

Burkard
1/7/95



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Telesec Library Services; Department of
Agriculture--Reconsideration

File: B-245844.3; B-245844.4

Date: August 13, 1992

John R. Tolle, Esq., Barton, Mountain & Tolle, for Telesec
Library Services, a requesting party.

Curtis Wilburn, Jr., Department of Agriculture, for the
agency.

Richard P. Burkard, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Request for reconsideration is denied where requesting party has not shown that prior decision contains either errors of fact or law or information not previously considered that warrant reversal or modification of the decision.

2. Despite the fact that prices were revealed in prior decision and that redacted portions of the awardee's proposal were released by agency in response to a Freedom of Information Act request, General Accounting Office declines to change its recommendation that another round of best and final offers be solicited since the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.

3. Award of costs to successful protester is affirmed where General Accounting Office finds that award was made on the basis of a proposal which does not accurately reflect the availability of key personnel.

DECISION

Telesec Library Services and the Department of Agriculture request that we reconsider our decision, CBIS Federal Inc., B-245844.2, Mar. 27, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 308, in which we sustained, in part, a protest filed by CBIS Federal Inc. against the award of a contract to Telesec for library support services under request for proposals (RFP) No. 12-3K06-91.

We deny the reconsideration request.

CBIS alleged, among other things, that Telesec misrepresented the availability of its proposed key personnel, failed to provide a letter of commitment for one of them, and failed to provide key personnel it proposed to perform the contract. We sustained the protest because we found that Telesec proposed two key personnel in its best and final offer (BAFO) whom it reasonably could not have expected would be available to perform the contract.

We found that Telesec did not have (and therefore did not submit to the agency) a letter of commitment from its proposed control and circulation unit supervisor as required by the solicitation and that Telesec's assumption that she would be available was unreasonable. Concerning its proposed project manager, the record showed that at some time before award was made she advised Telesec that she was no longer available. The record was unclear as to whether this conversation occurred before or after Telesec submitted its BAFO. We stated that even assuming the conversation occurred after Telesec had submitted its BAFO, the record showed that the proposed project manager had signed a letter of intent more than 8 months earlier and that Telesec had not communicated with her during that period concerning her availability. Consequently, we concluded that when Telesec submitted its BAFO, it could not reasonably have expected that she was still available for contract performance.

We stated further that the agency technical evaluators thought highly of these two individuals proposed by Telesec and considered these positions to be important to successful performance of the contract. Because it was possible that the award decision would have been different but for Telesec's failure to assure the availability of the personnel it proposed, we recommended that the agency reopen negotiations and request additional BAFOs from the firms in the competitive range. We also found that the protester was entitled to recover its costs of filing and pursuing the portion of its protest which was sustained.

In its request for reconsideration, Telesec argues principally that our decision contains a factually inaccurate statement. Specifically, it asserts that, contrary to the statement in our decision, Telesec had, in fact, communicated with the proposed project manager during the 8 month period before submission of BAFOs.

The standard for reconsideration is that a requesting party must show that our prior decision contains either errors of fact or law or information not previously considered that warrants reversal or modification of the decision. Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1992); Department of the Air Force, et al.--Recon., 67 Comp. Gen. 372 (1988), 88-1 CPD ¶ 357. We do not find that Telesec's new argument concerning its alleged communications with its proposed project manager provides a basis for reconsideration.

Other than to simply repeat arguments which we previously considered in our prior decision, Telesec's request for reconsideration does not contest our findings concerning the availability of the proposed supervisor and does not challenge our finding that the Telesec proposal failed to include a letter of commitment from this individual, as required by the RFP. Rather, it focuses on our discussion of the project manager and attempts to introduce for the first time in the reconsideration request an affidavit from this individual.¹

The affidavit does not, in our view, resolve the issue of when the project manager advised Telesec that she was unavailable. It leaves open the possibility that this individual withdrew her offer to work for Telesec before the firm submitted its BAFO.

Even if we assume that the withdrawal came after Telesec submitted its BAFO--as we did in our initial decision--Telesec has not shown that our conclusion that the firm could not reasonably have expected that she would be available was incorrect. In fact, the declaration submitted by the proposed project manager contradicts Telesec's previously submitted affidavit of the only Telesec employee with whom the project manager communicated regarding the contract. The project manager states that this Telesec employee "kept me apprised of the status of the contract" through "several conversations" during the period from

¹In light of the serious question about this person's availability, her affidavit should have been provided in the course of the protest. See Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299. The firm has not stated why the affidavit was not submitted at the appropriate time.

November 1990 "through the summer of 1991." The Telesec employee, however, stated in her affidavit that she worked on the firm's proposal only through February 1991 and did not work on the BAFO. That individual made no representation that she kept the project manager informed of the status of the procurement. Telesec has not provided an affidavit from any of its employees, including this individual, which would rebut our finding that Telesec had not communicated with the proposed project manager during the 8 month period before BAFOs. Since it is the responsibility of Telesec, and not its proposed project manager, to submit an accurate proposal to the agency, and considering the affidavit of the relevant Telesec employee, we do not think that the protester has shown that our conclusions regarding the inaccuracy of Telesec's proposal in this regard were incorrect.

The agency, in its request for reconsideration, challenges the recommendation portion of our decision on two separate grounds. First, it argues that reopening negotiations with firms in the competitive range would create an improper auction. The agency states that it has released a redacted version of Telesec's proposal to the protester and one other offeror in the competitive range under a Freedom of Information Act (FOIA) request. Second, it points out that Telesec's and CBIS' overall prices were revealed in our decision.

We see no basis to withdraw our recommendation for corrective action. With respect to the release of Telesec's proposal, the agency released only redacted versions of the proposal and that release was in response to FOIA requests made prior to the filing of the protest. We have reviewed the released documents and do not agree with the agency that their disclosure would significantly affect further competition. With respect to the agency's fears that an auction will result from our recommendation since prices have been revealed, under the circumstances here, we think that the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action. Cubic Corp.-- Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174.

The agency also argues that awarding costs to the protester under these circumstances is unjustified. The agency maintains that since our Office found no errors on its part, it was inappropriate for us to have directed the protester to submit its claim for costs to it.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (1988), authorizes our Office to declare that an appropriate interested party is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees, where we find that "a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation." The entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir. 1986). Congress believed that the prospect of successful protesters being reimbursed their bid protest costs was necessary to enhance the effectiveness of the bid protest process. Armour of Am., Inc.--Claim for Costs, B-237690.2, Mar. 4, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 257; see H.R. Rep. No. 98-1157, 98th Cong., 2d Sess. 24-25 (1984).

Here, contrary to the agency's position, the record shows that the agency shares responsibility for the defective procurement. As stated, Telesec's proposal did not contain a letter of commitment from its proposed supervisor as required by the RFP. The agency, nevertheless, did not bring this to the attention of Telesec and awarded the firm the contract notwithstanding this defect in its proposal. Considering the importance of the position, the failure of the agency to adhere to the RFP terms was improper.

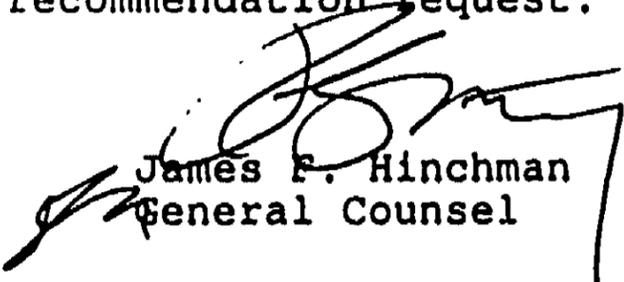
Further even if the agency made the award without prior knowledge of the misrepresentations in Telesec's proposal, award of costs here would be appropriate. We have consistently awarded successful protesters the cost of pursuing the protest where, as a result of its protest, we find that the award was made on the basis of a proposal which does not accurately reflect the availability of key personnel. Omni Analysis; Dept. of the Navy--Recon., 68 Comp. Gen. 560 (1989), 89-2 CPD ¶ 73; Ultra Technology Corp., B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42; Mantech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309. We think that in such cases the ultimate responsibility is the agency's to ensure that the representations upon which the agency bases its evaluation and selection are true.

Both Telesec and the agency argue that our decision is incorrect in light of previous decisions of our Office. They essentially argue that since Telesec did not intentionally misrepresent the availability of the two proposed individuals, we should not have sustained the protest.² In this regard, Telesec discusses several of the cases cited in our decision and since it is unable to find a decision of this Office which addressed a factual situation sufficiently similar to the one at hand and which sustained the protest, Telesec contends that our decision is incorrect.

We have reviewed the arguments presented in this regard and find them to be without merit. Our Office has previously considered and sustained protests that an offeror has misrepresented, intentionally or not, the availability of proposed key personnel. Omni Analysis, 60 Comp. Gen. 300 (1989), 89-1 CPD ¶ 239; aff'd, Omni Analysis, Dept. of the Navy--Recon., supra; Ultra Technology Corp., supra. While the facts in these cases vary, Telesec simply has not shown that we erred in concluding that its proposal did not accurately reflect, or misrepresented, the availability of two individuals who were proposed and who, in fact, were unavailable to perform.

Finally, Telesec has submitted other arguments concerning our decision which were also raised in the original protest and were considered by our Office. Telesec's repetition of these arguments and reliance on the same facts show that it simply disagrees with the conclusions and does not provide a basis for reconsideration. Interstate Diesel Servs.--Recon., B-230107.3; B-230107.4, Aug. 30, 1988, 88-2 CPD ¶ 190.

We conclude that neither Telesec nor the agency has shown that our decision was in error, therefore we deny the recommendation request.


James F. Hinchman
General Counsel

²Both Telesec and the agency also argue that the evaluation of these two individuals had no effect on the award decision. We considered this issue in our original decision, stating that had the awardee's proposal been accurate and updated, the selection decision may have been different. The bare assertion that Telesec would still be entitled to the award if the proposals were "rescored" does not provide a basis for us to conclude that our decision contained an error of fact or law.