



The Comptroller General
of the United States

Washington, D.C. 20548

Murphy
PL II

Decision

Matter of: University of Michigan; Industrial Training
Systems Corporation
File: B-225756; B-225756.2
Date: June 30, 1987

DIGEST

1. General Accounting Office will not dismiss protests by potential subcontractors of a prime contractor because the protesters did not provide copies of their protests to the agency contracting officer for the prime contract. The protesters provided copies of their protests to the prime contractor and government officials believed to be involved in the subcontract selection.
2. General Accounting Office will consider protests by potential subcontractors of a prime contractor where the subcontractor selection is in effect by the government. Where the prime contract provides for selection by government employees, and provisions of the prime contract, the actual selection procedures, and the subcontract establish that the prime contractor acts as a mere conduit for the government to obtain items from another firm and primarily to handle the administrative procedures of subcontracting, the procurement is by the government.
3. Protest that selection of a subcontractor violated established selection factors is sustained, where solicitation set forth three inconsistent bases for award and the prime contractor, acting for the government, used none of the listed bases to select a subcontractor.

DECISION

The University of Michigan and Industrial Training Systems Corporation (ITS) protest the award of a subcontract under Dynamac Corporation's prime contract (No. DLA900-82-C-4426) with the Defense Electronics Supply Center, Defense Logistics Agency (DLA). The protesters argue that Dynamac did not follow its announced evaluation scheme in awarding the subcontract to Interactive Medical Communications. Performance under the contract has not been stayed pending our decision.

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We sustain the protests.

BACKGROUND

Under its contract with DLA, Dynamac established and now operates a Hazardous Materials Technical Center, a program intended to increase the productivity and knowledge of government personnel and government contractors handling hazardous and toxic materials. The Center maintains information on hazardous materials; publishes critical reviews, technology assessments, abstracts, handbooks, and other instructional and reference materials; and provides other services, such as developing programs for meeting particular hazardous material disposal needs.

On September 30, 1986, DLA issued amendment P00059 to Dynamac's contract, adding 12 specific tasks to it. Among these was the subcontract effort at issue here: Selection and Implementation of a Hazard Communication Training Program for the Department of Defense (DOD) and Other Federal Agencies. This requirement stemmed from new Occupational Safety and Health Administration (OSHA) standards that require federal employees to receive training on the potential hazards of substances to which they are or may be exposed. Dynamac was to "identify, evaluate, select, and implement (from existing programs) an appropriate Hazardous Communication Training Program." Two phases were specified: first, an existing training program was to be selected by a team of representatives from DOD, OSHA, and the Center; second, the contractor for this program was to become a subcontractor to Dynamac for the purpose of modifying the existing program to meet the needs of DOD and other federal agencies.

On November 3, 1986, Dynamac sent a "Request for Bid" to 20 organizations that conduct hazard communication training programs. The solicitation described three different and inconsistent bases for award. It stated that award would be made for the "lowest priced . . . technically acceptable training program"; that equal weight would be given to price and the ability to deliver a technically acceptable program on schedule; and that equal weight would be given to price and to specified technical factors. The technical factors and their respective weights were (1) understanding the scope of work and OSHA standards, based upon the offeror's statement of the purpose and the scope of the project (20 percent); (2) technical approach, including understanding of required training units and plan to evaluate effectiveness of the program (30 percent); (3) personnel (35 percent); and (4) management plan, including a schedule demonstrating the ability to complete the work by December 31, 1987 (15 percent).

Dynamac received 13 proposals by the December 5 closing date. A technical evaluation committee was formed that consisted of 11 officials representing DOD agencies, OSHA, the Department of Agriculture, and the American Federation of Government Employees. In an affidavit filed with our Office, the chairman of the evaluation committee, a representative of the Office of the Secretary of Defense,^{1/} states that a Dynamac employee also served on the committee; however, the record establishes that this individual did not participate in the scoring of proposals.

The evaluation committee chairman asked two Dynamac employees to screen initial proposals, and they found seven to be technically unacceptable. The committee found two additional proposals unacceptable. It subsequently provided the remaining four offerors with an opportunity to present audiovisual materials and to discuss their training programs. Those at issue here received the following technical scores: Interactive, 880 out of a possible 1,000 points; Michigan, 861; and ITS, 756. Thereafter, the evaluation committee provided each offeror with written questions and requested best and final offers (BAFO's) by January 13, 1987.

Dynamac states that at some time after the initial evaluation, Interactive, which had originally presented materials on laser discs, submitted a videotape of the same materials. According to Dynamac, the quality of the videotape was so high that a special showing was held for six members of the evaluation committee, who concluded that unless the other offerors greatly improved their proposals, Interactive would be preferred for award. Dynamac states that two of its employees reviewed BAFOs and told the chairman of the committee that the revisions to them did not significantly affect the scores.

The record is unclear as to who actually was responsible for the award decision. The Deputy Assistant Secretary of Defense for Family Support and Education and Safety, the immediate superior of the chairman of the evaluation committee, announced on January 14, the day following submission of BAFOs, that DOD had the lead on the program and had selected a contractor. On February 2, the chairman of the evaluation committee wrote to Dynamac, stating:

^{1/} This individual was the Director of Safety and Occupational Health Policy, Office of the Secretary of Defense.

"Based upon a careful evaluation of the bids and responses, the TEC [Technical Evaluation Committee] has determined that Interactive Medical Communications (IMC) of Waltham, Massachusetts, submitted the best technical proposal and responses to the Best and Final questions that most fully meets all selection criteria. Therefore, we request you proceed with appropriate subcontract actions with this firm."

A Dynamac employee, however, states that she reviewed the BAFO's and advised the chairman of the evaluation committee that Dynamac intended to award a contract to Interactive subject to government concurrence, and another Dynamac employee states that he selected Interactive after receiving the February 2 "recommendation" of the evaluation committee chairman and opening the cost proposals.

What is clear is that at some time after completion of the technical evaluation, Dynamac opened the cost proposals, and, on February 9, it awarded a subcontract to Interactive. The University of Michigan's and ITS' protests followed.

THRESHOLD ISSUES

Service on the Procuring Agency

DLA preliminarily argues that our Office should dismiss both protests because the protesters failed to file a copy with the contracting officer under Dynamac's contract within 1 day after filing with our Office. The University of Michigan provided copies of its protest to the director of contracts administration for Dynamac, the chairman of the technical evaluation committee, and the Office of Policy at OSHA. ITS provided copies of its protest to Dynamac and to the Defense Contract Administration Services Management Area, Philadelphia, Pennsylvania.

Our Bid Protest Regulations require a protester to furnish a copy of its protest to the individual or location designated by the contracting agency in the solicitation or, if there is no designation, to the contracting officer. 4 C.F.R. § 21.2(d) (1986). This provision was drafted with protests of prime contract awards in mind. The reference to individuals designated by the contracting agency and to the contracting officer is not applicable in the context of a subcontract protest, where there is no contracting agency or contracting officer. Both protesters sought to comply with the purpose of the regulation by providing copies of their protests to the prime contractor and certain government officials, and in the absence of any designated individual

in the solicitation, we find this was all that was reasonably required.

Jurisdiction

DLA also asks that we dismiss the protests for lack of jurisdiction over subcontract protests. The Competition in Contracting Act of 1984 (CICA) authorizes our Office to decide protests concerning solicitations issued by federal agencies. 31 U.S.C. § 3551 (Supp. III 1985). Our implementing Bid Protest Regulations therefore provide that we will only consider subcontract protests where the subcontract is "by or for" the government. 4 C.F.R. § 21.3(f)(10). For example, we will entertain a subcontract protest when the prime contractor is providing large-scale management services to the government, or when there is evidence that the prime contractor is serving as a mere conduit between the government and the subcontractor. Ocean Enterprises, Ltd.--Reconsideration, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10; Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, aff'd on recon., B-224607.2, Apr. 9, 1987, 87-1 CPD ¶ 390.

DLA cites our decision in Rhode & Schwarz-Polarad, Inc.--Reconsideration, B-219108.2, July 8, 1985, 85-2 CPD ¶ 33, in support of its argument for dismissal. In that decision, we found that a prime contractor for an airport direction-finder system was not acting as a mere conduit in subcontracting for a major component for the system, even though the government allegedly controlled selection of the subcontractor. We find the facts here substantially different. Dynamac's prime contract and the actual selection procedures for the subcontractor indicate that Dynamac acted as a mere conduit, used by the government to obtain its requirements from another firm. Dynamac's contract required it to subcontract with a firm selected by a government-controlled evaluation team. While Dynamac employees apparently were given preliminary screening and review responsibilities, evaluation and scoring of proposals was conducted entirely by federal officials, and they also were involved in the award decision. Dynamac's prime contract further requires the subcontractor to modify its existing training program to meet the needs of federal agencies, and this effort is not dependent upon or incidental to any other Dynamac responsibilities under the prime contract--it is a discrete task that could itself have been directly contracted for by DLA.

The subcontract with Interactive also supports our conclusion that Dynamac was a conduit, since the subcontractor's first task is to discuss its current training program with agency representatives. The

subcontractor must then develop plans for a federal training program, based upon modifications and recommendations of the technical evaluation committee, and provide reports or materials either directly to the committee or to Dynamac "for review by the committee." In our view, Dynamac functions primarily to handle the administrative procedures of subcontracting, and the selection of a subcontractor was, in effect, by DLA.

ANALYSIS

Standard of Review

The statutes and regulations governing direct federal procurements generally do not apply to procurements by prime contractors.^{2/} However, where, as here, the prime contractor was a mere conduit, its primary function being administrative, used by a federal agency to obtain its requirements, we believe it is appropriate to review the procurement as one contractor by the agency itself and thus subject to federal statutes and regulations.

Evaluation of Proposals

In our view, Dynamac violated basic statutory and regulatory requirements of any competitive procurement. First, Dynamac failed to disclose the basis upon which selection would be made, including three substantially different bases for award in its single solicitation. CICA requires agencies to disclose evaluation factors and their relative importance and to evaluate proposals solely on those factors. 10 U.S.C. §§ 2305(a)(2), (b)(1); Price Waterhouse & Co., B-203642, Feb. 8, 1982, 82-1 CPD ¶ 103. Second, in selecting Interactive, Dynamac did not use any of the bases for award listed in the solicitation; it relied upon an undisclosed evaluation factor to the exclusion of price. Finally, the subcontract with Interactive states that Dynamac will provide 1,500 hours of assistance without cost (except for travel expenses) to the subcontractor. We find no indication in the record that Dynamac offered to provide free services to any of the other offerors. Dynamac presumably expects to be paid for its effort through its prime contract and, as a result, the government would pay more for Interactive's training program than the firm proposed.

^{2/} In those cases, the prime contractor's procurements must be consistent with and achieve the policy objectives of the "federal norm," i.e., the fundamental principles of federal procurement law. Ocean Enterprises, Ltd.--Reconsideration, 65 Comp. Gen. 683 (1986), supra.

1. Evaluation factors

Although the solicitation includes three bases for award, the protesters state that they assumed that price would be accorded equal weight with the technical evaluation factors listed in the solicitation. Michigan and ITS argue that the emphasis given to quality of audiovisual materials was inconsistent with this scheme.

The record indicates that the evaluation committee initially used the four technical factors listed in the solicitation. Subsequently, a Dynamac employee states, she notified all offerors that "determination of the eventual successful bidder would be primarily based upon the quality, content, appeal, and format of their audiovisual materials." Michigan and ITS complain that they were never so notified.

It is apparent from statements submitted to our Office that upon review of Interactive's videotape, the attending members of the evaluation committee effectively decided that Interactive was so far ahead that it would receive an award irrespective of price. The record does not indicate what led to this conclusion; the only change was a transfer of Interactive's presentation from interactive laser disk to linear videotape. The content of the program did not change, and program content was the primary focus of the technical approach factor. Of the four technical evaluation factors (understanding OSHA standards, technical approach, key personnel, and management plan) we find only technical approach to be relevant to audiovisual materials. This factor encompassed the extent to which offerors demonstrated an understanding of the "training units" to be incorporated in the program, and it was accorded 30 percent of available points.

Thus, the factor upon which Interactive's proposal was reevaluated was not specifically described in the solicitation, and was at best only one element of an evaluation factor worth 30 percent of technical points. If price was worth equally as much as all technical factors combined, no improvement in Interactive's relative technical score could eliminate price as a factor in the selection. In determining that Interactive would receive an award irrespective of price, the evaluation scheme upon which the protesters based their proposals was violated.

Michigan may not have been prejudiced by elimination of price as an evaluation factor, because its proposed price, \$465,101, was \$276 more than Interactive's, \$464,825, and its proposal was not as highly regarded. However, there is no explanation of why the ITS proposal could not meet the

government's minimum needs, and ITS' price, less than \$300,000, was considerably more favorable.

We conclude that as in any competitive procurement, all offerors should have been informed in writing of the revised evaluation scheme and given an opportunity to submit proposals in accord with it. See Federal Acquisition Regulation, 48 C.F.R. § 15.606. We sustain the protests on this basis.

2. Subcontract price

Interactive originally proposed to provide interactive laser disks for \$2,094,000. Its BAFO, however was for a linear videotape program for \$464,825. The subcontract, however, contains the following language:

"Dynamac will provide support staffing and materials to assist the subcontractor in the development and production of written training materials as needed. The deliverable will be prepared by the subcontractor with Dynamac Corporation's assistance where requested. Dynamac's total assistance on Tasks 3 and 4 will be limited to 1,500 hours of training specialists', writers', and artistic assistants' effort in the preparation of mechanicals. All travel and per diem costs other than salaries of Dynamac employees will be paid by the subcontractor."

We assume that Dynamac intends that its labor costs be reimbursed under its prime contract with DLA, but we find nothing in the record to justify the reimbursement of such direct labor costs in addition to the subcontractor's price. Consequently, we question whether any charge for such services by Dynamac would be an allowable cost.

Both Michigan and ITS point out that their prices included the services Dynamac agreed to provide to Interactive. For Michigan, reduction of its price by the value of Dynamac's services would make its price less than Interactive's. Similarly reduced, ITS' price would represent an even greater saving to the government.

RECOMMENDATIONS

Where selection for award was not based upon the listed evaluation factors because of changes in the agency's minimum needs, the appropriate remedy where feasible is for

the agency to amend the solicitation and seek revised proposals, terminating the awarded contract if appropriate. 4 C.F.R. § 21.6(a). Since performance of the contract has continued during pendency of the protest, the agency should determine whether the foregoing remedy is feasible.^{3/} Where our Office finds a violation of statute or regulation, and resolicitation and termination is not feasible, we may declare the protester entitled to the reasonable costs of filing and pursuing the protest, including attorney's fees, and bid or proposal preparation costs. 4 C.F.R. §§ 21.6(d) and (2). Regarding the former costs, our Office allows the recovery of such costs where the protester is excluded from the procurement and we are unable to recommend award to the protester; recovery of the latter costs is allowed where the protester, having a substantial chance for award, is unreasonably excluded from the competition and, none of the other remedies in our regulations, at 4 C.F.R. § 21.6(a)(2)(5), is appropriate. American BallScrew, 66 Comp. Gen. ____ (1986), B-223915, Dec. 10, 1986, 86-2 CPD ¶ 664.

In the circumstances, if termination is not feasible, the protesters are entitled to the recovery of both costs and should submit their claims directly to the agency.

for *Harry R. Van Cleave*
Comptroller General
of the United States

^{3/} Although CICA provides for suspension of performance of a contract upon receipt of notice that a protest has been filed with our Office within 10 days of the date of contract award, performance was not required to be suspended as the protest was filed with our Office on the 11th day. 10 U.S.C. § 3553(d)(1) (Supp. III 1985).