



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: SBC Federal Systems

File: B-283693; B-283693.2

Date: December 27, 1999

James J. Regan, Esq., John E. McCarthy, Jr., Esq., and Daniel R. Forman, Esq., Crowell & Moring, for the protester.
Judith Ward Mattox, Esq., for TennMark Telecommunications, Inc., an intervenor.
Phillipa L. Anderson, Esq., and Dennis Foley, Esq., Department of Veterans Affairs, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although contracting agency may have improperly performed a price/technical tradeoff between proposals in violation of the solicitation's evaluation scheme, the protester was not prejudiced by the improper tradeoff decision where the record shows that agency reasonably concluded that protester's proposal was technically unacceptable.

DECISION

SBC Federal Systems protests the issuance of a task order to TennMark Telecommunications, Inc. by the Department of Veterans Affairs (VA), made pursuant to a task order proposal request, No. VHA-014(VISN 18), issued to all Nortel Authorized General Services Administration (GSA) Schedule representatives listed on GSA Schedule No. GS-35F-1130D. The agency is purchasing replacement telephone systems for VA Medical Centers in Big Spring, Texas, and Prescott, Arizona. SBC argues that the agency improperly conducted a price/technical tradeoff between its and Tennmark's proposals in violation of the task order request's stated evaluation scheme.

We deny the protest.

As discussed in greater detail below, this protest turns ultimately on prejudice. The solicitation here did not anticipate an evaluation of the relative technical merits of the systems offered, as the VA is purchasing commercially-available Nortel telephone

systems from the GSA schedule. Nevertheless, the record shows that the contracting officer permitted the users of the system to perform a price/technical tradeoff. Thus, the protester contends that the VA violated the solicitation's stated evaluation scheme, and that award should have been made to SBC based on its lower-priced, technically acceptable proposal.

The agency responds that even if it did perform a price/technical tradeoff that considered relative technical merit, the protester was not prejudiced because its proposal was technically unacceptable and could not have been selected under this solicitation. Thus, the agency argues that any price/technical tradeoff performed is irrelevant to the outcome of this protest.

BACKGROUND

The task order request here was issued on May 27, 1999, and was distributed to contractors identified on GSA Schedule No. GS-35F-1130D as distributors of Nortel telephone systems. The solicitation advised that the VA was seeking complete digital and voice telephone systems for the two Medical Centers identified above, as well as a public address (PA) system for each Medical Center. The solicitation advised potential offerors that the agency would select the proposal which was most advantageous to the government; it also stated that the evaluation factors would be past performance and price, and that the two factors were approximately equal in weight. Solicitation at 69-70. The solicitation also identified five past performance subfactors that are not at issue in this protest. Although there was no technical evaluation factor, the solicitation advised offerors that

[t]echnical proposals must meet all mandatory requirements in the Scope and Statement of Work. Proposals that fail to meet all of the mandatory requirements will not be considered.

Solicitation at 70. Also, although the solicitation did not identify for offerors which requirements were "mandatory" (and which presumably were not), it did require that proposals specifically address each of the numbered paragraphs in the statement of work to permit the evaluation team to assess whether or not the requirement was met. Solicitation at 64.

By the due date for receipt of proposals, the VA received offers from SBC and TennMark. SBC offered a Nortel product known as Option 61C for \$[deleted]; TennMark offered a Nortel product known as Option 81C for \$3.5 million. Award Statement, undated, at 1. In two areas of SBC's proposal, the company took direct issue with requirements of the solicitation--i.e., the requirement for a warranty for voltage fluctuations and lightning, and the requirement for a 48- or 70-volt PA system. The VA's final evaluation, in essence, concluded that SBC's proposal was unacceptable with respect to its warranty, and with respect to its 24-volt PA system. For comparison, the final evaluation concluded that Tennmark's proposal was

technically acceptable in every area but one. In this area--information about the prior employment of one of Tennmark's proposed employees--the VA final evaluation stated, "It is recommended the response be considered as non-compliant and not acceptable." Memorandum from Contracting Officer's Technical Representative (COTR) to Contracting Officer (CO) 1 (Aug. 24, 1999).

On the same date of the COTR's evaluation memorandum, the CO directed an e-mail message to the users of the telephone systems at issue here. In relevant part, this message appears to invite the users of the system to make a tradeoff between the two competing proposals. The portions of the message that support this interpretation are set forth below:

[E]ach offeror proposed a different Nortel platform. Along with different platforms come different concerns and different costs. [The COTR] and I believe this will need to be a VISN¹ (in conjunction with the facilities) call. We provide the following to assist you in your determination. For simplicity, I have labeled the offerors "Vendor A" and "Vendor B." While there may be a quick determination based on the evaluated costs for these systems, I recommend you [look] at long range plans for each of these facilities and the amount of growth that may take place in the next 5 years.

Vendor A [TennMark] proposed a Nortel Option 81C. The system characteristics for this system [are] as follows:

Option 81C System Characteristics:
Maximum number of ports -- 10,000

* * * * *

Vendor B [SBC] proposed a Nortel Option 61C. The system characteristics for this system [are] as follows:

Option 61C System Characteristics:
Maximum number of ports -- 2,000

* * * * *

In the statement of work the VA has sized the Big Spring switch for a maximum of 969 ports. For Prescott, the switch is sized for a maximum of 1385 ports. Looking at this and going with the Option 61C, Big Spring will have the ability to grow approximately 1000 ports

¹ VISN is an acronym for Veterans Integrated Service Network.

and Prescott will have the ability to grow approximately 400 ports. When considering the costs between the two vendors, take into consideration how quickly the extra ports in the 61C will be taken thereby placing the facility in a situation of upgrading to a larger platform.

Agency Report (AR), Tab 21, E-mail Message from CO to Numerous Recipients, Aug. 24, 1999, 4:13 p.m. The message also contains language that repeats the COTR's findings that SBC's proposal is non-compliant in two areas, and TennMark's proposal is non-compliant in one. The record shows, however, that on the same day as the e-mail message, the CO overrode the COTR's conclusion that the TennMark proposal was unacceptable. AR, Tab 19, at 3.

In response to the CO's e-mail message, the users of the telephone systems conferred with each other further via e-mail, and ultimately selected the higher-priced TennMark proposal because of its capacity for future growth, characterized by its greater number of ports. Upon communication of their choice to the CO, she issued a task order to TennMark on September 7, and gave notice to SBC the same day. In response to SBC's request for a debriefing, the CO prepared a written debriefing letter, dated September 15, which both stated that SBC's proposal was "non-compliant" in the two areas discussed above, and also described a price/technical tradeoff decision based on the greater capacity of the 81C system. The letter concludes as follows:

The team determined that the cost[s] between the Options 61C and 81C were not that great considering the features and capabilities of the Option 81C were much greater. The fact that Vendor B [SBC] to the team was technically non-compliant in two areas of their technical proposal was a consideration also.

Letter from CO to SBC 4 (Sept. 15, 1999).

This protest followed.

DISCUSSION

SBC argues that the VA performed a price/technical tradeoff between SBC's and TennMark's proposals in violation of the evaluation scheme. In addition, SBC challenges any contention by the agency that its proposal was technically unacceptable. In this regard, SBC argues that the CO's August 24 e-mail message to the VISN users, quoted above, and the users' response, show both that the tradeoff occurred, and that the agency believed that either proposal could be accepted for award.

In response, the VA denies that it made a tradeoff between SBC's and TennMark's proposals, but argues that regardless of whether it did, or did not, SBC was not prejudiced by these actions, because its proposal was technically unacceptable and not eligible for award. Prejudice to the protester is critical to our decisionmaking, since our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

While we agree with the protester that the record here suggests that the selection decision may have been based on a price/technical tradeoff, in violation of the terms of the solicitation, we need not reach this issue. As set forth below, we conclude that even if a tradeoff was performed, SBC was not prejudiced because the VA reasonably concluded that SBC's proposal was technically unacceptable.

As a threshold matter, we recognize that the VA's position that SBC's proposal was technically unacceptable appears inconsistent with the CO's invitation to the VISN users to choose, in her words, Vendor A or Vendor B. This apparent inconsistency leads SBC to base its arguments on technical acceptability on the premise that once the CO permitted the users to choose between the two proposals, any prior conclusion that SBC's proposal was unacceptable is overridden by the evidence that the users (and in SBC's view, the CO) are proceeding as if SBC's proposal is acceptable. Our Office convened a hearing to ask the CO to address this inconsistency.

At the hearing, the CO testified that the purpose of her August 24 message was only to inquire about whether the VISN users had sufficient funds for the award to TennMark, although she admitted that the message contains "a poor choice of words." Video Transcript (VT) at 10:38:29, 11:51:15. In addition, the CO explained that she viewed SBC's proposal as technically unacceptable, even though she acceded to the demands of the users to provide them with information about the two proposals so that they might reach their own conclusions. VT at 10:40:30, 10:45:54, 11:54:25, 11:58:40. Consistent with her testimony that she viewed SBC's proposal as unacceptable, she explained at the hearing that if the VISN users had responded to her e-mail message by asking her to award the contract to SBC, she would have had to reopen the competition, advise the offerors that solicitation requirements were being relaxed, and allow submission of revised proposals to address the changed requirements. VT at 10:52:41, 11:57:35. While the CO's invitation to the users to choose between a technically acceptable proposal and a technically unacceptable proposal was inappropriate, her testimony regarding her view of the SBC proposal was credible, and leads our Office to find that the CO has consistently viewed SBC's proposal as unacceptable.

With respect to the two areas where the CO concluded that SBC was technically unacceptable, there is no dispute in the record that SBC did not comply with the solicitation's requirement for a warranty for voltage fluctuations and lightning, and its requirement for a 48- or 70-volt PA system. We have reviewed the record in each of these areas, and we think the agency's conclusions were reasonable under the terms of this solicitation.

For example, when SBC proposed to meet the requirement for a 48- or 70-volt PA system with a 24-volt system, the VA expressly advised SBC that a 24-volt system was not acceptable. Letter from CO to SBC 3 (Aug. 12, 1999). In its response to the VA's discussion questions, SBC continued to argue that the VA should accept its 24-volt system, and pointed out that the higher-powered systems sought by the VA would cost "approximately 2.5 times the price" of SBC's system. Letter from SBC to CO attach. at 10 (Aug. 20, 1999). In our view, SBC's own words show that the agency could not have accepted SBC's lower-powered (and lower-priced) PA system without amending the solicitation to relax the specifications so that TennMark could offer a similarly lower-powered (and lower-priced) PA system.² See Container Prods. Corp., B-255883, Apr. 13, 1994, 94-1 CPD ¶ 255 at 5 (protest sustained where agency treated offerors unequally by waiving a solicitation requirement for the awardee without relaxing the requirement for other offerors).

Since the proposal did not offer the required configuration for the PA system, since the VA considered this a material requirement of the solicitation--and told SBC the same during discussions, and since SBC acknowledges a significant price differential between its system and the system required by the solicitation, we think the CO reasonably concluded that SBC's proposal was technically unacceptable. Therefore, SBC was not prejudiced, even if there was an improper price/technical tradeoff.

The protest is denied.

Comptroller General
of the United States

² Since we find that the agency reasonably concluded that SBC's PA system rendered its proposal technically unacceptable, we need not address in detail SBC's failure to provide the required warranty for voltage fluctuations and lightning. For the record, however, we find that this non-compliance also provided a reasonable basis for concluding that the SBC proposal was technically unacceptable.