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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Integration Technologies Group, Inc.

File: B-291657

Date: February 13, 2003

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Lee P. Curtis, Esq., and Suzette W. Derrevere, Esq., Perkins Coie, for Communications Technologies, Inc., an intervenor.

L. Benjamin Young, Jr., Esq., Department of Agriculture, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that small business concern awardee, under solicitation for nationwide computer and printer maintenance, misrepresented status of a large business firm as a member of its team is sustained where discussions between the awardee and its proposed large business subcontractor had consisted of essentially nothing more than the large firm's transmittal of a proposal to perform nearly all of the work, which the awardee recognized was unacceptable under the solicitation limitation on subcontracting; and the misrepresentation regarding the large firm's participation had a significant impact on the evaluation.

DECISION

Integration Technologies Group, Inc. (ITG) protests the Department of Agriculture's award of a contract to Communications Technologies, Inc. (COMTek), under request for proposals (RFP) No. FSA-R-003-02DC, for maintenance of computers and printers. ITG asserts that the favorable evaluation of COMTek's proposal was not a proper basis for award, because it was based in part on a misrepresentation.

We sustain the protest.

The RFP provided for award of a fixed-price, indefinite-delivery/indefinite-quantity contract to a small business concern for a base year, with 4 option years, for remedial and preventive maintenance of an estimated 2,557 Farm Service Agency (FSA) IBM AS/400 Model 170 computers, 3,130 IBM Model 4317 laser printers, and a small quantity of other laser printers (6 IBM Model 4028 and 12 IBM Model 5262).

The computers and printers are located at approximately 2,370 county Field Service Centers, 50 state FSA offices, 10 Caribbean offices, and headquarters offices in Washington, D.C., Kansas City, Missouri, and St. Louis, Missouri. The RFP established required response times for any necessary remedial maintenance, with the contractor required to return the computer or printer to operation within 4 to 18 business hours--depending on the location of the equipment--of the government's reporting the problem to the contractor. RFP §§ 10.2.1, 16.

Award was to be made to an offeror with at least 3 years experience in maintaining AS/400 computers and laser printers whose conforming proposal was most advantageous to the government based on three evaluation factors--technical capability, past performance and price. Technical capability and past performance together had a weight of 50 percent, and price had a weight of 50 percent.

The agency received [DELETED] proposals. Based on the technical/past performance evaluation, the Technical Evaluation Team (TET) recommended that [DELETED] offerors, [DELETED] of which proposed teaming or partnering with IBM (the current maintenance service provider) be considered for award. COMTek's proposal was ranked [DELETED] in the technical/past performance evaluation, with a technical/past performance score of [DELETED] points, an overall rating of [DELETED] and a [DELETED] risk assessment; its price (\$[DELETED]) was significantly lower than that of any of the other [DELETED] highest-ranked offerors. ITG's proposal was ranked [DELETED] in the technical/past performance evaluation, with a technical/past performance score of [DELETED] points, an overall rating of [DELETED] and a [DELETED] risk assessment; its price (\$[DELETED]) was the [DELETED] lowest among the top [DELETED] ranked firms. The agency determined that the combination of COMTek's technical score and low price made its proposal the most advantageous. Upon learning of the resulting, October 10 award to COMTek, and after being debriefed, ITG filed this protest with our Office.

ITG asserts that COMTek's statement in its proposal that IBM was a team member was a misrepresentation. According to the protester, IBM was neither a member of COMTek's team, nor likely to become a member, at the time COMTek submitted its proposal. Indeed, notes the protester, COMTek has still not reached an agreement with IBM on becoming a team member. ITG concludes that, because the evaluation was based in significant part on this misrepresentation, it was flawed and did not provide a reasonable basis for making award to COMTek.

An offeror's material misrepresentation in its proposal can provide a basis for disqualification of the proposal and cancellation of a contract award based upon the proposal. A misrepresentation is material where the agency relied upon it and it

likely had a significant impact upon the evaluation. Sprint Communications Co. LP; Global Crossing Telecomms., Inc.--Protests and Recon., B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4; AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 11. We find that COMTek made a material misrepresentation concerning IBM's status as a member of COMTek's team.

IBM submitted identical proposals to both ITG and COMTek. Specifically, the record indicates that, by cover letters of August 28, 2002, IBM submitted proposals to ITG and COMTek "for maintenance services in support of the United States Department of Agriculture's Farm Services Agency, and for your use as a Federal Systems Integrator (FSI)." The cover letters included "a technical response, price table, and contract terms and conditions that apply to this opportunity," with the price table including monthly maintenance prices for all computers and laser printers under the RFP other than the 6 IBM 4028 laser printers. The proposals cautioned, however, that "[t]he attached pricing is valid only upon acceptance of this proposal in its entirety. Changes in the inventory being maintained will require repricing." IBM Proposals to ITG and COMTek, Cover Letter.

ITG [DELETED]. IBM Proposal to ITG, Aug. 28, 2002; IBM E-mail to ITG, Sept. 3, 2002.

COMTek proceeded differently. It is undisputed that accepting IBM's proposal and using IBM to perform maintenance for all computers and laser printers (other than the few IBM 4028 laser printers) would place COMTek in violation of the limitation in the Federal Acquisition Regulation (FAR) on subcontracting where a solicitation is set aside for small business and the contract amount is expected to exceed \$100,000. In this regard, under FAR § 52.219-14(b)(1), which was included in the solicitation, in the case of a contract for services, "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."¹

¹ In a footnote in its final submission to our Office, COMTek suggested that ITG might not comply with the FAR subcontracting limitation. COMTek Comments, Jan. 6, 2003, at 12 n.1. (The agency has not made this argument.) COMTek suggests that IBM's proposed division of effort in its revised proposal to ITG is inconsistent with the subcontracting limitation, but offers no analysis beyond generally referring to the fact that IBM's price [DELETED] may total as much as \$[DELETED], or approximately [DELETED] percent of ITG's contract price (\$[DELETED]). We note, however, that IBM's pricing included the cost of parts, which is not included in the subcontracting limitation calculation under FAR § 52.219-14(b)(1). Thus, IBM's [DELETED] subcontract pricing does not establish noncompliance with the subcontract limitation.

However, notwithstanding that (as explained below) COMTek recognized that IBM's proposal was unacceptable, COMTek did not discuss with IBM, prior to closing time on September 4, reducing IBM's proposed share of the work (or any resulting repricing of the effort in the event that the amount of subcontracted work were reduced). Nevertheless, COMTek stated in its proposal, dated September 4, 2002, that:

We . . . have IBM, our mentor under the [Department of Defense] Mentor-Protégé program as a Teaming partner on this proposal in order to provide optimum service regarding this contract. Throughout this proposal, the use of the phrase the 'COMTek Team' refers to the combined professional assets of COMTek and IBM.

COMTek Technical Proposal at 1. According to COMTek's proposal:

Our Teaming partner is the current maintenance contract holder and [original equipment manufacturer] for the AS/400 equipment. You can rely on the largest network of Systems Services Representatives (SSRs) in the industry. This extensive network supports every county in every state as well as Puerto Rico and the Virgin Islands.

. . . .

Our Team's Global Services employs over [DELETED] SSRs geographically dispersed throughout the United States, Puerto Rico, and the Virgin Islands to support FSA's approximately 2,370 Field Service Centers.

. . . .

COMTek Team Service Representatives have access to a \$[DELETED] nationwide parts inventory stocked in over [DELETED] locations.

Id. at 2-3.

The record indicates that the contract resources COMTek cited in its proposal were in large measure IBM's. For example, COMTek's proposal statements that the agency could rely on "the largest network of Systems Services Representatives (SSRs) in the industry," "employ[ing] over [DELETED] SSRs geographically dispersed throughout the United States, Puerto Rico, and the Virgin Islands," and that the "COMTek Team Service Representatives have access to a \$[DELETED] nationwide parts inventory stocked in over [DELETED] locations," referred to IBM's resources. (COMtek itself had only approximately [DELETED] service representatives at the time it submitted its proposal. Hearing Transcript (Tr.) at 87-88.) These representations would be accurate only if IBM were part of

COMTek's team. As discussed below, however, IBM was never a part of COMTek's team.

The record indicates that COMTek understood that IBM's proposal was unacceptable. Testimony at the hearing that our Office conducted in connection with this protest indicated that COMTek was aware that the IBM proposal was inconsistent with the FAR limitation on subcontracting. COMTek indicates that, in fact, it intended, consistent with the limitation on subcontracting, to subcontract with IBM for a significantly smaller share of the work than the near 100 percent on which IBM's proposal was based. (This was COMTek's intent even in the first year of the contract, when COMTek intended to rely more heavily on IBM.) Tr. at 56, 61-64. Again, however, despite its awareness that IBM had not proposed performing a permissible share of the contract work, COMTek did not discuss with IBM, prior to closing time on September 4, reducing IBM's proposed share of the work (or any resulting repricing of the effort in the event that the amount of subcontracted work were reduced.) Tr. at 57-58, 61, 104; Statement of COMTek Director, Dec. 13, 2002. Indeed, the record includes no evidence that COMTek engaged in any substantive discussions with IBM concerning the scope of any IBM contribution to contract performance from the time IBM provided its proposal to COMTek until after award. In short, while COMTek's proposal stated that IBM was a team member, COMTek had no agreement with IBM and not even a meeting of the minds as to one of the most significant features of an agreement--the amount of work IBM would perform. Under these circumstances, we believe it was a misrepresentation for COMTek to state that IBM was a member of its team, and to include IBM's resources in its proposal, without at least indicating the status of its negotiations with IBM. Failing to do so misled the agency into assuming that IBM would be performing contract work, when there was a substantial undisclosed obstacle to an agreement for it to do that.

COMTek maintains that its proposal should not be considered misleading because it reasonably expected that it could reach agreement with IBM after award on a division of the work that was consistent with the FAR limitation on subcontracting clause. COMTek notes in this regard that it had a pre-existing relationship with IBM under the Department of Defense's mentor-protégé program--IBM was COMTek's mentor--and through a 2001 master subcontract agreement. COMTek concludes that, given this relationship, the fact that IBM could not continue to perform the contract as the prime contractor (since the procurement had been set aside for small business concerns), and the regulatory restriction on subcontracting, which IBM, as an experienced government contractor, presumably understood, it was reasonable for COMTek to assume that it could come to an acceptable agreement with IBM.

However, while COMTek may have hoped that it could negotiate an acceptable agreement with IBM after award, the fact remains that its proposal reflected something much different. Given the status of COMTek's and IBM's dealings at the time of proposal submission, it was, in our view, materially misleading for COMTek

to state in its proposal that “[w]e . . . have IBM . . . as a Teaming partner on this proposal in order to provide optimum service regarding this contract.”²

COMTek’s misrepresentation that IBM was on its team played a significant role in its proposal. As noted above, the record indicates that the contract resources COMTek cited in its proposal were in large measure IBM’s. Indeed, as COMTek’s witnesses testified, “IBM membership on our team was felt to be critical . . . to the award of the contract”; IBM, the incumbent contractor for 19 years, was considered to be “the only choice.” Tr. at 12, 130.

It appears that COMTek’s inclusion of IBM in its proposed team in fact had a significant impact on the evaluation. In this regard, the agency’s Technical Evaluation Team (TET) explained its recommendation [DELETED] for award consideration as follows:

[DELETED].

TET Report at 11. Likewise, the agency’s negotiation memorandum explained the selection of COMTek for award, in part, on the basis that COMTek “is proposing to partner with IBM, the original Equipment Manufacturer and current service provider.” Negotiation Memorandum at 4. Since the record indicates that the agency relied upon COMTek’s misrepresentation concerning IBM’s status as a member of COMTek’s team, and that the misrepresentation had an apparently significant impact on the evaluation, we sustain ITG’s protest on this ground.

² Agriculture asserts that our view in this regard is inconsistent with the holding in our decision Airwork Ltd.-Vinnell Corp. (A Joint Venture), B-285247, B-285247.2, Aug. 8, 2000, 2000 CPD ¶ 150 at 5, where we denied a protest that the awardee had proposed specific individuals as key personnel that it did not, and could not reasonably, expect to use. We disagree. We concluded in Airwork that the fact that the awardee had not discussed employment details (including salary, benefits and positions) with the individuals before proposing them did not warrant a finding of misrepresentation on the awardee’s part. Id.; see Potomac Research Int’l, Inc., B-270697, B-270697.2, Apr. 9, 1996, 96-1 CPD ¶ 183 at 5; cf. Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 7 (an agreement to work for an offeror if it prevails in the competition—assuming successful salary and benefit negotiations—is no more than a promise to negotiate for employment, and not a binding commitment). We see no inconsistency in our holdings, since the operative facts are materially different. In Airwork, unlike the circumstances here with respect to IBM’s offer to COMTek, there was no indication that the proposed employees had conditioned their offer to work on the contract on the acceptance of unacceptable terms.

We recommend that the agency open negotiations with offerors in the competitive range so that it can fully consider in the evaluation the extent to which any proposed subcontractors or team members will be available to support contract performance, request revised proposals, and make a new determination as to which proposal is most advantageous to the government. In the event that a proposal other than COMTek's is found to be most advantageous, the agency should terminate COMTek's contract and make award on the basis of that proposal. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2002). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after the receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel