶ 185 (consideration of documentation prepared after-the-fact and furnished with the agency report); H. Bendzella Contracting, B-246112, Nov. 8, 1991, 91-2 CPD ¶ 441 (questionable agency actions do not estop agency from later actions); Urban Indian Council, Inc., B-225955.2, May 12, 1987, 87-1 CPD ¶ 500 (dismissal of untimely filing does not constitute denial of due process). Further, the issues relate only to one specific procurement action and, thus, do not have widespread significance to the procurement community. Since such significance is a precondition to the invocation of the exception, Computer One's request is denied. NPF Servs., Inc.--Recon., B-236841.2, Jan. 3, 1990, 90-1 CPD ¶ 9.

REQUEST FOR RECONSIDERATION OF B-249352.5

On March 26, 1993, Computer One protested the award to Holman's on the basis that the University selected Holman's to take advantage of its low price in order to stay within what the protester describes as an unannounced funding limitation which Computer One first learned of on March 15. More specifically, Computer One argued that the decision to award a subcontract to Holman's--which was one of two offerors whose price fell within the alleged limitation--had been predetermined and that Holman's may have been privy to information concerning the funding limitation which was not shared with other offerors. Computer One also argued that the limitation nullified the solicitation evaluation criterion that favored technical excellence over price and suggested that the University may have altered technical scores to enhance Holman's competitive position in order to stay within the funding limitation.

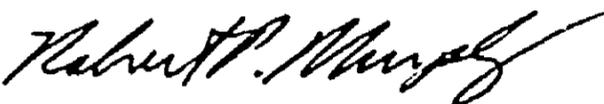
We dismissed the protest in B-249352.5, April 8, 1993, because the record did not support Computer One's contention that the University altered technical scores to take advantage of the eventual awardee's low price. In doing so, we pointed out that award was in fact made to the highest technically ranked offeror consistent with the terms of the RFP and that Computer One's allegations regarding the funding limitation constituted nothing more than speculation that did not constitute a valid basis of protest.

In its request for reconsideration, Computer One asserts that we did not address its price limitation argument insofar as Computer One had argued that the alleged failure to disclose a funding limitation violated Federal Acquisition Regulation (FAR) § 15.605(e) which requires solicitations to clearly state all evaluation factors including price related factors that will be considered in source selection and their relative importance.

There was no need to address this argument since the solicitation made the required disclosure when it listed price as an evaluation criteria second only to technical excellence. Nothing in the record indicates that any proposal was not considered because it exceeded the alleged funding limitation. In any event, a funding limitation is not a price-related evaluation factor within the meaning of FAR § 15.605(e). While agencies are required to disclose price-related evaluation factors, as a general rule, they are not required to disclose budget information, such as funding limitations, in solicitations. See Charles Trimble Co., B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77. Moreover, it is unlikely that the existence of such a funding limitation would prompt the University to tamper with the evaluation when Computer One admits that the allegedly undisclosed

limitation could be waived with DOE's approval. In our view, the "basis" for Computer One's protest was its unproven speculation that the agency manipulated Holman's technical score to justify award of a low-priced contract. An extensive review of the evaluation record revealed no evidence of such a manipulation and we, therefore, deny the request for reconsideration.

The requests for reconsideration are denied.


for James F. Hinchman
General Counsel