

(Arsevaoff)



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** The EC Corporation

**File:** B-236973

**Date:** January 5, 1990

---

## DIGEST

Agency properly rejected protester's best and final offer which was ambiguous with regard to protester's intention to subcontract guard services where solicitation prohibited subcontracting those services.

---

## DECISION

The EC Corporation protests the award of a contract to Inter-Con Security Systems, Inc., under request for proposals (RFP) No. JM89-S-127-FA-991, issued by the Department of State for guard services at the American Embassy in Kingston, Jamaica. The protester contends that its proposal was improperly rejected as unacceptable.

We deny the protest.

The RFP was issued on June 1, 1989, contemplating a 1-year contract for guard services with four 1-year options. Award was to be made to the responsible offeror submitting a technically acceptable proposal determined to present the best value to the government in accordance with an evaluation formula assigning a maximum of 60 points for price and 40 points for technical considerations.

The RFP at paragraph H.8 also required the contractor and the contracting officer to develop a "transition plan" within 30 days after award for preparing the contractor to assume all responsibilities for the guard services described in the statement of work; the transition period was included within the initial phase of contract performance and contemplated a 1-month period in which reduced performance would be permitted at a reduced charge to the government while the contractor phased in to full performance.

047434/140351

Of the 13 proposals received, five, including the protester's, were found technically acceptable and included in the competitive range. On August 22, each of the remaining offerors was sent an identical request for best and final offers (BAFOs). In addition to asking for final prices in Jamaican Dollars and evidence that the offerors were legally constituted to perform guard services in Jamaica, the request stated:

"We also request a detailed timetable and plans for implementing the transition period. This will assist our planning in the event that you are awarded the contact. As mentioned at the recent site visit, we would like to have the contract fully implemented by October 1, 1989."  
 "The deadline for receipt of your best and final offer is . . . September 5. . . . We plan to announce the awardee on Friday, September 8."

The two highest-rated final offers were as follows:

<u>Offeror</u>	<u>Price (Jamaican)</u>	<u>Price Score</u>	<u>Tech Score</u>	<u>Total</u>
EC	\$J 30,826,217	60.00	30.25	90.25
Inter-Con	\$J 33,877,600	54.60	34.00	88.60

EC and Inter-Con submitted transition plans as requested. Unlike Inter-Con's, however, EC's plan contained a narrative proposing to employ local subcontractors for various purposes. Because the RFP prohibited the subcontracting of guard services, the agency rejected EC's proposal as technically unacceptable and awarded the contract to Inter-Con.

In its protest, EC initially maintains that, as a general matter, its proposed transition plan--which admittedly contains references to subcontracting--cannot properly serve as a basis for rejecting its offer because the development of such a plan was, by the terms of the original RFP, intended to be a collaborative post-award effort which necessarily fell outside of the scope of the evaluation criteria established for selection purposes.

In our view, this position ignores the fact that the request for BAFOs had the effect of amending the RFP to make the development of a transition plan a preaward matter. Notwithstanding the protester's contention that the August 22 request for the preaward submission of transition timetables "clearly violated the terms of the RFP," we have recognized that an RFP can be effectively amended by a letter, which, although is not issued as a formal amendment,

is signed by the contracting officer and sent to all offerors. See IBIS Corp., B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136; Datapoint Corp., B-186979, May 18, 1977, 77-1 CPD ¶ 348. Thus, once the transition plan was transformed into a preaward requirement by the August 22 BAFO request, to the extent that the protester's transition plan was inconsistent with the prohibition against subcontracting guard services, its BAFO could properly be rejected as unacceptable since it took exception to a material requirement of the solicitation. Conrac Corp., SCD Div., 66 Comp. Gen. 444 (1987), 87-1 CPD ¶ 497.

Next, EC maintains in effect that, even if the contents of its proposed transition plan could properly be evaluated, they do not reflect an intention to subcontract guard services after October 1. Rather, the protester submits that the plan is limited by its own terms to describing the period of time between anticipated award on September 8 and October 1, when full performance was expected, and that, in any event, the references to subcontracting pertain solely to matters such as obtaining equipment and administrative services incidental to starting up a business--matters which fall outside the RFP prohibition.

In response, the State Department contends that, at best, EC's proposed transition plan was ambiguous as to whether or not the protester intended to subcontract for guard services. Since, in the agency's view, it was incumbent on EC to submit a BAFO which was free from any ambiguity, the State Department argues that the contracting officer acted reasonably in rejecting the protester's final proposal as technically unacceptable.

An agency may properly reject as technically unacceptable a proposal which it initially finds as acceptable if the BAFO is noncompliant with a material term or condition of the RFP. Digital Equipment Corp., B-235665, Sept. 21, 1989, 68 Comp. Gen. \_\_\_\_, 89-2 CPD ¶ 260. Moreover, an offeror must affirmatively demonstrate the merits of its proposal, and it runs the risk of proposal rejection if it fails to do so clearly. See RCA Service Co. et al., B-218191; B-218191.2, May 22, 1985, 85-1 CPD ¶ 585.

While the plan submitted with EC's BAFO does in large part address a preperformance transition period, and while it does contain a discussion of subcontracting for such things as equipment and administrative-type services, it also contains passages which, in our view, may reasonably be read as applying to the period of contract performance commencing October 1 and as proposing the use of a subcontracted guard staff. For example, the plan states:

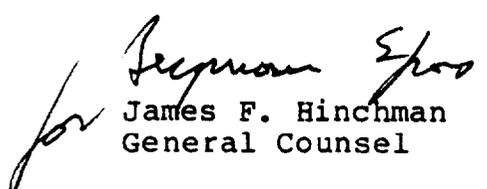
". . . even if the subcontract option<sup>1/</sup> is exercised, we will remain in complete control and bear complete operational responsibility. EC's policies, procedures, and management techniques will apply even to the subcontractor. Personnel will be trained throughout transition in EC's policies and approaches even as guard service is provided without interruption."

"[W]e have talked to the incumbent and if we submit the successful bid, we will be able to hire through them as a subcontractor as many of their staff as we like."

Although, as the protester now argues, it may have intended to indicate that it was merely proposing to use the incumbent contractor in some sort of a role as an employment agency prior to the beginning of contract performance, such a limited intention is by no means made clear in the above-quoted passages. To the contrary, one could easily read them as indicating a more pervasive subcontractor use. Since EC submitted a BAFO which was therefore ambiguous at best with regard to the proposed use of subcontractors, we are presented with no basis for disturbing the agency's conclusion that the BAFO was technically unacceptable. See RCA Service Co. et al., B-218191; B-218191.2, supra.

Finally, we do not agree with EC's suggestion that the agency was obligated to seek clarification regarding the deficiency it perceived in the protester's BAFO. While an agency may sometimes seek to clarify minor uncertainties in a particular proposal, where, as here, the information sought is essential to determining its acceptability, a request for such information constitutes the reopening of negotiations, and an agency generally has no legal duty to reopen negotiations to permit a single offeror to submit a revised proposal. Motorola, Inc., B-235599, Sept. 20, 1989, 89-2 CPD ¶ 252.

The protest is denied.

*for*   
James F. Hinchman  
General Counsel

---

<sup>1/</sup> The terms of the protester's transition plan simply described one proposal which involved the use of subcontractors; no other "options" were presented.