



The Comptroller General
of the United States

Washington, D.C. 20548

Linder

Decision

Matter of: International Business Machines Corporation
File: B-234753
Date: May 23, 1989

DIGEST

Protest that awardee's proposal materially misrepresented its personnel qualifications and its intent to subcontract maintenance for certain equipment after contract award is denied where the record does not support a finding of material misrepresentation.

DECISION

International Business Machines Corporation (IBM) protests the award of a contract to Storage Technology Corporation (StorageTek) under request for proposals (RFP) No. M00264-88-R-0014, issued by the Marine Corps for maintenance of IBM-manufactured automatic data processing (ADP) equipment. IBM contends that the contract with StorageTek should be terminated since StorageTek did not provide trained personnel to maintain the IBM equipment and failed to inform the Marine Corps of its intent to subcontract the maintenance for the central processing units (CPUs) as required by the RFP. IBM asserts that StorageTek's proposal materially misrepresented its intention concerning these two mandatory requirements.

We deny the protest.

The RFP solicited proposals on a fixed price basis to provide maintenance service for fiscal year 1989 (October 1, 1988 to September 30, 1989) for government-owned IBM equipment located at Marine Corps Headquarters in Arlington, Virginia and at a facility in Quantico, Virginia. The RFP stated that technical factors would be given slightly more consideration than cost. The RFP listed five technical factors that would be evaluated and described the relative order of importance of these factors.

Eight proposals were received. IBM, StorageTek, and two other firms were determined to be in the competitive range.

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Negotiations were conducted with the four firms. StorageTek's best and final offer (BAFO) had the highest technical score and the lowest evaluated price. IBM's BAFO had the second highest technical score and the highest evaluated price. Using a 60 percent technical/40 percent price formula, StorageTek received the highest total score and IBM received the second highest total score. On February 28, 1989, the contract was awarded to StorageTek—with performance to begin the next day and continue through September 30, 1989.

The solicitation required the offerors to provide an adequate number of service personnel thoroughly trained in the maintenance and operation of the equipment and to certify the training level for each employee designated to maintain the equipment. The RFP further required the offerors to provide resumes for those professionals determined to be key personnel under the contract; these resumes would be evaluated as part of the offeror's proposal. With regard to subcontracting, the relevant solicitation language provided in part:

"It is the intention of the government that the Contractor selected for maintenance of equipment listed in the enclosed description of equipment, or equipment subsequently added to the contract, shall maintain this equipment. Hence, any subcontracting to be done shall be very specifically identified in the proposal as to whom the subcontractor is and exactly what equipment is to be maintained. . . . [The contractor may not] engage in any further subcontracting for maintenance services under this contract without the express prior written consent of the Contracting Officer."

In support of its position, the protester submitted an affidavit from one of its employees stating that on or about March 7, he was called by a StorageTek employee who said that StorageTek did not have anyone trained in this geographic area to maintain one type of equipment covered by the RFP, the IBM 3084-QX6 CPUs, and would have to send an employee to Atlanta for training. The IBM employee states in the affidavit that the StorageTek employee also said that the firm did not have anyone to maintain certain other equipment, the IBM 3090-120E CPUs and the IBM 3380 models AE4 and BE4, and would have to subcontract for maintenance

for this equipment.^{1/} Based on these facts, IBM filed a protest with our Office on March 9 alleging that StorageTek did not have personnel trained to perform the maintenance requirements under the contract, and that StorageTek did not comply with the contract requirement relating to informing the Marine Corps of any subcontracting plans.

On March 10, a meeting was held between representatives of the Marine Corps and StorageTek to discuss the issues raised in IBM's protest. StorageTek stated that it always intended to maintain the 3090-120E CPUs itself and had located a company in Minnesota to supply the necessary spare parts for the processor, but that after the contract was awarded on February 28, StorageTek discovered its supplier was having internal problems and could not provide the parts for the 3090-120E CPUs. StorageTek stated while it had personnel trained to perform the maintenance on the 3090-120Es, it decided to subcontract for the maintenance and parts with Control Data Corporation (CDC), a company with which it had prior successful business dealings, because performance was to begin the next day and StorageTek wanted to ensure full compliance under the contract.

At the conference on the protest and in its comments on the agency report, IBM alleged that StorageTek did not have personnel trained to maintain the equipment, and therefore, its proposal materially misrepresented its intention concerning this mandatory requirement. IBM contends that StorageTek used a "bait and switch" strategy in which it listed the names of individuals to perform maintenance in its proposal for evaluation purposes, while intending all along to substitute other employees for these individuals after contract award.

IBM further alleges that StorageTek intended to subcontract the maintenance for the 3090-120E CPUs after the contract was awarded, and again, materially misrepresented its intention by not disclosing this to the Marine Corps in its proposal. IBM contends that there is no logical explanation as to why StorageTek had to subcontract the maintenance for the 3090-120E CPUs when it discovered its original supplier could not furnish the parts--if StorageTek had personnel trained to perform the maintenance--since there are other

^{1/} While the IBM affidavit refers to three types of equipment in the context of StorageTek's subcontracting plans, in subsequent submissions the parties confine their arguments to the proposed subcontract for the 3090-120E CPUs. Accordingly, our discussion is similarly limited to that class of equipment.

companies including IBM that can supply the parts for the 3090-120E CPUs. Moreover, IBM states that the fact that StorageTek did not even learn of its supplier's difficulties until after contract award supports IBM's position that StorageTek was planning all along to subcontract the maintenance, since if it had intended to perform the maintenance it would have conducted an investigation of its supplier prior to contract award to ensure the availability of parts.

In response to these allegations, StorageTek states that it does have qualified personnel to maintain the equipment and those individuals who are listed in its proposal are performing the maintenance under the contract. StorageTek again states that while it has personnel trained to maintain the 3090-120E CPUs, it decided to subcontract for the maintenance with CDC to ensure satisfactory contract performance particularly in light of the 1-day start-up time for performance, since it was aware of the criticality of the 3090-120E CPUs to the Marine Corps and has had previous successful business relationships with CDC. Furthermore, with regard to conversations between IBM and StorageTek personnel, StorageTek states that it called IBM on March 6 merely to obtain from IBM certain software relevant to the contract. StorageTek states that the first call it placed to IBM relating to subcontracting was on March 10, after IBM's protest was filed. According to StorageTek, it contacted IBM on March 10 to discuss IBM's prices and availability for subcontracting in case CDC encountered difficulties in performing the maintenance.

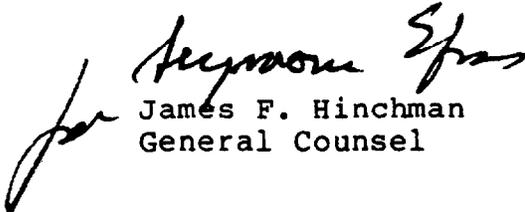
The Marine Corps states that it properly evaluated the technical proposals in accordance with the evaluation criteria in the RFP and properly awarded the contract to StorageTek based on its highest technical score and lowest evaluated price. In response to the bait and switch allegation, the Marine Corps states it was informed by StorageTek after IBM's protest was filed that all 13 of the field engineers listed in StorageTek's proposal are employed by StorageTek and are currently available to support the contract. With regard to the subcontracting allegation, the Marine Corps states that this is a matter of contract administration since StorageTek did not become aware of the problem with its parts supplier and the need to subcontract the maintenance of the 3090-120E CPUs until after contract award. Additionally, the Marine Corps states that it had no reason to doubt StorageTek's stated intention in its proposal to provide the maintenance itself.

We find protester's allegations that StorageTek's proposal misrepresented the qualifications of its personnel and its intention regarding subcontracting of maintenance to be

without merit. There is nothing in the record to indicate that StorageTek intended to change its personnel since the record establishes that all of the individuals identified in StorageTek's technical proposal were employed at the time of contract award and are currently employed by StorageTek and available for contract performance. Similarly, there is no evidence to support protester's statement that StorageTek knew prior to contract award that it would have to subcontract the maintenance of the IBM 3090-120E CPUs. StorageTek has provided a reasonable explanation of its decision to subcontract, stating that given the 1-day start-up time for contract performance and potential problems with its proposed parts supplier, it concluded that the prudent course to ensure satisfactory performance was to subcontract with CDC, a decision which in any event is subject to approval by the contracting officer.

Further, with regard to IBM's argument that problems with StorageTek's proposed parts supplier did not warrant abandoning its plan to perform the maintenance in-house since there are other sources for parts, including IBM, StorageTek agrees that the parts are available from IBM but states that its arrangement with its initial supplier was on a "lease kit" basis which was more advantageous with regard to both cost and parts availability than buying the parts from IBM. While IBM may disagree with StorageTek's business judgment regarding the decision to subcontract, its disagreement is not sufficient to show that StorageTek misrepresented its intentions in its proposal. See Triad Research, Inc., B-225793, July 6, 1987, 87-2 CPD ¶ 16.

The protest is denied.


James F. Hinchman
General Counsel