



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Computer Sciences Corp.
File: B-231165
Date: August 29, 1988

DIGEST

The contracting agency acted reasonably in concluding that an inadvertent disclosure of cost information relating to the protester's development contract does not warrant the exclusion of the recipient of that information from competition on a training contract in light of the likely adverse effect that exclusion would have on overall competition and because the record does not disclose that the recipient used the information in the preparation of initial proposals.

DECISION

Computer Sciences Corporation (CSC) protests the decision by the Department of the Navy's Space and Naval Warfare Systems Command (SPAWAR) to allow Advanced Technology, Inc. (ATI) to submit proposals under request for proposals (RFP) No. N00039-88-R-0018(Q), for software maintenance training services in support of the Enhanced Naval Warfare Gaming System (ENWGS). CSC alleges that prior access to certain proprietary cost information of the protester constitutes a conflict of interest and provides that firm with an unfair competitive advantage which should be remedied by excluding ATI from the competition.

We deny the protest.

BACKGROUND

The RFP was issued on February 23, 1988. It contemplates the award of a cost-plus-fixed-fee contract for a base period ending September 30, with four successive 1-year options which can be exercised at the sole discretion of the agency. CSC is, and has been, the primary development contractor for ENWGS. Additionally, it was the initial

program contractor for software maintenance and training-- services which comprise some of the work called for by the RFP. ATI is currently performing its second contract in support of the SPAWAR Information Program Directorate; in this capacity, ATI provides administrative and technical support, including the maintenance of a library which houses documentation produced by ENWGS contractors like CSC. The firm also provides financial management assistance to the program, including the preparation of various funding documents necessary to provide incremental funding to ENWGS contractors.

Because ATI's work required access to proprietary data of other companies, each of its contracts contained a clause requiring the firm to enter into agreements with those companies to protect the data from unauthorized use or disclosure. Although CSC sought such an agreement with ATI, none was ever reached. CSC did, however, receive assurances from the ENWGS Program Manager that none of its proprietary cost data would be furnished to ATI or to any other support contractor.

PROTEST AND RESPONSE

The primary basis of CSC's protest is that, despite its reliance on the assurances of SPAWAR, ATI was, in fact, given access to proprietary cost data concerning, among other things, its labor, overhead and general and administrative (G&A) rates for fiscal years 1986 through 1988, as well as other sensitive financial data. This situation, the protester contends, resulted in an organizational conflict of interest which should preclude consideration of ATI's proposal under the RFP.

In response, SPAWAR concedes that ATI was inadvertently supplied with proprietary financial information in the form of two Engineering Change Proposals (ECPs) submitted by CSC under its development contract which contained, among other things, potentially sensitive labor, overhead and G&A rates for fiscal years 1986 through 1988.^{1/} Relying on

^{1/} CSC has also suggested other instances in which ATI was allegedly provided with valuable proprietary data. These instances primarily involved meetings conducted by SPAWAR to monitor progress under the development contract, and it appears that ATI was exposed to some general discussion of CSC's finances as they related to award fees under that contract. However, as described above, the detailed cost information concededly disclosed to ATI in the ECPs was

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affidavits from ATI employees, the agency reports that these documents were never transferred within the firm to ATI personnel responsible for preparing its proposal under the RFP at issue. Moreover, the affidavit of the ATI employee in charge of proposal preparation states that no information proprietary to CSC was used in the preparation of ATI's proposal. Thus, SPAWAR maintains that the protester has failed to adequately demonstrate the existence of an actual conflict of interest or an unfair competitive advantage to ATI and, therefore, the agency concludes that exclusion of ATI is not warranted. The agency and ATI also maintain that CSC must bear some of the responsibility for the disclosure because it took inadequate steps to protect its data in failing to mark one of the ECPs "proprietary" and in not successfully concluding a protective agreement with ATI.

Finally, the agency argues that the requested remedy of excluding ATI from competition is particularly inappropriate because it would limit competition to an unnecessary degree, a result not favored by the Competition in Contracting Act of 1984, particularly when the facts do not disclose that the protester's data was used by ATI.

ANALYSIS

The responsibility for determining whether a firm has a conflict of interest and to what extent, if any, that firm should be excluded from competition rests with the procuring agency, and we will not overturn such a determination unless it is shown to be unreasonable. NAHB Research Foundation, Inc., B-219344, Aug. 29, 1985, 85-2 CPD ¶ 248. The procuring agency bears the responsibility for balancing the competing interests of the procurement process between preventing possible bias and awarding a contract that will best serve the government's needs to the most qualified firm after full and open competition. Id. Where a potential conflict of interest is alleged as the result of the disclosure of confidential information, we will examine the reasonableness of the agency's decision regarding excluding the recipient of that information from competition in light of such factors as whether or not the disclosure was inadvertent and the likely effect that exclusion would have

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clearly more valuable to the preparation of a competitor's proposal than the information CSC says was disclosed at the meetings. As a result, we need not resolve the factual disputes which remain concerning the extent of ATI's exposure to CSC's data at the meetings.

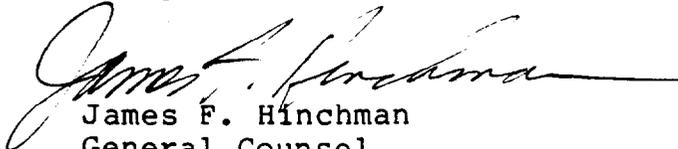
on the degree of competition. See Youth Development Associates, B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126.

The record here does not indicate that the disclosure of the ECPs was due to anything more than mere inadvertence; there is no suggestion that either the agency or ATI acted deliberately. Rather, it appears that the transmittal of the cost information in the ECPs was a mistake attendant to the routine transfer of many such documents to ATI in its role of tracking the overall progress of the technical portions of such proposals. In fact, it was only following the filing of this protest, when the Navy asked ATI to search its files for proprietary data from CSC, that an ATI employee first discovered the existence of the ECPs in the firm's files, volunteered that information to the agency, and returned the documents.

As to the likely effect that the exclusion of ATI would have on the degree of overall competition, since the procurement is still in its preliminary stages and no award has been made, a detailed discussion of the identity and number of offerors is not appropriate. Nonetheless, based on our in camera review of the record, we find that the agency's determination that excluding ATI would have a significant impact on the degree of competition is reasonable.

Since we see no basis to object to the Navy's conclusion that ATI did not use CSC's proprietary data in preparing its initial proposal, and excluding ATI would have a significant adverse impact on the degree of competition, we conclude that the Navy acted reasonably in weighing the competing interests of the procurement process--preventing an unfair competitive advantage and insuring full and open competition--and deciding not to eliminate ATI from consideration under the RFP. Nevertheless, the Navy should be alert to the possibility that, as the procurement progresses, facts and circumstances may change so as to support a different result. If, for example, an audit or other examination of the cost portion of ATI's best and final offer were to reveal that the firm made use of data contained in the ECPs, then the agency should consider excluding the firm at that time.

The protest is denied.


James F. Hinchman
General Counsel