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Roger Ryan
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DECISION



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

FILE: B-190035

DATE: October 3, 1977

MATTER OF: Storage Technology Corporation

DIRECT:

Where solicitation requires that contractor furnish written statement regarding frequency, duration, and quality of preventive maintenance, bidder's failure to provide statement with bid does not render bid nonresponsive, since standard of maintenance to be provided is otherwise established in solicitation and requirement is properly applied only after contract is awarded.

Storage Technology Corporation (STC) protests the award of a contract to Telex Computer Products, Incorporated (Telex) for four 6250 tape drives, one controller, and maintenance (on-call and preventive) for both the tape drives and the controller under invitation for bids (IFB) No. 2016 issued by the United States Department of Justice, Federal Bureau of Investigation (FBI). At bid opening two bids were submitted. It is STC's contention that the low bid of Telex is nonresponsive and that it should be rejected because it failed to specify the frequency, duration, and quality of the preventive maintenance which Telex would provide were it awarded the contract.

The solicitation required each bidder to bid both the equipment (Items 0001 and 0002) and the maintenance (Item 0003) and warned that failure to bid one of the items would render the bid nonresponsive and subject to rejection. Both STC and Telex bid all three items as required. Item 0003 was structured so as to provide maintenance for the equipment in five optional increments each of 12 months duration. Succeeding increments after the first were renewable at the sole option of the Government. The schedule read as follows:

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"0003 Maintenance for Items 0001 and 0002 optional periods;	QUANTITY	UNIT	UNIT PRICE	AMOUNT
(1) First year	12	mo	_____	_____
(2) Second year	12	mo	_____	_____
(3) Third year	12	mo	_____	_____
(4) Fourth year	12	mo	_____	_____
(5) Fifth year	12	mo	_____	_____

Item C of the schedule furnished specifications for the two types of maintenance (on-call and preventive) called for under Item 0003. The protest centers about the meaning to be ascribed to the following segment of Item C.

"Preventive Maintenance

The Contractor shall specify in writing the frequency, duration and quality of preventive maintenance. The quality shall be comparable to that provided by the Contractor for identical leased equipment."

As submitted, the Telex bid did not specify the frequency, the duration or the quality of preventive maintenance. The STC bid, however, had the following typed in immediately below the above quoted passage:

"The frequency of preventive maintenance is once a month per unit, the duration of maintenance is at least three (3) hours per unit per month. The quality of preventive maintenance is comparable to that provided on identical leased equipment."

It is STC's position that the absence of a similar statement in the Telex bid renders it nonresponsive. STC argues that although the use of the term "contractor" ordinarily would impose only a post-award requirement, since the preventive maintenance constitutes so important an aspect of the Government's requirements under the solicitation that failure to establish the frequency, duration and quality of that work prior to award would prevent a valid contract from coming into existence. STC further notes that without such a statement a contractor would be at liberty to alter the quantity and quality of work which he would be obligated to perform under the contract.

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Preventive maintenance is intended to reduce to the extent practicable the time the machines cannot function properly. We are, therefore, in agreement with STC's contention that preventive maintenance constitutes a material requirement of the solicitation. However, the preventive maintenance requirements of equipment vary from one manufacturer to another and for this reason the Government did not dictate in the solicitation the extent of preventive maintenance to be provided.

We find, however, that the solicitation provides a standard against which the contractor's preventive maintenance obligation is to be measured. First, the solicitation requires that the quality of preventive maintenance be such as is "comparable to that provided by the contractor for identical leased equipment." Second, the solicitation contains a "Liquidated Damages or Temporary Replacement" clause which reads as follows:

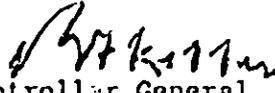
"If during the specified systems life (sixty months), a machine purchased and maintained under this contract is inoperative due to machine failure and the total number of inoperative hours exceeds 20 hours during each of three (3) consecutive calendar months, the Contractor shall pay to the Government as fixed and agreed liquidated damages equal to the Total Monthly Maintenance Charge for each month where the level of performance or 700 hours is not achieved retroactive to the first calendar month. Liquidated damages shall cease effective with the first month wherein the effectiveness level, 700 hours, is again achieved. If the Contractor furnishes a functionally equivalent machine in good operation while the defective machine is being repaired, liquidated damages shall not apply."

A preventive maintenance program which fails, for whatever reason, be it frequency, duration or quality, to limit equipment downtime to 20 hours or less during three consecutive calendar months will subject the contractor to liquidated damages or the requirement that it provide substitute equipment. Therefore, we find the solicitation's provision for contractor submission of a preventive maintenance (frequency, duration and quality) statement

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was not needed to establish any material condition of the contract and should be interpreted in accordance with its plain language to impose a post-award requirement.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States