L. Glass 148325

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Storage Technology Corporation--
Reconsideration

File: B-250468.2

Date: December 18, 1992

David S. Cohen, Esq., and Donn Milton, Esq., Cohen & White, for the protester.
Paul Shnitzer, Esq., Crowell & Moring, for IBM Corporation, an interested party.
Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.
Linda Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where Commerce Business Daily (CBD) notice announcing agency's plans to make sole-source award contains footnote 22--giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements--a potential source must first timely respond to the CBD notice and receive a negative agency response before its protest of the agency's sole-source decision will be considered by the General Accounting Office.

DECISION

Storage Technology Corporation (StorageTek) requests reconsideration of our dismissal of its protest challenging the Department of the Air Force's proposed sole-source award of an automated bulk storage and file transfer system under request for proposals (RFP) No. F29601-92-R-0034. StorageTek contends that the automated tape library subsystem should be procured competitively.

We affirm our dismissal.

We dismissed StorageTek's protest against the proposed sole-source award because StorageTek failed to submit an expression of interest to the Air Force detailing, at least minimally, its ability to meet the agency's needs in response to a Commerce Business Daily (CBD) synopsis which

advised of the Air Force's intent to award the system on a sole-source basis to International Business Machines (IBM) and invited expressions of interest from firms within 45 days of the synopsis. We concluded that if StorageTek believed it could supply the automated tape library, a key subsystem, it was required to timely respond to the CBD notice. See Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490.

In our dismissal, we rejected StorageTek's contention that since it was negotiating with IBM to supply its automated tape library in support of IBM's proposal when the CBD notice appeared in May, it had no reason to believe that the intended sole-source award was for any system other than the one that included StorageTek's subsystem. StorageTek contended that at the time it believed it had the only product that would meet the Air Force's requirements. The firm stated that it protested once it realized competition from IBM existed for the tape library.

We disagreed that StorageTek had the right to delay notifying the agency that it was a potential source for one of the items because it was negotiating with IBM and believed it was the only source for the item. We pointed out that the Competition in Contracting Act of 1984 (CICA) publication procedures for sole-source acquisitions provides the agency an opportunity to reconsider its sole-source decision and that the agency, not StorageTek, must make the decision concerning the existence of competition. See 10 U.S.C. § 2304(c)(1),(f); Federal Acquisition Regulation § 6.302-1 (FAC 90-8). Here, the agency, due to StorageTek's inaction based on its apparent belief that it possessed the only tape library which would meet the agency's and IBM's needs, was deprived of an opportunity to timely evaluate its decision to procure the system as a total package on a sole-source basis. While StoragetTek made a business decision to negotiate with IBM, we concluded that the statutory scheme and our decisions required StorageTek to file a timely expression of interest with the Air Force, if it wished to subsequently protest the Air Force's sole-source decision.

On reconsideration, StorageTek contends that the Air Force knew that only its product could meet the agency's needs. StorageTek states that it had no reason to insist on a break-out of the acquisition since it had every expectation of receiving a contract, no matter how the overall procurement was divided. It now claims that it only knew competition existed on August 28, when it obtained the Air Force RFP and discovered that a requirement in the synopsis that Phase I be completed by September 30 had been deleted, giving IBM the time to deliver the total package, including the automated tape library subsystem.

Under our Bid Protest Regulations, to obtain reconsideration, a protester must either show that our prior decision contains errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1992). We find that StorageTek has not shown that our decision was erroneous.

Initially, StorageTek claims on reconsideration that it had no basis to protest until it obtained a copy of the Air Force RFP on August 28, which showed that delivery of the product was no longer required by September 30.[1] In objecting to the original motion to dismiss its protest as untimely, StorageTek did not make this argument. In fact, this statement appears to directly contradict the protester's original submission which stated that "only when IBM made known its accelerated product schedule in late August 1992, did StorageTek . . . realize that competition existed . . . ." StorageTek did not refer to the alleged relaxation of the RFP as the basis for its protest. In any event, failure to make all arguments or submit all information available during the course of the initial protest does not justify reconsideration of our prior decision. The Department of the Army--Request for Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

As we stated in our dismissal, the statutory scheme contemplates a timely expression of interest to a sole-source synopsis. StorageTek's failure to timely express interest deprived the Air Force of an opportunity to timely evaluate the propriety of continuing with its sole-source award. While StorageTek in its original protest provided an explanation for its failure to provide such an expression, this explanation does not excuse its failure.

It also is undisputed that StorageTek's decision not to submit an expression of interest was based on its determination that it was the only supplier of the item. As we noted in our original dismissal, IBM issued a proposal to evaluate a "make" or "buy" decision. Obviously IBM was considering furnishing its own product and, in fact, StorageTek acknowledged in its protest submissions that it was aware IBM was developing a competitive product. We think StorageTek should have been aware that IBM was not limiting itself to StorageTek's product and might furnish the item itself. StorageTek obviously made a business decision which subsequently proved erroneous. Again, StorageTek could have fully protected its interest by timely notifying the Air Force of its interest.

[1]The record shows that the RFP was issued on August 10.

Finally, StorageTek argues that our dismissal is ill-considered from a policy standpoint because it will encourage every prospective supplier in a sole-source integration acquisition to file a separate expression of interest and then to protest if the agency proceeds with the sole-source award. We think our position as expressed in Keco Indus., Inc., supra is sound. If a company with the requisite direct economic interest believes that a sole-source is improper because it also can furnish the item or items to be procured, the agency should be provided this information at the earliest possible time to permit timely corrective action. See Keco Indus., Inc., supra.

Robert M. Strong
Associate General Counsel