



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Epoch Engineering, Inc.

File: B-276634

Date: July 7, 1997

Michael W. Kauffman, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, P.A., for the protester.

Devon E. Hewitt, Esq., and Matthew A. Anzaldi, Esq., Shaw, Pittman, Potts & Trowbridge, for Applied Measurement Systems, Inc., an intervenor.

Chris Hagberg, Esq., and Stephen H. S. Tryon, Esq., Department of the Navy, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The contracting agency reasonably determined that the awardee's conflict of interest mitigation plan adequately avoided or mitigated potential conflicts that might arise if one of the awardee's proposed subcontractors were tasked to do work under particular delivery orders to be issued under an indefinite delivery/indefinite quantity contract for engineering and technical support services where: (1) the awardee's proposed conflict mitigation plan included a number of safeguards designed to detect potential conflicts and to assign work under those task orders to the prime and/or another subcontractor; and (2) the awardee has proposed more than enough qualified professional personnel who are not employed by the subcontractor with potential conflicts so that the awardee can successfully avoid conflicts and still perform the full scope of work contemplated by the solicitation.

DECISION

Epoch Engineering, Inc. protests the Naval Surface Warfare Center's award of an indefinite delivery/indefinite quantity, cost-plus-fixed-fee contract for engineering and technical support services to Applied Measurement Systems, Inc. (AMSI) pursuant to request for proposals (RFP) No. N00167-95-R-0128. Epoch contends that AMSI is ineligible for award under the express provisions of the RFP because one of AMSI's proposed subcontractors has an unavoidable organizational conflict

of interest. Epoch also contends that the Navy unreasonably failed to consider the effect of AMSI's proposed organizational conflict of interest mitigation plan in its technical/management evaluation of AMSI's proposal.¹

We deny the protest.

Issued on January 24, 1996, the RFP solicited offers to provide engineering and technical support services for submarine and surface ship acoustical trials for a period of 5 years. The RFP called for the contractor to perform various tasks in response to individual delivery orders issued by the Navy over the course of the contract. The RFP's statement of work (SOW) listed 11 different categories in which work would be performed as follows: (1) submarine and surface ship noise source localization and analysis; (2) submarine silencing effectiveness; (3) transient noise studies; (4) own ship radiated noise monitoring; (5) data analysis and studies in support of the Submarine Maintenance Monitoring Support Office and the Shore Intermediate Maintenance Activity; (6) submarine silencing development and design studies; (7) submarine detection and detectability studies; (8) acoustic measurement and data acquisition system development; (9) database management system development and maintenance; (10) low frequency submarine target strength studies and analysis; and (11) acoustic trial direction support.

The RFP indicated that the contract would be awarded to the offeror whose offer was determined to be most advantageous to the government after evaluation of technical/management factors and cost. The RFP stated that the technical/management factors were more important than cost. The technical/management factors were listed, in descending order of importance, as follows: personnel; corporate experience; technical understanding; management plan; and facilities.

The RFP included an organizational conflict of interest clause which stated, in pertinent part:

"This clause provides examples of certain organizational conflicts of interest which are prescribed by Federal Acquisition Regulation Subpart 9.5. The two underlying principles which this clause seeks to avoid are preventing the existence of conflicting roles that might bias a contractor's judgement and preventing unfair competitive advantage. The following subsections prescribe certain limitations on contracting

¹Epoch also alleged in its initial protest letter that the Navy deviated from the RFP's stated evaluation criteria in evaluating the technical/management merit of AMSI's proposal. However, Epoch provided no evidence nor any detailed statement of facts to support this allegation and, therefore, the unsupported allegation is not an adequate protest basis. Bid Protest Regulations 4 C.F.R. §§ 21.1(c)(4), 21.5(f) (1997); Science Applications Int'l Corp., B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest.

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(d) The Contracting Officer has determined that, in performance of this contract, the contractor will be required to provide technical evaluation of various contractor's offers and products. Contracts involving (a) technical evaluations of contractor's offers or products or (b) consulting services shall not be awarded to a contractor that would advise the Government concerning its own products or activities or those of a competitor without proper safeguards. Therefore, Contractors or Subcontractors that have detail design and/or construction contracts with the Government which are directly involved with producing current nuclear attack submarines, surface combatants and/or advanced naval vehicles which may be subject to technical evaluation under this contract, shall not be eligible for award of this contract, as such contractors have an unavoidable conflict of interest."

The Navy clarified its position regarding organizational conflicts of interest by issuing amendment 0001 to the RFP which stated:

"This amendment is being issued in response to an offeror's question concerning the Organizational Conflict of Interest Clause (OCI). The Government does not intend to delete the OCI Clause from the subject solicitation. Those offerors who feel performance of work under the contract may cause a conflict of interest, of the kind contemplated by the clause, should address the issue in their proposal and should include their plan to mitigate the conflict of interest. The Government will then evaluate the mitigation plan and may grant a waiver to the clause if the mitigation plan is determined to be acceptable."

In addition, in response to offerors' further questions concerning the conflict of interest provisions, the Navy issued amendment 0002 to the RFP which stated in pertinent part:

"Question: What criteria will be used to evaluate the acceptability of [organizational conflict of interest] mitigation plans? Answer: The Government will evaluate an offeror's plan to mitigate a potential organizational conflict of interest on the basis of the following criteria: Does the proposed plan mitigate the potential conflict of interest such that the full scope of work contemplated by this solicitation can be performed by the offeror?"

Only AMSI and Epoch submitted proposals. After initial proposals were evaluated, discussions were held with both offerors. Both offerors submitted best and final offers (BAFO) by the February 28, 1997, closing date. Evaluation of BAFOs resulted in AMSI's BAFO receiving a total score of [deleted] technical/management points (approximately [deleted] percent of the total points available) and Epoch's BAFO receiving a total score of [deleted] technical/management points (approximately [deleted] percent of the total points available). AMSI's total proposed BAFO price was [deleted], and Epoch's total proposed BAFO price was [deleted]. The contracting officer determined that AMSI's BAFO represented the best value to the government, because [deleted] AMSI's total proposed price represented a savings of roughly [deleted]. Therefore, the Navy awarded the contract to AMSI on March 24. After a debriefing conference, Epoch filed this protest in our Office.

Epoch contends that AMSI is ineligible for award because one of AMSI's proposed subcontractors, [deleted], has an unavoidable conflict of interest because it is a shipbuilder.² Epoch believes that [deleted] might be called upon, in its capacity as a subcontractor to AMSI, to evaluate nuclear attack submarines, surface combatants, or advanced naval vehicles that it, or one of its competitors, has built for the Navy in the past or will build for the Navy over the 5-year period of AMSI's engineering and technical support services contract. Epoch argues that because nearly all of the RFP's requirements are linked to the quality of construction or design of nuclear attack submarines, surface combatants, or advanced naval vehicles, [deleted] objectivity may be impaired when providing engineering and technical support services relating to locating the source of, analyzing, and reporting on noise detected during acoustic trials.³ Thus, Epoch argues that the Navy's finding that

²[deleted].

³In its initial protest letter (filed on March 31, 1997), Epoch argued exclusively that [deleted] had an unavoidable conflict of interest because it might be required to review its own products or those of its competitors, creating the potential for "impaired objectivity" on [deleted] part. "Impaired objectivity" is but one of three broad categories of conflicts. See Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13, for a discussion of the following three conflict types: Type 1: "unequal access to information" cases; Type 2: "biased ground rules" cases; and Type 3: "impaired objectivity" cases. In its comments on the agency's report (filed on May 12), Epoch alleged for the first time, in very general terms, that [deleted] might also gain an unfair competitive advantage from working on the present contract. We allowed each party to file an additional statement after comments were received. In its additional statement (filed on May 27), Epoch explained that [deleted] might gain an unfair competitive advantage in future competitions because, in performing the various tasks, [deleted] would gain access to information not available to its

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AMSI's organizational conflict of interest mitigation plan was acceptable lacked a rational basis. Epoch also contends that the Navy should have considered AMSI's proposed conflict mitigation plan and downgraded AMSI's proposal on the personnel and corporate experience factors because the mitigation plan prevents AMSI from using [deleted] for work on delivery orders for which [deleted] has a conflict.

A contracting officer is required to avoid, neutralize, or mitigate a significant potential organizational conflict of interest on the part of a prospective contractor before award. Federal Acquisition Regulation (FAR) §§ 9.504(a)(2), 9.505; D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419 at 4-5. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR § 9-505; SC&A, Inc., B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197 at 9. The responsibility for determining whether an actual or apparent conflict of interest will arise if a particular firm is awarded a contract, and to what extent the firm should be excluded from the competition, rests with the contracting agency; we will not overturn the agency's judgment in this regard unless it is shown to be unreasonable. D.K. Shifflet & Assocs., Ltd., supra, at 5; SC&A, Inc., supra, at 9.

AMSI proposed a contracting team consisting of itself and two subcontractors, [deleted].⁴ AMSI's proposed conflict of interest mitigation plan stated that AMSI itself had no known conflicts since it had no detailed design and/or construction contracts involving the production of nuclear attack submarines, surface combatants, or advanced naval vehicles that might be evaluated under the contract. While AMSI's conflict mitigation plan acknowledged the possibility that a proposed subcontractor might have a conflict related to an individual delivery order, the plan

³(...continued)

competitors (a Type 1 conflict). In our view, the later-raised allegation of an unfair competitive advantage accruing to [deleted] because of a Type 1 conflict presents a new and independent protest basis that is separate and distinct from the original basis of protest alleging a Type 3 conflict and must independently satisfy our timeliness requirements. Vinnell Corp., B-270793; B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271 at 7. As this later-raised allegation is based upon the protester's general knowledge of [deleted] and the RFP requirements, this allegation should have been raised in the initial protest letter or within 10 days after Epoch's March 26 debriefing conference, at the latest. 4 C.F.R. § 21.2(a)(2).

⁴[deleted]. Epoch has not alleged that [deleted] has any potential conflicts.

stated that the work on that delivery order would be performed by AMSI and/or the other subcontractor on the team.

The contracting officer states that she was favorably impressed with the detailed plan AMSI proposed for reviewing delivery order SOWs in order to mitigate potential conflicts that might arise. The contracting officer also states that she reviewed AMSI's staffing plan in conjunction with the conflict mitigation plan and was convinced that AMSI had a sufficient number of qualified personnel who were employed by either AMSI or [deleted] to enable the AMSI team to perform all of the work required under any particular delivery order on which [deleted] might have a conflict without using any [deleted] employees. The contracting officer also indicates her opinion that the AMSI mitigation plan would adequately avoid having work performed by employees of a firm that had a conflict was supported by the fact that the Navy evaluators, although aware of the issue, had not raised any concerns about AMSI's approach to mitigating conflicts during their technical/management or cost evaluations.⁵ Accordingly, the contracting officer states that she considered the AMSI conflict mitigation plan to have met the agency's standard, as set forth in amendment 0002, for acceptability--i.e., the plan would mitigate any conflicts so as to allow the offeror to perform the full scope of work required under the contract.

AMSI's detailed conflict mitigation plan included several features designed to protect the Navy from conflicts that might arise under specific delivery orders. Under the plan, AMSI and each of its subcontractors [deleted].

Both the contracting officer and the chairman of the technical evaluation board report that they believed that AMSI's conflict mitigation plan would work because AMSI would [deleted].

In our opinion, the Navy reasonably determined that AMSI's proposed conflict of interest mitigation plan was adequate. The plan, as described above, included a

⁵AMSI's conflict mitigation plan was set forth in full in AMSI's cost proposal. While the technical/management evaluators did not have the entire plan before them for consideration, AMSI's technical/management proposal did state that AMSI realized that conflicts might be encountered, that AMSI had included a complete conflict mitigation plan in its cost proposal, that each corporate member of the AMSI team would have an [deleted], and that AMSI believed that [deleted] would allow it to perform the required work without [deleted].

number of built-in safeguards to avoid assigning work to a firm with a conflict of interest, including [deleted].⁶

Additionally, in view of the large number of proposed key and non-key personnel that are not employed by [deleted], we think that the Navy reasonably concluded that AMSI could successfully avoid conflicts by assigning work to the corporate member(s) of the AMSI team that did not have a conflict. In this regard, we note, as did the Navy, that for the 43 required positions, [deleted]. Thus, AMSI could cover approximately [deleted] of the required positions using only its own or [deleted] employees. In view of the fact that AMSI's proposed conflict of interest mitigation plan contained [deleted] safeguards [deleted] to detect and mitigate conflicts if they occur, and because AMSI proposed more than enough qualified personnel and, therefore, was not dependent upon [deleted] to do work in any professional labor category, we conclude that the Navy reasonably determined that AMSI's mitigation plan was acceptable. See Research Analysis and Maintenance, Inc., B-272261; B-272261.2, Sept. 18, 1996, 96-2 CPD ¶ 131 at 12; D.K. Shifflet & Assocs., Ltd., supra, at 5.

Concerning the allegation that the Navy improperly did not consider the effects of AMSI's proposed conflict mitigation plan in its technical/management evaluation, we find nothing improper in the Navy's failing to downgrade AMSI's proposal when evaluating the personnel and corporate experience factors. As noted above, the RFP stated that proposals would be evaluated on personnel, corporate experience, technical understanding, management plan, and facilities factors. The RFP included a very detailed discussion about how the Navy would evaluate each of those factors. Conspicuously absent from the RFP's discussion is any indication that the technical/management evaluation would consider the effects, if any, of an offeror's conflict mitigation plan. Moreover, when the Navy amended the RFP to clarify its position regarding conflicts of interest, the evaluation scheme was not altered to include a technical/management evaluation of proposed conflict mitigation plans. In fact, amendment 0002, quoted above, expresses the only standard for review of the acceptability of conflict mitigation plans when it states that the Navy will review organizational conflict of interest mitigation plans to determine whether the full scope of work contemplated by this solicitation can be performed by the offeror. As described in full above, the Navy's review and acceptance of AMSI's organizational conflict of interest mitigation plan was fully consistent with that

⁶In addition to the [deleted] safeguards present in the AMSI mitigation plan, since performance under the contract is ordered through the issuance of task orders, the Navy can also exercise care in controlling the scope of AMSI's and its subcontractors' work through proper contract administration. This would provide yet another safeguard to prevent [deleted] from reviewing its own or its competitors' products under any task order issued by the Navy. Deloitte & Touche, 69 Comp. Gen. 463, 469 (1990), 90-1 CPD ¶ 486 at 8.

standard. In any event, it is clear that the contracting officer reviewed the mitigation plan in the context of AMSI's approach to performing the work and its proposed staffing, and concluded, reasonably in our view, that there was no reason to downgrade AMSI's proposal.

The protest is denied.

Comptroller General
of the United States