

Anti-Corruption Workshop: FCPA and Anti-Corruption Enforcement Hot Topics and Compliance Best Practices

Compliance and Ethics Institute

Society of Corporate Compliance and Ethics, Las Vegas, NV, October 21, 2018

The Korean Bid

InfoTech, Inc.- Superior Vigilance Joint Venture

InfoTech, Inc., a U.S.-based multinational company registered on the U.S. stock exchange, formed a joint venture (“JV”) with a Korean company named Superior Vigilance to bid on a contract with Korea’s Ministry of Interior (“MOI”) to supply certain high-tech surveillance equipment and associated technical support services for use by the National Police.

Infotech is the majority partner in the JV and has management control. Before partnering with Superior Vigilance, Infotech ran them through its third party due diligence, and asked them to make anticorruption compliance representations.

The Bid Team

Superior Vigilance has experience with a similar technology and has represented that it can help navigate the procurement process. The InfoTech bid team understands that Superior Vigilance is working informally with an individual named Wahn Cho on the bid effort.

Cho, a former member of the National Police who retired several years ago, has a small tech company in Seoul and is a potential subcontractor for the program. Some members of the InfoTech bid team have heard of Cho’s company.

Cho has not been put through InfoTech’s third party due diligence process nor has InfoTech required Superior Vigilance to conduct due diligence.

The InfoTech bid team is not aware of whether Cho is being paid for his help during the bid process, or whether any promises of future compensation have been made.

Part One: The Bid Process (Anti-Bribery)

During the bid process, Superior Vigilance obtains information regarding the customer’s needs and the qualifications of competitors. InfoTech makes changes to the bid as a result.

Some of the information has redundant information published as part of the RFP and other MOI official communications. Some is not. In email correspondence, Superior Vigilance refers to all the information, without distinction, as “highly confidential.”

The InfoTech bid team is not clear as to how the information is being obtained, but understands that some of it has come through Cho.

After winning, InfoTech learns that Superior Vigilance had promised Cho a success fee and a subcontract. This agreement was not in writing because Superior Vigilance has a “longstanding business relationship” with Cho.

Superior Vigilance also reports that Cho incurred 25K USD in travel and hospitality-related expenses in connection with the bid. Superior Vigilance has reimbursed Cho for these costs and asks if Infotech will now cover half of them. Superior Vigilance also wants to pay Cho his success fee and to engage him as a subcontractor.

The InfoTech bid team lead calls Cho. Cho assures the team lead that Cho is aware of U.S. anticorruption rules, and there is nothing to worry about, but that he cannot share details about his work over the phone. Cho says he cannot provide the names of anyone at the MOI from whom he obtained information helpful for the bid. However, Cho explains that they can meet in person in Seoul and he will be happy to talk in more detail.

Part Two: Reimbursing and Subcontracting to Cho (Books and Records/Internal Controls)

Expense Reimbursement

InfoTech does not want to turn down the contract, but the bid team leader wants to understand Cho’s role better. He decides to meet with Cho.

Cho produces some receipts to support his travel and hospitality expenses. Some of the travel expenses appear to be only his own transportation and lodging expenses for traveling to contract-relevant sites. Other receipts are for restaurants and karaoke bars, but do not list who attended or how many guests Cho hosted on these occasions.

Cho’s expenses – and InfoTech’s half thereof – are insignificant in comparison to the contract. The bid effort cost 200K USD. The contract is worth 25M USD.

The InfoTech bid team leader decides, given the small amount of money involved, to reimburse Superior Vigilance to maintain good relations with them. Also, he can’t believe any officials would be influenced by merely hospitality and entertainment to award such a large contract.

Under InfoTech’s policies, the bid team’s supervisor or Legal has to approve payment of any expenses for entertainment of a government official. The Infotech bid team leader prepares a request for payment that describes 12.5K USD as the full amount expended by Cho, because that is the only portion being paid by InfoTech, and because he thinks his supervisors might ask questions about Cho having spent double that amount.

The bid team leader then attaches receipts from Cho for the most palatable expenses to that request for payment. As much as possible, he includes only the receipts for Cho’s own travel and meal expenses, but since this does not cover the full 12.5K USD he also has to include some

receipts for hospitality that Cho says was provided to MOI officials.

On some receipts it is not clear who was at the meal, karaoke bar, or hotel. The Infotech bid team leader fills in gaps in Cho's invoices with names of MOI officials and a generic description of the purpose of each expense.

The Infotech bid team leader succeeds in getting the expenses reimbursed to Superior Vigilance.

Subcontracting to Cho

The InfoTech bid team leader also decides it would be a good idea to have Cho work on the program, so he initiates InfoTech's third party due diligence process.

The due diligence form asks for information about prior work performed by the third party for InfoTech. The bid team leader decides not to describe in the due diligence form what he knows about Cho's efforts to obtain information from the customer during the bid. He feels this information is not called for because this assistance was informal and unpaid.

Cho is hired as a subcontractor, at the compensation structure to which he had agreed orally with Superior Vigilance. He also receives a success fee. InfoTech does not bid out these services, and accepts that the compensation is reasonable based on its partner's representations.

Discovery of New Information (Anti-Bribery, Books and Records, Internal Controls)

InfoTech subsequently learns that that after Cho began receiving his subcontractor payments, he made payments to MOI officials based on a prior agreement with them to share percentage of his fees if InfoTech/Superior Vigilance won the bid.

Cho is still owed payment for services performed under his subcontract.