

11/1/86
PL-7

DECISION



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

FILE: B-220651

DATE: January 2, 1986

MATTER OF: Finalco, Inc.

DIGEST:

1. Protest challenging requirement in request for proposals (RFP) that offerors obtain certification from original equipment manufacturer agreeing that proposed equipment modifications will not affect manufacturer's existing equipment maintenance agreement is untimely where basis of protest--objection to RFP requirement in light of manufacturer's refusal to furnish certification--was evident at the latest before the time best and final offers were due, but protest was not filed until after the due date for best and final offers.

2. Under RFP calling for upgrade and modifications of existing equipment, contracting agency reasonably concluded that protester's offer to have original equipment manufacturer approve protester's modifications after they are installed did not satisfy requirement in RFP that offerors obtain certification from manufacturer agreeing that proposed modifications will not affect manufacturer's existing maintenance agreement, since the purpose of the certification requirement is to obtain an assurance before installation that the maintenance agreement will continue unaffected.

Finalco, Inc. protests the rejection of its offer and the award of a contract to International Business Machines Corporation (IBM) under request for proposals (RFP) No. DAAA08-85-R-0214, issued by the Army for the acquisition and maintenance of upgrades and modifications to its IBM automatic data processing equipment at the Rock Island Arsenal, Rock Island, Illinois. Finalco's offer was

034156

rejected for failure to comply with two provisions in the RFP requiring offerors to furnish certifications from IBM that installation of the upgrades and modifications on the IBM equipment will not affect IBM's existing agreement to maintain the equipment. We dismiss the protest in part and deny it in part.

The RFP was issued on July 8, 1985, with initial proposals due by August 7. Paragraph C.6.2 of the RFP provided that "[p]roposals must include signed certification from IBM permitting any necessary internal circuitry, hardware, and microcode modification." Paragraph C.7.1.1 stated that "[t]he contractor shall provide a signed certificate from IBM to cover joint maintenance, collaborative problem definition, and resolution of all affected equipment." An amendment to the RFP was issued on July 31, extending the proposal due date to August 16, and in part clarifying what was required under paragraphs C.6.2 and C.7.1.1. Specifically, the amendment stated:

"The certification required by paragraphs C.6.2 and C.7.1.1 is not a specified formatted document. All that is required is a document signed by IBM agreeing to other vendor installation of upgrade, any modifications, joint maintenance, if required, and that this action will not negate any existing maintenance agreements with IBM."

A second amendment to the RFP was issued extending the due date for initial proposals to August 21.

Finalco submitted its initial proposal without the required certifications from IBM. With regard to paragraph C.6.2, the proposal stated that "Finalco will have the upgraded machines certified for maintainability by IBM Corporation at the completion of the installation." With regard to paragraph C.7.1.1, Finalco proposed that "the upgraded machines be maintained by IBM Corporation. IBM's maintenance terms and conditions, as set forth in the current IBM GSA schedule, comply with requirements of this section." In a message to Finalco dated September 17, the contracting officer set September 24 as the date for submission of best and final offers, and reiterated that the IBM certifications had to be submitted by that date.

Finalco submitted its best and final offer by letter dated September 19. In that letter, Finalco said first that the IBM representative had stated, and Finalco

agreed, that the certification required by paragraph C.6.2 to allow installation of the upgrades and the modifications on the existing equipment should be furnished by the Army as the owner of the equipment, rather than by IBM. In addition, Finalco stated that based on its conversation with the IBM representative, IBM "would probably be unwilling to agree to 'joint' maintenance or 'collaborative' problem definition" as called for in paragraph C.7.1.1, in view of IBM's standard policy for mixed-vendor equipment under which IBM diagnoses and repairs any problem unless IBM determines that it involves another vendor's equipment. Finalco concluded by noting that it believed that it had complied with paragraphs C.6.2 and C.7.1.1 despite IBM's refusal to supply the certifications called for by the RFP.

A contract was awarded to IBM on September 30. Finalco then filed its protest with our Office on October 9.

In its protest Finalco first reiterates its position that only the owner of the equipment, not IBM, could provide the certification required by paragraph C.6.2 allowing the proposed modifications. Finalco also argues that, although it was precluded from fully complying with paragraph C.7.1.1 because of IBM's refusal to furnish the required certification, the usual procedure under the Army's existing maintenance agreement with IBM would be for IBM to handle maintenance of the upgraded and modified equipment. Finalco thus contends that it complied with paragraphs C.6.2 and C.7.1.1 to the greatest extent possible by agreeing to have IBM certify the equipment for maintenance after installation. Finalco also argues that the Army improperly waived the certification requirements with regard to IBM.

The Army initially contends that Finalco's protest, not filed until after award was made, is untimely. The Army argues that, by objecting to the certification requirements, the protester is challenging an alleged impropriety apparent on the face of the RFP, and therefore should have filed its protest before the due date for initial proposals, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985). We agree that the portion of the protest concerning the propriety of the certification requirements is untimely.

The focus of Finalco's protest is that it was improper for the Army to require offerors to furnish the certifications called for in paragraphs C.6.2 and C.7.1.1

in light of IBM's refusal to provide the certifications. Finalco contends that the result of imposing the requirements was to ensure a sole source award to IBM. In essence, the protester challenges the certification requirements as unduly restrictive of competition.

The certification requirements were clear both from the original RFP and amendment No. 1 which discussed them in further detail. Finalco's objection to the requirements is based on IBM's refusal to agree to furnish the certifications; this refusal either was or should have been known to the protester before the due date for initial proposals, since the RFP clearly required submission of the certifications with each offeror's proposal. Thus, the basis for the protest is an alleged impropriety apparent on the face of the RFP which, under our Bid Protest Regulations, must be protested before the due date for initial proposals. 4 C.F.R. § 21.2(a)(1).

Even assuming that Finalco was unaware of IBM's position before initial proposals were due, the protest nevertheless is untimely. As noted above, Finalco was specifically advised in the Army's September 17 message that submission of the certifications was necessary. Further, the letter accompanying Finalco's best and final offer clearly shows that Finalco was aware of IBM's refusal to provide the certifications by the date of that letter, September 19. Thus, at the latest, Finalco was aware by September 19 that it would have problems meeting the solicitation requirements. Finalco did not file its protest prior to the September 24 closing date for receipt of best and final offers; as a result, its protest is untimely. See 4 C.F.R. § 21.2(a)(2).

In its comments on the agency report, Finalco implies that its September 19 letter was intended as a protest to the Army, stating that the letter "took issue" with the Army's requirement that the certifications be furnished with best and final offers. In our view, the September 19 letter did not constitute a protest. While a letter does not have to explicitly state that it is intended as a protest for it to be so considered, the intent to protest must be conveyed by an expression of dissatisfaction and a request for corrective action, neither of which is evident in Finalco's letter. See Peeves Brothers, Inc., et al., B-212215.2, et al., May 2, 1984, 84-1 CPD ¶ 491.

The protester also challenges the Army's rejection of its offer for failure to comply with the certification

requirements. Specifically, Finalco contends that its offer to have IBM approve Finalco's modifications after they are installed satisfied the certification requirements.

The Army report states that the IBM equipment to be upgraded and modified currently is maintained by IBM. Under the maintenance agreement, IBM is to discontinue maintenance service until safety hazards created by alterations or additions to the equipment are removed. IBM also may terminate service if a non-IBM part is added which significantly affects IBM's ability to provide maintenance. According to the Army, the purpose of the certification requirements in the RFP is to ensure that IBM is aware of the offeror's proposed modifications and has no objection to them which might affect continued maintenance of the equipment by IBM.

Finalco does not challenge the Army's goal of preserving its maintenance agreement with IBM; at most, Finalco contends that its offer to have IBM approve Finalco's modifications after they are installed satisfied the certification requirements. We find this argument unpersuasive since the purpose of the requirement is to obtain an assurance before installation that the IBM maintenance agreement will continue unaffected. Finalco's own assurance that its modifications will not be objectionable to IBM simply is not the equivalent of certification from IBM itself.

Further, with regard to the requirement in paragraph C.6.2 for IBM's "permission" for the modifications, in our view the only reasonable interpretation of the provision is that offerors were to obtain IBM's agreement that the planned modifications would not negate the existing maintenance agreement, not, as Finalco argues, IBM's permission for the actual modifications. Finally, we see no merit to Finalco's argument that the certification requirements were waived improperly with regard to IBM, since the purpose of the requirements was to avoid disrupting maintenance service in the event that modifications not furnished by IBM were installed. Clearly, if IBM installs the modifications, the maintenance agreement would remain unaffected.

The protest is dismissed in part and denied in part.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel