



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Systems Corporation
File: B-229905
Date: March 2, 1988

DIGEST

Since the assessment of the impact of protester's advisory role in a prior contract as to whether the protester may be impeached were it to provide litigation support in this solicitation involves the evaluation of risk, our review is limited to determining whether the agency's conclusion that an unacceptable risk existed is shown to have no reasonable basis.

DECISION

Marine Systems Corporation (MSC), protests the decision of the Military Sealift Command, U.S. Navy, to exclude it from the competition under request for proposals (RFP) N00033-87-R-3054, for litigation support services. The contract is to assist the Navy in preparation and presentation of the Navy's defense of two contract claims scheduled for trial before the Armed Services Board of Contract Appeals (ASBCA).

The protest is denied.

Incident to the performance of two repair and overhaul contracts on the USNS Rigel and the USNS Pawcatuck, the contractor, Coastal Dry Dock Corp., filed claims for alleged formal and constructive changes to the contract. A part of both of these claims represents alleged government caused disruption to the contract performance. In response to Coastal's claims, the Navy contracted with MSC to provide technical and engineering services and technical advisory reports analyzing Coastal's claims. MSC's reports were subsequently used and adopted in part in the contracting officer's final decisions on Coastal's claims.

After Coastal filed appeals with the ASBCA of the contracting officer's decisions, the Navy issued this solicitation for litigation support services. The Navy informed

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MSC, however, that MSC was not an acceptable candidate for award because its earlier analyses on behalf of the Navy created an unacceptable conflict of interest and MSC could not provide an independent and objective review of its own earlier work.

The Navy also stated that since MSC's earlier analyses endorsed the validity of the NAVSEA 028 formula, this precluded the credible use of MSC's employee as an expert witness at the trial in which the Navy intended to discredit the validity of the NAVSEA 028 formula. The Navy states that the NAVSEA 028 formula assumes, without analysis of the facts surrounding alleged changes, that if there are multiple changes issued under a ship repair contract, disruption automatically results and, in a subjectively applied formula, weights are assigned to various factors to determine the number of manhours attributable to the disruption.

MSC contends that its past analyses of these claims do not present a conflict of interest but rather provides justification for negotiating a non-competitive contract with MSC to provide the litigation support.

Further, MSC contends it did not use the NAVSEA 028 formula in its analyses of Coastal's claims. Rather, MSC states its analyses of the claims disputed the validity of the NAVSEA 028 formula as used by Coastal, and recommended rejection of the conclusions reached except where acceptance was in the interest of the government. MSC acknowledges that it did recommend acceptance of the results of Coastal's analyses for local disruption on Coastal's USNS Rigel claim but MSC claims it did not endorse the method used.

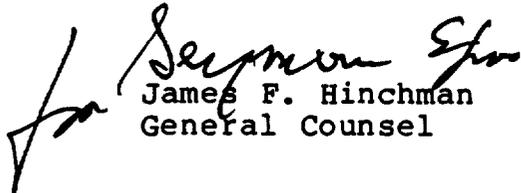
The Navy states that its legal review of MSC's analyses of Coastal's claims, upon which the contracting officer relied, reveal that for certain elements of the claims the amounts allowed were excessive. The Navy's position is that the NAVSEA 028 formula which MSC used, should be rejected. The Navy wishes to obtain, by means of this RFP, an analysis of the actual scope of alleged changes and their effect, if any, upon the performance of Coastal's contract and it does not want to rely on the formula method which had been previously used. The Navy now wishes to obtain a critical path analyses, which is an attempt to factually reconstruct the actual performance of a contract, to assess the reasonableness of the contractor's planned schedule for performance, and to compare the actual performance, including the performance of any changes, with a reasonably planned performance schedule.

Our review of MSC's reports under its prior contract with the Navy shows that at least in the case of Coastal's USNS Rigel claim (Part II Local Disruption), MSC accepted Coastal's results from Coastal's use of NAVSEA 028 methodology. The Navy is concerned that if it used MSC as an expert witness in the litigation, MSC's testimony could be discredited because of its past acceptance of the NAVSEA 028 results. MSC finds this concern unwarranted.

The Competition in Contracting Act, 10 U.S.C. § 2304(a)-(1)(A) (Supp. III 1985), calls for "full and open competition" but we do not view this as requiring where expert witness services are being procured, the participation of an offeror who presents unacceptable risks to the agency's position were it to be awarded the contract. Here, were MSC to be awarded the contract, the use of its employee as the Navy's witness at the ASBCA hearings presents a risk that the Navy's witness would be impeached because of its prior endorsement of NAVSEA 028 formula results in determining the value of these same claims. MSC argues that this presents no problem because it did not endorse NAVSEA 028 methodology but the fact remains that MSC did use and endorse the results of NAVSEA 028 methodology. Where an agency has a reasonable basis for its conclusion that an unacceptable risk exists that an offeror's testimony would be impeached we have found the agency's determination to be entitled to great weight. Transcomm, Inc., B-190273, Feb. 9, 1978, 78-1 CPD ¶ 113. This is because of the inherent difficulty in estimating such risks, involving the trial attorney's forecasting whether impeachment would be attempted, whether it could be successfully completed, and the overall effect on the Navy's case. Id.

In this case we view the Navy's exclusion of MSC from the competition to be a reasonable restriction as MSC, because of its prior work on these claims, would present an unacceptable risk to the Navy were it to testify before the ASBCA.

The protest is denied.


James F. Hinchman
General Counsel