



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eastman Kodak Company

File: B-228306

Date: December 30, 1987

DIGEST

1. Protest alleging that awardee's equipment is not equal to the specified brand name is timely where filed within 10 days after award. Preaward statement by agency official that type of equipment offered by awardee was being considered for award did not obligate protester to file a defensive protest before award was made.

2. Pursuant to Commerce Business Daily (CBD) notice announcing contracting agency's intent to purchase brand name or equal microfiche equipment from schedule contract, agency properly found awardee's non-brand name equipment was equal to brand name model even though it used a different method to produce the microfiches, since the CBD notice did not list the production method as a salient characteristic and awardee's equipment was functionally equivalent to the brand name.

DECISION

Eastman Kodak Company protests the Army's decision to place an order with Datagraphix, Inc., for computer output microfilm (COM) equipment under its nonmandatory automatic data processing schedule contract with the General Services Administration (GSA). We deny the protest.

On June 30, 1987, the Army published a notice in the Commerce Business Daily (CBD) announcing its intention to acquire certain COM equipment, designated as Kodak Komstar IV or equal. The notice stated that in the absence of a better offer, the Air Force would order the equipment from Kodak under its existing GSA schedule contract.

The equipment being procured is used to produce microfiche copies from computerized data. The parties agree that there are two principal types of COM equipment, which differ according to whether they use "wet" or "dry" technology

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to produce the microfiches. The brand name equipment listed in the CBD notice, Kodak's Komstar IV, uses the newer dry or thermal technology. The CBD notice, however, did not list either type of technology as a salient characteristic of the equipment.

Two firms responded to the CBD notice, Kodak, which offered the Komstar IV, and Datagraphix, which offered its Datagraphix XL model which, like the Komstar IV, is available from a GSA schedule contract and uses dry technology.

The Army states that a review of the equipment to determine the technically acceptable system with the lowest overall cost was performed by the Army official responsible for reviewing all its COM purchases. In addition to Kodak's Komstar IV and the Datagraphix XL model, the reviewing official included in his analysis another Datagraphix model available on the GSA schedule, the model XC, which, unlike the other systems being considered, uses wet technology. The official ultimately determined that the Datagraphix XC model would meet the Army's needs at the lowest cost and an order for the equipment was placed on September 23.

Kodak challenges the Army's selection of the Datagraphix XC model, arguing that it is not equal to the Komstar IV as required by the CBD notice since it uses wet instead of dry technology. Kodak also contends that even if the wet technology used by the model XC is considered acceptable, its Komstar IV has a lower overall cost. We find these arguments to be without merit.

As a preliminary matter, the Army argues that the protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987), because it was not filed until September 25, more than 10 days after a meeting between representatives of Kodak and the Army on September 9, during which Kodak was told that equipment using either wet or dry technology was being considered. We disagree. We do not require protesters to file defensive protests in anticipation of improper action by the contracting agency. Custom Training Aids, Inc., B-224868, Feb. 6, 1987, 87-1 CPD ¶ 131. Here, Kodak was not required to file its protest until after the Army actually took adverse action against Kodak by selecting the Datagraphix XC on September 23. Since the protest was filed 2 days later, it is timely.

Kodak contends that the type of technology used to produce the microfiches is a significant operational feature of the COM equipment since the wet technology requires the use of chemical supplies and certain maintenance not required by the dry technology. In addition, Kodak states that since the Army activity which will be using the COM equipment

currently has in place an older model which uses dry technology, acquisition of new equipment using wet technology will limit the Army's use of the older equipment as a backup. Accordingly, in Kodak's view, in order for any non-brand name system to be considered equal to the Komstar IV, it must use dry technology. In essence, Kodak maintains that, although it is not listed as such in the CBD notice, dry technology is a salient characteristic of the equipment which the Army improperly waived by selecting the Datagraphix XC. We disagree.

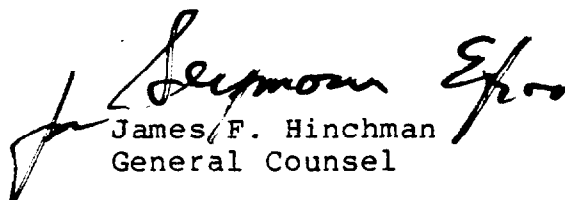
In our view, Kodak's interpretation is not supported by the CBD notice which, as noted above, did not specify either type of technology or in fact list any other salient characteristics of the COM equipment. Even where salient characteristics are listed, if they are written in general terms only, the non-brand name products must only be functionally equivalent to the brand name; they need not meet the salient characteristics in the exact manner the brand name does. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. Similarly here, the Army's decision not to list any salient characteristics in the CBD notice is more consistent with the Army's position that it sought equipment only functionally equivalent to the Komstar IV, than it is with Kodak's position that the dry technology it uses was a salient characteristic which other models had to match. In fact, since equipment using wet technology was found to meet the Army's needs, any effort by the Army to restrict the procurement to equipment using dry technology, consistent with Kodak's interpretation of the CBD notice, would be improper as exceeding the Army's needs and unduly restricting competition. As a result, we see no basis to object to the Army's determination that the Datagraphix XC was equal to the Komstar IV despite its use of wet instead of dry technology.

Kodak also argues that even if a wet technology system such as the Datagraphix XC is acceptable, its own Komstar IV system is lower in cost overall. The Army's cost analysis had three components, hardware, 5-year maintenance costs and supplies. During the course of the procurement, Kodak disputed various elements of the cost analysis and, as a result, the Army revised certain calculations in its analysis of the Komstar IV. Nevertheless, in the Army's final analysis prepared in connection with the protest, Kodak's cost (\$469,222) was still higher than either of the Datagraphix models (the XL, \$440,590; the XC, \$424,336). Kodak challenges this final cost analysis principally on one ground, arguing in its comments on the agency report that the Army improperly included a dual density tape drive in the list of Kodak hardware when all that it required was a less expensive single density drive.

As the parties recognize, the CBD notice omitted the tape drive from the list of equipment to be acquired. When the Army began its analysis of the available systems, however, the reviewing official determined that a dual density tape drive was necessary for off-line operation of the equipment and added the cost of the tape drive to the cost analyses. While Kodak does not dispute that a tape drive may be necessary to meet the Army's needs, Kodak argues that the using activity as opposed to the reviewing official required only a single density drive. Kodak states that substituting a single density drive would have reduced its overall cost by approximately \$45,000 and made its Komstar IV the lowest cost model. The change from dual to single density would have had no effect on the cost of the Datagraphix models according to Kodak, since Datagraphix does not offer a single density drive.

While Kodak objects to the inclusion of a dual density tape drive, it has submitted no explanation as to the basis for its disagreement with the Army's technical judgment that it needs a dual density drive for off-line operation. Further, the fact that the judgment was made by the official designated to make the award selection as opposed to the using activity personnel is irrelevant. As a result, Kodak has failed to show that the Army improperly included the cost of the dual density tape drive or that the cost analysis of the Komstar IV was erroneous.

The protest is denied.


James F. Hinchman
General Counsel