

DECISION



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

FILE: B-183639

DATE: November 12, 1975

MATTER OF: Computer Network Corporation

60144

97754

DIGEST:

1. Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder the opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system.
2. Receipt of no responsive bids to IFB requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protester has indicated it will therefore protest and record has been completely developed, protest will be considered now.
3. Recommendation made that FPR "Brand Name or Equal" provisions be utilized in specifying computer and software requirements since specifications should state agency's minimum needs and FPR provides for listing of salient characteristics where brand names are used; specifications for VS operating systems be modified to permit bidders with OS operating systems to demonstrate capabilities to meet agency's performance requirements; and there be reevaluation of barring computer operator priority reset to consider possible economic benefits in using it.

The Computer Network Corporation (Comnet) has protested any award under invitation for bids (IFB) NOAA 17-75, issued by the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), to provide the Great Lakes Environmental Research Laboratory (GLERL) with access to a large scale data processing system.

The IFB was issued on March 17, 1975, after NOAA canceled its prior IFB (NOAA 3-75) because of inadequate specifications. On March 20, 1975, Comnet protested to the agency that certain

requirements in the specifications unduly restricted competition in areas where the previous IFB had permitted full and free competition. By letter dated April 8, 1975, received by Comnet on April 10, 1975, the contracting officer informed Comnet that, but for one modification, the provisions of the IFB would remain unchanged and bid opening would proceed as scheduled on April 15, 1975. As a consequence of this letter, Comnet filed the instant protest with us on April 11, 1975.

Inasmuch as some of the specific points raised by Comnet relate to IFB NOAA 3-75, a brief history of the procurement is necessary. As in IFB 17-75, the canceled IFB required benchmark tests and prices. Because Comnet's benchmark #3 price appeared to be unusually low NOAA requested Comnet to verify its bid. In the process of explaining the bid and how an error occurred, Comnet noted that it had encountered problems in ascertaining whether NOAA considered its IBM 360/65 equal or superior to the IBM 370/158 stated in the IFB. It was also pointed out by Comnet that benchmark #3 could not be run as stated in the benchmark instructions. Aware that the IFB permitted either OS or VS operating systems, Comnet saw that certain uninitialized variables gave incorrect results when run without making adjustments to the program, which was not permitted by the terms of the IFB. Comnet alleged that the net effect of the foregoing was to preclude from competition firms that had OS systems. Comnet stated that it was able to correctly run benchmark #3 only because it wrote a non-standard OS Fortran procedure that could accommodate uninitialized variables. Regardless of the foregoing, on March 11, 1975, NOAA rejected all bids and canceled IFB 3-75 on the basis that the solicitation was inadequate for failure to include evaluation criteria sufficient to determine all cost factors to the Government.

After receipt of IFB 17-75, Comnet telephoned NOAA to protest certain requirements in the IFB it believed were restrictive. This conversation was confirmed by mailgram dated March 20, 1975. The issues raised were the same as those now before this Office. IFB 17-75 requires that the offered system possess a "capability equivalent to IBM 370/158." The former IFB required that the system be "equal to or superior to IBM 370/158." Comnet contends that the requirement should be changed to "IBM 360/65 or IBM 370 or its equivalent" in order to open competition.

The main memory capacity was increased from 640 K bytes in the original IFB to 800 K bytes. Comnet contends that increase is more than

necessary and favors users of VS systems. IFB 17-75 specifies "Executive programs VS and HASP", whereas either a VS or OS operating system was permissible under the previous invitation. This change is alleged to be restrictive in that it eliminates from competition firms that have an IBM 370/158 or 370/168 without VS and 20 firms with IBM 370/155's or IBM 360's. Another change from IFB 3-75 to 17-75 is the addition of a provision that "software required under IBM Time Sharing Option (TSO) * * * utilize * * * Tektronix Inc. supplied software." The provision allegedly precludes numerous firms from competing by requiring only TSO. Comnet claims that its time sharing software package, Alpha, exceeds NOAA requirements. Further, Comnet contends that the addition of a requirement for "a remote user to reset the priority of jobs previously submitted without central computer operator intervention" is restrictive in that the feature is found only in TSO. Finally, the requirement that GLERL programs requiring up to 800 K bytes of core memory in prime time be run without the intervention of a computer operator is alleged to restrict Comnet's participation in the competition because, without computer operator intervention to account for the uninitialized variables, Comnet's OS system would not be able to run the program.

By letter dated April 8, 1975, to Comnet, NOAA responded to the allegations. In essence, NOAA's response was that the specifications reflected the Government's minimum needs. This rationale constituted NOAA's response for the VS system requirement, specifying an IBM 370/158 and the requirement for 800 K bytes of memory. As for specifying TSO and Tektronix, Inc., software in IFB 17-75, and not in IFB 3-75, NOAA stated that requirement did not exist when the original IFB was issued. The need for the remote user to reset job priorities without central computer operator intervention was said to be predicated on the probability that high priority jobs will occur while the computer is processing lower priority jobs. The capability was needed to enhance the administrative and economic efficiency of GLERL. NOAA stated that the requirement was needed to promote efficiency and to negate the necessity for the Government to physically segregate programs requiring computer operator intervention from those that do not.

Notwithstanding the subsequent protest to our Office, NOAA proceeded to open the bids received. All bidders' representatives

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at bid opening were apprised of the protest and that award would be withheld pending our decision. Two bids were received:

LRCC	\$17,509.77
Computeristics, Inc.	23,374.44

LRCC's bid was not announced at bid opening because "CONFIDENTIAL" had been stamped on relevant portions of the bid. Comnet subsequently amended its protest to contend that LRCC's bid should be rejected as nonresponsive due to the restriction on the bid.

NOAA's response to Comnet's protest is contained in the report to our Office dated May 15, 1975. Generally, the point is stressed that while certain requirements in IFB 17-75 have the effect of precluding certain firms from competing, all requirements specified in the IFB reflect the needs of the Government. NOAA states that the users of the programs to be run on the system, both resident and visiting scientists at GLERL, have training sufficient only to write software programs in the computer language to which they have become accustomed. The use of procedures or languages different than those presently used by the scientists would require substantial revisions to many software programs and retraining of personnel. NOAA states:

"[R]ewriting the software and retraining the scientists is a burden the Government is not prepared to accept because the effort would divert the scientists from their primary missions and would be expensive in both time and money."

Specifically with regard to requiring an IBM 370/158, NOAA states that the IFB only requires that the proposed system have a capability equivalent to the IBM 370/158. This requirement reflects the fact that GLERL's programs were developed during a period when it was using an IBM 370/158. Thus, it was stipulated that the system must have equivalent capabilities so that the programs can be processed without being changed. NOAA further maintains that it cannot determine prior to bid opening the equivalency of any other computer, such as the IBM 360/65 offered by Comnet. NOAA states that the initial determination whether the systems are equivalent is the bidder's responsibility.

Once a bidder submits a bid predicated on the IBM 360/65 and it is subjected to the benchmarks, then NOAA will determine whether the system is equivalent.

On the matter of requiring a VS operating system, NOAA states that this requirement was inserted as a result of its experience with IFB 3-75. That is, NOAA discovered that certain of GLERL's programs could not be run on an OS system without modification to the programs. On the other hand, the VS system showed its capability to run all of the programs unchanged. As NOAA saw it, there were three alternate ways to solve the problem: (1) rewrite the program to accommodate the OS system; (2) physically separate the two types of programs and permit computer operator intervention when necessary; and (3) leave the programs unchanged and permit VS systems only. The first two options were abandoned due to the amount of time and expense considered to be involved. In the judgment of the individuals who would be most affected by any change, the most reasonable approach was to leave the programs unchanged by requiring the VS system.

In response to Comnet's allegation that the requirement for 800 K bytes of core memory during peak operating periods was unreasonable and excessive, NOAA states that the amount was increased from the previous solicitation simply to reflect a change in the anticipated needs of GLERL. NOAA maintains that it is the intent of the Government to run programs of 800 K bytes during peak hours. This intent, in NOAA's view, is implicit in the IFB, particularly where it is estimated that benchmark #3 or its equivalent (requiring up to 800 K byte capacity), would be processed 150 times each month.

NOAA next maintains that requiring TSO and Tektronix, Inc., software is a necessary requirement:

"The requirement * * * was included to permit GLERL to utilize * * * Tektronix, Inc., * * * graphic display systems. The Tektronix software guide manual states that the terminal control system for Tektronix is implemented on the IBM system using TSO and makes no mention of any other time sharing system for an IBM computer. Since there is an interlocking relationship between the computer software, the graphics terminal software

and the operating characteristics of the graphics display unit, it is the judgment of the users that proper operation of the system can be assured only if the software and recommendations of the equipment manufacturer are employed."

In defense of the requirement barring computer operator intervention for priority reset, NOAA notes that the GLERL scientists often reset job priorities. Typical of the problem envisioned if computer operator intervention is necessary for job priority reset are the possibilities that the telephone line may be busy or the terminal left unattended. Citing the fact that only high level scientists will have authority to reset job priorities, NOAA alleges that the economic loss attendant to the time lost by the scientists waiting for a clear line or for the computer operator to return to the computer line is significant in the aggregate. Conceding that the priority reset feature is available from LRCC because of modifications made to its HASP system, NOAA states that there is nothing in the IFB that precludes similar modifications by other firms.

NOAA's report attempts to refute Comnet's allegation that the IFB, when viewed as a whole, was designed to assure that LRCC will obtain the contract. NOAA states that three firms other than LRCC are known to have the necessary facilities and capabilities to compete under IFB 17-75. NOAA alleges that one firm did not bid because it did not want to be committed to the Government for such a long period; another did not bid because it could not submit its bid timely; and the third firm (Computeristics, Inc.,) submitted a nonresponsive bid only because of an error by its computer operator in running the benchmarks.

Lastly, NOAA responded to the issue raised by LRCC's "CONFIDENTIAL" stamp in the bid. NOAA notes that the applicable Federal Procurement Regulations (FPR) do not have any specific provisions regarding the effect of submitting a bid marked "confidential." LRCC withdrew the confidential legend after bid opening. Therefore, NOAA proposes to accept LRCC's bid by permitting deletion of the stamp in accordance with FPR § 1-2.404-2(b)(5) (1964 ed. amend. 121).

Comnet commented on NOAA's report. First, Comnet, citing 53 Comp. Gen. 24 (1973), stresses that the "CONFIDENTIAL" stamp on LRCC's bid rendered it nonresponsive as of bid opening.

Second, Comnet concedes the reasonableness of the proposition that, in defining its minimum needs, NOAA may require any proposed system to have the capability of running programs currently being used by NOAA. The problem, as Comnet sees it, is that NOAA has not defined what it considers to be equivalent to an IBM 370/158. Comnet asserts that NOAA should list those features it considers essential for another system to be equivalent to the IBM 370/158 so that a firm will not be put unnecessarily to the expense of bidding and running a benchmark only to be determined unacceptable at some future time under an undefined equivalency.

The third point concerns the requirement that the system be VS. Comnet states that while it can run, using its OS system, any program which can be run on a VS system, it is precluded from submitting a bid by the VS requirement. In response to NOAA's position that specifying a VS system was preferable to the other two options (rewrite the program or physically separate those for OS and VS), Comnet maintains that there are two acceptable alternatives. Under the first option, the contractor can be required at no cost to the Government to rewrite the programs so that they can be run on an OS system. To permit this approach, the IFB requirement prohibiting any change in the NOAA benchmark must be deleted. In the second option, the bidder proposing an OS system can be required to make changes to his internal computer software so that he can run all of the programs on the OS system. Comnet states that permitting these alternative approaches will satisfy all of the legitimate needs of the Government and broaden competition.

Fourth, Comnet states it is suspicious that NOAA's actual need is for 800 K bytes of core memory. However, since Comnet can meet this requirement, it " * * * will not take further issue with this particular requirement." In view of this, our Office will not consider the matter of the 800 K bytes of core memory.

Fifth, Comnet suggests that the internal computer software package it employs, Alpha, can run the Tektronix software. In support of this, Comnet submitted a letter dated June 13, 1975, from Tektronix stating:

"After our discussion regarding use of PLOT/10 Terminal Control System on your time sharing system, I see no difficulties in implementing our software * * *.

"We discussed the possible difficulties and found them to be rather minor * * *."

Sixth, Comnet discussed the reasonableness of the requirement barring computer operator priority reset. Comnet states that it can provide priority reset without computer operator intervention, but at a higher cost than with computer operator intervention. Notwithstanding this, it is Comnet's position that the requirement exceeds the minimum needs of NOAA. Comnet analogizes this requirement to the purchase of automobiles requiring that windows be opened by pushbuttons. A car that met all other requirements, but had windows that operated manually could be purchased much less expensively than one with pushbutton windows. Comnet likens NOAA's assertion regarding the economic impact of scientists having to wait to contact the computer operator to the time lost by operating windows manually instead of by pushbuttons and questions whether the premium for the feature is commensurate with the benefit.

RESPONSIVENESS OF LRCC

The public advertising statute, 41 U.S.C. § 253(b) (1970), requires that: "All bids shall be publicly opened at the time and place stated in the advertisement." We have interpreted this requirement for a public opening to mean that the bid must publicly disclose the essential nature and type of the products offered and those elements of the bid which relate to price, quantity and delivery terms. 53 Comp. Gen. 24 (1973). The purpose of public opening of bids for public contracts is to protect both the public interest and bidders against any form of fraud, favoritism or partiality and such openings should be conducted to leave no room for any suspicion of irregularity. Page Airways, Inc., et. al., 54 Comp. Gen. 120 (1974), 74-2 CPD 99; 48 Comp. Gen. 413 (1968).

The basis upon which a bid is submitted is determined as of the bid opening. New England Engineering Co., Inc., B-184119, September 26, 1975. To allow a bidder to modify the terms of its bid after bids have been opened would be tantamount to affording the bidder a chance to submit a second bid. S. Livingston & Son, Inc., B-181905, January 16, 1975, 54 Comp. Gen. _____, 75-1 CPD 24. To permit a bidder to decide after bids have opened and all prices (but its own) exposed, gives that bidder an option not afforded any other bidder, to accept or reject an award. If the bidder has submitted the low bid, it may, at its whim, choose whether to receive

an award by merely refusing or permitting removal of the restrictive legend. This is contrary to requirements of the competitive bid system. 38 Comp. Gen. 532 (1959). Thus, LRCC's withdrawal of the "confidential" stamp after bid opening has no bearing on whether the bid was responsive.

Our Office has found that restrictions on the disclosure of certain types of information do not render a bid nonresponsive. See Ace-Federal Reporters, Inc., 54 Comp. Gen. 340 (1974), 74-2 CPD 239, where the restricted information concerned bidder's responsibility; and 41 Comp. Gen. 510 (1962) concerning portions of descriptive literature submitted for evaluation on a restrictive basis with a bid for an off-the-shelf item which is known to industry and requires minor but obvious modification to conform to the IFB. However, where the system offered is not commercially available or a standard off-the-shelf item and the descriptive literature is necessary to disclose the essential nature and type of system offered, a restriction on the descriptive literature is a proper basis for finding the bid nonresponsive. 53 Comp. Gen., supra.

The stamp on LRCC's bid restricted the disclosure of price, quantity and delivery terms as well as the essential nature and type of services and product offered. Therefore, LRCC's bid is nonresponsive. This determination is not changed by FPR § 1-2.404-2(b)(5) which states:

"(b) Ordinarily, a bid shall be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit his liability to the Government so as to give him an advantage over other bidders. For example, bids shall be rejected in which the bidder:

* * * * *

"(5) Limits rights of Government under any contract clause. However, a low bidder may be requested to delete objectionable conditions from his bid if these conditions do not go to the substance, as distinguished from the form of the bid. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered."

This regulation is not concerned with the type of damage to the competitive system discussed above. The restriction on disclosure

of information does not affect the substance of the bid per se, since the bid is the same whether the information is released. Therefore, removing the restrictive legend would not affect the substance of the bid. It would, however, afford the bidder "two bites at the apple", which cannot be permitted.

Thus, since the only other bid submitted on IFB 17-75 by Computeristics, Inc., has been determined nonresponsive for other reasons, the procurement will have to be resolicited. In this posture, we would not ordinarily decide the other matters raised by Comnet. However, it seems apparent that NOAA's resolicitation will be based on essentially the same specifications and Comnet has indicated that it will submit essentially the same protest in that event. Since the record has been completely developed, we will consider the rest of the protest at this time rather than subject the parties to further delays that would result from refileing the protest at a later date.

It is clear that resolution of some of the remaining issues requires a degree of technical expertise. Since the requisite expertise is available within our Office, we are able to respond to the allegations that certain of the specifications are, in effect, technical luxuries and unduly restrict competition.

REQUIRING AN IBM 370/158 OR EQUIVALENT

The protest on this item is not against using the IBM 370/158 as the model against which an equivalent capability is to be measured. Rather, the thrust of Comnet's complaint is that there is no way from the IFB itself for a bidder to determine whether the computer system upon which it intends to bid will satisfy NOAA that it is equivalent. Comnet is requesting an objective method by which a bidder can determine, prior to incurring the expense of submitting a bid and running the benchmark, that its system will be acceptable. NOAA's response is that this type of determination is the bidder's to make on the basis of its own judgment.

When specifying in an IFB the features of a particular system which the Government requires, it is permissible to cite a particular brand name item and model number as an example. However, FPR § 1-1.307-4(b) (1964 ed. amend. 85) provides that a purchase description which cites a brand name product as an example of the item desired should set forth those salient physical, functional or other characteristics of the referenced product which are

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essential to the needs of the Government. Moreover, FPR § 1-1.307-6(a)(2) (1964 ed. amend. 117), prescribes the "Brand Name or Equal" clause that is required to be used when a procurement is based upon equivalency to a brand name product.

NOAA is correct when it states that the bidder must make the initial determination whether its proposed system can fulfill the Government's needs. In that connection, FPR § 1-1.307-7(a) (1964 ed. amend. 117) states:

"Bids offering products which differ from brand name products referenced in a 'brand name or equal' purchase description shall be considered for award where * * * the offered products meet fully the salient characteristics requirements listed in the invitation * * *."

However, the bidder's determination whether its offered product meets the requirements should be an informed one based upon the listed salient characteristics. We therefore recommend that the ensuing IFB conform to the requirement of FPR for brand names or equal procurements.

REQUIRING A VS OPERATING SYSTEM

The major technical feature of the VS system is that it responds to the memory requirements of the program by providing small units of memory called "pages." The VS system provides only that amount of pages required for the segment of a program then in application. VS keeps track of the pages and when the filled pages are needed they are called back to the main memory from the disc memory where they are stored.

An OS system operates by allotting a section of main memory large enough to accommodate the maximum memory need of the program. The entire capability is available while the program runs, even though the maximum memory requirement may be early in the program or disproportionately large compared to the rest of the program.

Normally, an OS system cannot provide the capabilities equivalent to a VS system because programs coded for VS contain certain programming conventions unique to VS. In this case,

Comnet claims that it can program its OS system to run VS oriented programs. This capability was demonstrated when Comnet ran benchmark #3 successfully for IFB 3-75. Thus, Comnet can provide the capability required by NOAA, but not by the specified method. The question then is whether the requirement that the system be VS is based upon a valid need of the Government or is a statement only of administrative preference.

Our Office has traditionally recognized that it is the province of a procuring agency to draft specifications. However, the specifications must be a statement of the agency's minimum needs. To include more in a specification transcends our interpretation of the controlling statute (41 U.S.C. § 253 (1970)) which requires that specifications be sufficiently broad to permit maximum competition consistent with the nature of the supplies and services being procured. See 46 Comp. Gen. 281, 284 (1966).

NOAA is correct in asserting that all specifications, by their nature, restrict the field of competition. The salient inquiry, however, is whether the specification unduly restricts competition. We have equated the inclusion in a specification of requirements in excess of the agency's minimum needs to an undue competitive restriction. For instance, we have found as unduly restrictive the inclusion in a specification of design requirements beyond the stated performance requirements. We held that any specification is unduly restrictive which requires the use of a particular component, unless no other component can meet the requirement equally as well. B-178508, October 23, 1973; Charles J. Dispenza & Associates, B-181102, 180720, August 15, 1974, 74-2 CPD 101.

NOAA has not stated that only a VS system can meet its operational requirements. Nor has NOAA maintained that the OS system cannot meet its minimum needs. Rather, it seems that Comnet has presented strong evidence that it is capable of programming its OS system to run the VS program. Comnet did successfully run benchmark #3 on IFB 3-75. Therefore, it should not be precluded from utilizing its OS system solely because NOAA prefers the VS system.

NOAA asserts that its programs would have to be rewritten so that certain programs could be run on an OS system while a

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VS system could run all of the programs unchanged. However, Comnet maintains that it can run all of the programs without rewriting them by making a modification to its internal software.

We are not concluding that Comnet has proved its ability to provide the requisite capability necessary to satisfy NOAA's minimum needs. Since NOAA has chosen the benchmark as the means by which to determine the capability of the proposed system, and the benchmarks are representative of the range of programs to be run, we believe that bidders should not be precluded from demonstrating their capabilities to satisfy NOAA's needs. That is not to say that NOAA is required to assume undue administrative burdens of the type it envisioned (rewriting or physically aggregating programs). If a bidder can successfully run the benchmarks on its OS system, without requiring NOAA to rewrite or modify its programs, we perceive no valid reason to restrict competition to a VS system. We are aware that this approach places a greater burden on NOAA to insure that its benchmarks are truly representative of the technical and operational features of the entire workload. However, we see this as a proper administrative action in consonance with the statutory mandate that specifications be drafted to permit full and free competition consistent with the needs of the Government. 41 U.S.C. § 253X(1970).

The immediate IFB left no room for evaluation of other than a VS approach. However, before issuing a new solicitation, NOAA might give consideration to stating the minimum requirements to reflect various approaches which might include the following approach:

- (1) Ninety-percent of all programs having a core storage requirement of 500 K bytes or less be in execution within 30 minutes and the remaining 10 percent completed within 2 hours; and
- (2) all programs having core requirements between 500 K and 800 K bytes be scheduled for a 1 hour period during prime time. During that period, these large programs be in execution within 10 minutes.

REQUIRING PROPRIETARY SOFTWARE

The use of trade name software packages as minimum requirements limits competition to those who have the packages. Therefore, the

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technical and operational requirements of the software packages should be expressed independently of the trade names. In that connection, see our discussion, supra, with respect to the VS operating system and IBM 370/158.

BARRING COMPUTER OPERATOR PRIORITY RESET

As in the preceding discussions, this requirement becomes unduly restrictive if it crosses the bounds of the Government's minimum need and becomes an administrative preference. We appreciate NOAA's position that the need for priority reset without computer operator intervention will promote administrative efficiency, particularly if the need for reset occurs at the end of a workday. Although NOAA asserts that the cumulative economic loss occasioned by the wait that might be encountered in reaching the computer operator would be substantial, it is conceivable that any economic detriment caused by this delay could be offset by a bidder offering the computer operator reset at a lower cost than without operator intervention. However, we are not prepared to state that this requirement is not an actual need of NOAA. We do suggest that NOAA consider the possible cost benefits of permitting computer operator intervention before excluding it.


Deputy Comptroller General
of the United States