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**DECISION**



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

**FILE:** B-208439

**DATE:** January 31, 1983

**MATTER OF:** Systems Engineering Associates  
Corporation

**DIGEST:**

1. Protest alleging unfair competitive advantage and organizational conflict of interest with respect to the awardee is timely filed within 10 working days after award. The basis of protest arose from the date of the protester's receipt of the contracting agency's written notification of the award to the awardee and not from an earlier date on which the protester might have been aware of the awardee's prior agency contract which allegedly gave the awardee the unfair competitive advantage.
2. The Government has no obligation to eliminate a competitive advantage that a firm may enjoy in a procurement because of its own particular circumstance or because it gained experience under a prior Government contract unless such advantage results from a preference or unfair action by the contracting agency. The record shows nothing to indicate that whatever advantage the awardee gained from the performance of a prior contract with the agency was the result of preference or unfair action by the agency.
3. The Government has the right to be protected from the bias that might result from awarding a contract to a firm having an organizational conflict of interest. However, a firm should not be excluded from competition simply on the basis of a theoretical conflict of interest. GAO finds no organizational conflict of interest existed on account of awardee's similar prior contract with the contracting agency. The mere fact of a prior contractual relationship does not in itself create a conflict of interest.

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4. In the absence of evidence from the protester in support of its allegation that inclusion of a clause in the contract that was not in the solicitation was improper, GAO has no basis to question the inclusion of the provision in the contract.

Systems Engineering Associate Corporation (SEACOR) protests the award of a contract to Analytics, Inc. (Analytics), under request for quotations (RFQ) No. DAABO7-82-Q-J064 issued by the United States Army Communications-Electronics Command (Army), Fort Monmouth, New Jersey, for the Integrated Logistics Support Documentation portion of the Single Channel Objective Tactical Terminal (SCOTT) program.

SEACOR contends that a prior contract between the Army and Analytics under which Analytics provided an updated Baseline Cost Estimate (BCE) for the Ground Mobile Forces Satellite Communication (GMFSC) program (of which the SCOTT program is a part) created an organizational conflict of interest and unfair competitive advantage in favor of Analytics. SEACOR also contends that Special Provision H.57 (H.57), which was not included in the RFQ, should not have been included in the contract subsequently entered into by the Army and Analytics.

For the reasons set forth below, we deny SEACOR's protest.

#### Background

Seven proposals were received by the Army in response to the RFQ. Following initial evaluation, the Army, on April 13, 1982, sent out letters of technical unacceptability to four of the seven offerors. Letters requesting best and final offers were sent on April 16, 1981, with a closing date of April 28, 1982, for the receipt of such offers. The Army's evaluation of the three best and final offers revealed that the proposals of Analytics and SEACOR had superior technical approaches. The Army's evaluated cost for Analytics' proposal was \$1,066,148 and the Army's evaluated cost for SEACOR's proposal was \$1,744,175. After

consideration of both cost and technical factors, the Army determined that award to Analytics was in the best interest of the Government. Consequently, an award was made to Analytics on June 30, 1982.

By letter dated July 14, 1982, SEACOR protested the award to the contracting officer. Prior to resolution of the protest by the Army, SEACOR protested the matter to this Office by letter dated July 28, 1982, which was received by us on July 29, 1982.

#### Timeliness of Protest

The Army takes the position that SEACOR's contentions as to a conflict of interest and unfair competitive advantage are untimely. According to the Army, SEACOR has indicated it was first made aware in May 1982 of the possibility of a conflict of interest because of Analytics' prior contract with the Army. Since SEACOR has admitted knowledge sometime in May 1982 of an alleged conflict of interest, the Army argues SEACOR should have protested within 10 working days of that date.

SEACOR alleges that it did become aware on May 28, 1982, of "verbal, unconfirmed and considered hearsay" information of a possible Army-Analytics contract concerning the costing of an Army satellite communications program. According to SEACOR, a search of past issues of the Commerce Business Daily was then conducted until SEACOR found on June 14, 1982, a November 1981 issue stating that a contract "will be negotiated with Analytics to develop the BCE supporting the Ground Mobile Forces Communications Program."

SEACOR alleges that it immediately made a Freedom of Information Act (FOIA) request to the Army for contract information relating to the BCE negotiations with Analytics. Because of delays in the Army's processing of the FOIA request, SEACOR claims it did not receive a copy of Analytics' prior contract until July 21, 1982. Consequently, SEACOR contends that it did not know the basis of protest until July 21, 1982.

Our Bid Protest Procedures require that in order to be timely, a protest must be filed within 10 working days after

the basis for protest is known or should have been known. 4 C.F.R. § 21.2(b)(2) (1982). Also, where protests are filed with the contracting agency, any subsequent protest to this Office within 10 working days of actual notification of or constructive knowledge of initial adverse action will be considered as long as the protest to the agency was timely. 4 C.F.R. § 21.2(a) (1982).

We find SEACOR's protest to be timely filed. Although it appears that SEACOR knew of the prior Army contract with Analytics by June 14, 1982, at the latest, we do not think that a basis of protest existed until after the award was actually made to Analytics. Until then, it was reasonable for SEACOR to assume the possibility that award would be made to either it or the other offeror in the competitive range under the RFQ. While the record shows that the Army sent SEACOR a letter of notification of award on the date award was made, June 30, 1982, there is no indication when SEACOR received the letter. However, even assuming that SEACOR knew on June 30, 1982, of the award to Analytics, SEACOR's July 14, 1982, protest to the Army was still within 10 working days. Since SEACOR's protest with the Army was timely, the company's protest to our Office prior to any resolution of that protest is also timely.

#### Unfair Competitive Advantage

SEACOR asserts that because the SCOTT program is part of the GMFSC, for which Analytics prepared the BCE, an unfair competitive advantage accrued to Analytics in the competition for award under the RFQ. In this regard, SEACOR argues that in the preparation of a cost proposal in response to the RFQ, Analytics had extensive cost information which was not made available to SEACOR.

The Army takes the position that the Government is not required to equalize competition where one offeror's circumstances give it a competitive advantage, so long as that advantage does not result from unfair Government actions. In addition, the Army states in making the cost estimate under the prior contract for the Integrated Logistics System, that Analytics simply took a percentage of estimated hardware cost to arrive at an overall estimate of \$2.79 million dollars for the system. The Army emphasizes that

Analytics had no data package for the Integrated Logistics System and that Analytics' estimate for that portion of the GMFSC was nearly three times the cost proposed by Analytics under the RFQ. Finally, the Army states that the award under the RFQ was determined in accord with the RFQ's stated award factors and that, in this regard, technical factors were of greater weight than cost.

We agree with the Army that the issue for consideration by our Office is whether the Government unfairly participated in establishing any competitive advantage that Analytics enjoyed and not whether Analytics obtained a competitive advantage. It is well settled that the Government has no obligation to eliminate a competitive advantage that a firm may enjoy because of its own particular circumstances or because it gained experience under a prior Government contract or performed contracts for the Government unless such advantage results from a preference or unfair action by the contracting agency. See e.g., Varo, Inc., B-193789, July 18, 1980, 80-2 CPD 44; ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34.

Regardless of the nature of whatever advantage Analytics gained because of its prior preparation of a cost estimate for the GMFSC, we find that there is no indication in the record that such an advantage was the result of a preference or unfair action by the Army. SEACOR's only argument in this regard is that in preparing the cost estimate, Analytics was privy to SCOTT costing and program information provided to it by the Army and, consequently, the Army's providing of such information constituted unfair Government action. However, SEACOR makes no specific allegations as to what information the Army gave Analytics and whether the information that was given was outside the scope of Analytics' contract. Therefore, we have no reason to assume that the Army's actions during the performance of Analytics' prior contract were other than those necessary for the proper performance of that contract.

#### Conflict of Interest

SEACOR contends that Analytics' BCE contract for the GMFSC created an organizational conflict of interest with regard to Analytics' participation under the RFQ. SEACOR advances no argument in support of this contention.

The Army states that Defense Acquisition Regulation (DAR) § 1-113.2(b)(1) and (b)(2) (1976 ed.) requires the contracting officer to determine whether the possibility of an organizational conflict of interest exists in a procurement and whether a clause following appendix "G" of the DAR should be added to the solicitation. With respect to Analytics' BCE contract, the Army states that before the issuance of the solicitation under which the contract was awarded, it was determined that no organizational conflict of interest existed. Therefore, no conflict of interest provision was added to the solicitation. As to the protested RFQ, the Army declares that before its issuance, the question of a possible organizational conflict of interest with Analytics was again addressed and a determination was made that no conflict of interest existed. The basis for this determination was that Analytics had not obtained any knowledge of the RFQ's statement of work prior to the RFQ's issuance.

We have recognized the right of the Government to be protected from the bias that might result from awarding a contract to a firm having an organizational conflict of interest. See Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 91 (1976), 76-1 CPD 202. At the same time, because it is a general policy of the Federal Government to allow all interested qualified parties an opportunity to participate in its procurements in order to maximize competition, unless there is a clearly supportable reason for excluding a firm, a firm should not be excluded from competition simply on the basis of a theoretical conflict of interest. PRC Computer Center, Inc., On-Line Systems, Inc.; Remote Computing Corporation; Optimum Systems, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. Furthermore, the determination as to whether a sufficient possibility exists that an award to a particular firm would result in an organizational conflict of interest must be made by the procuring activity, with which lies the responsibility for balancing the Government's competing interest in (1) preventing bias in the performance of certain contracts which would result from a conflict of interest, and (2) awarding a contract that will best serve the Government's needs to the most qualified firm. See Planning Research Corporation Public Management Services, Inc., supra.

From our review of the record, we find no organizational conflict of interest existed on account of Analytics' prior cost estimate contract for the GMFSC. SEACOR apparently feels that a conflict of interest existed solely because of the prior Analytics contract with the Army. However, the mere fact of the prior contractual relationship does not create a conflict of interest per se. See Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218. As noted above, SEACOR provides no other argument or statement in support of its conflict of interest claim.

Provision H.57

The RFQ did not include Provision H.57, relating to estimated cost fixed fee, funding, and reimbursement, while the contract with Analytics did. SEACOR objects to the fact that the Army included H.57 in the contract, but not in the RFQ. The Army contends that it inadvertently left H.57 out of the RFQ, but that, in any case, H.57 is a strictly administrative provision that had no impact on the basis for award since it is not a negotiable item and created no substantive change in contract duties.

SEACOR's contention that H.57 was either improperly excluded from the RFQ or wrongfully included in the contract is unsupported by an evidence. In this regard, we point out that a protester has the burden of affirmatively proving its case. Plant Facilities and Engineering, Inc., B-201618, April 22, 1981, 81-1 CPD 310. Unsupported allegations do not satisfy the protester's burden of proof. J. L. Associates, Inc., B-201331.2, February 1, 1982, 82-1 CPD 99.

The protest is denied.

*Milton J. Fowler*  
for Comptroller General  
of the United States