



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ETEK, Inc.
File: B-234709
Date: July 11, 1989

DIGEST

Agency is not required to exclude a firm from a procurement because of an organizational conflict of interest where, although the firm previously provided related services to the agency under a forerunner contract, it did not prepare the work statement, or material leading directly, predictably, and without delay to the work statement, under the current solicitation.

DECISION

ETEK, Inc., protests the anticipated award of a contract to Architectural Energy Corporation (AEC) under Department of Energy (DOE) request for proposals (RFP) No. DE-RP03-89SF17966. ETEK argues that as a result of a contract AEC previously performed for DOE, AEC has an organizational conflict of interest and hence should be disqualified from this competition. We deny the protest.

The RFP solicited proposals to provide support services for Task 12 of the International Energy Agency (IEA) program for solar heating and cooling. Task 12 is part of an ongoing international program under which participating countries are working to design effective and efficient solar energy systems and, more specifically, solar heating, cooling, and day lighting materials, components and systems. Participating countries' representatives will perform work in three basic areas under Task 12: (1) model development, entailing the identification and ranking of those systems potentially offering significant improvements over existing or conventional concepts; (2) model evaluation, entailing the development of procedures for predicting the performance of solar energy systems; and (3) model use, entailing the definition of the potential audience for these systems.

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The firm to be selected by DOE under the RFP is to act as operating agent for Task 12. In this capacity, the firm will be responsible for overall management of the task, coordinating the work of the participating countries, and implementing actions required by the IEA's executive committee. The operating agent also is to provide periodic reports to the participating countries and the IEA's executive committee and executive director, and will be responsible for coordinating the United States' participation in this task.

In order to avoid giving any offeror an unfair competitive advantage due to performance of prior contracts, DOE included in the solicitation the standard clause "Organizational Conflicts of Interest Disclosure or Representation," DOE Acquisition Regulation (DEAR) § 952.209-70. This clause requires each offeror to provide a statement of all relevant facts as to its past, present, or future actions bearing on whether it has a competitive advantage in the performance of the solicited work. The clause states that DOE will review this information and may take appropriate action, including the disqualification of the offeror, if a conflict of interest resulting from an unfair competitive advantage is found to exist.

The RFP provides that award will be made to the offeror whose proposal is found most advantageous to the government, technical and cost factors considered. The specific technical evaluation factors are (1) qualifications of organization and key personnel to perform the scope of activities, and (2) quality of proposals; the first factor is approximately twice as important as the second. Within the first factor, four subfactors are listed in descending order of importance: (1) organizational experience in supporting and coordinating IEA programs, with specific emphasis on solar building technologies, or comparable experiences with other international groups; (2) knowledge of and familiarity with current IEA solar implementing agreements and annexes; (3) knowledge of and familiarity with solar buildings, energy analysis tools and other relevant programs and projects; and (4) knowledge of and familiarity with DOE and other relevant research institutions.

Two firms, ETEK and AEC, responded to the RFP. AEC previously had been awarded a DOE contract to perform a prior IEA Task (Task 8), for which its president was designated operating agent. Task 8 involved conducting surveys and analyses of design tools for solar energy systems, the evaluation and validation of these tools, and development of test cases for their evaluation. In his capacity as

operating agent for Task 8, the president of AEC participated in an IEA workshop on "Advanced Solar Building Design and Analysis," and also provided input concerning analysis and design tools developed by AEC. DOE determined that AEC's involvement in this prior task, and specifically the role of its president, did not afford AEC an unfair competitive advantage with respect to the current procurement. The agency reasoned that Task 8, while a forerunner of Task 12, was but one part of the whole planning process for the subsequent task, and that AEC, and particularly its president, therefore had not actually been involved in the development of the Task 12 statement of work or evaluation criteria. AEC thus was not disqualified from this competition and its offer, as well as ETEK's, is still being considered for award.

ETEK protests that AEC should be disqualified from the current competition in accordance with the solicitation's conflict of interest provision. ETEK contends that AEC's involvement in Task 8 afforded that firm an unfair competitive advantage over other firms with respect to the selection of a contractor for the performance of Task 12. In this regard, ETEK is concerned that Task 8 resulted in the formulation of the statement of work for Task 12 and that AEC's participation in this former procurement provided it with information not available to other competitors. ETEK adds that this competitive advantage is exacerbated by the evaluation factors, which place considerable emphasis on a firm's experience with prior IEA work.

Subpart 9.5 of the Federal Acquisition Regulation (FAR), which governs conflicts of interest, generally requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantages or conflicting roles that could impair a contractor's objectivity. See ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. In particular, the FAR provides that firms involved in the preparation of a solicitation's work statement, defined broadly as including the furnishing of information leading directly, predictably, and without delay to the work statement, generally may not be awarded a contract to supply the requested system or services. FAR § 9.505-2(b)(1). This restriction is intended to avoid putting a contractor in a position to favor its own capabilities. See Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100.

On the other hand, the mere existence of a prior or current contractual relationship between the government and a firm does not in itself create an organizational conflict of

interest for that firm. Ross Bicycles, Inc., B-217179 et al., June 26, 1985, 85-1 CPD ¶ 722, aff'd on reconsideration, B-219485.2, July 31, 1985, 85-2 CPD ¶ 110. A particular offeror may possess unique advantages and capabilities due to its prior experience, and the government is not required to attempt to equalize competition to compensate for this advantage where it did not result from preferential treatment or other improper action. Id.

We find that DOE properly included AEC in the competition here. DOE has provided an affidavit by the project manager involved in the development of Task 12 and the planning of the resultant DOE solicitation, stating that the statement of work for the RFP was prepared and reviewed exclusively by DOE staff, without outside assistance of any kind from AEC or other firms. The record contains no other evidence to the contrary. Similarly, ETEK's assertion that AEC's president, as operating agent under Task 8, was in a position to influence the drafting of this RFP or, at a minimum, to obtain confidential information not otherwise available, is unsupported in the record. The president's (and AEC's) input into Task 12 was no different from that of other contractors and government agencies that had previously performed work for IEA's solar energy program. The involvement of each of these organizations was limited to providing background information on the results of the work it performed under a particular task; the IEA then used this information to develop Task 12.

Specifically, although AEC's president was the Task 8 operating agent, as discussed above, his and AEC's work under Task 8 extended only to overseeing the development of a methodology for determining the effectiveness of solar energy system designs, and then advising the IEA of the final results. The work under Task 12, on the other hand, entails the development of actual model solar energy systems. This work appears to be related to that under the prior tasks only in that it represents a separate step in a progression of tasks that ultimately are to lead to the manufacture of effective solar energy systems.

While AEC may enjoy some competitive advantage because of its prior involvement in IEA's solar energy program, this advantage is no different than that enjoyed by all other previous participants in the program and, in our opinion, is not the sort of advantage that mandates the firm's exclusion from the procurement. As stated above, the pertinent conflict of interest regulations do not automatically exclude a firm with prior involvement in an ongoing program from competing for successor contracts, but rather only disqualifies those firms that were in a position to

influence, for their own benefit, the development of the statements of work for the follow-on contracts. See Coopers & Lybrand, 66 Comp. Gen. 216, supra. We do not think this was the case here since, again, AEC had no involvement in the preparation of the actual work statement for Task 12, but simply furnished background information regarding its prior work effort.

We conclude that AEC did not perform services that led "directly, predictably, and without delay" to the RFP's statement of work, and was not in a position to influence this competition; accordingly, DOE was not required to exclude AEC from consideration for award. See Associated Chemical and Environmental Services, et al., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248.

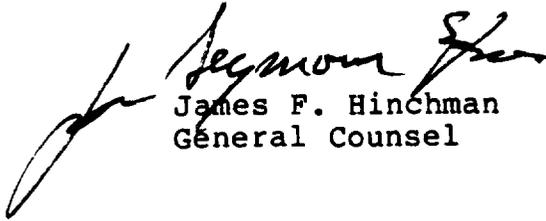
Moreover, we do not think DOE was under an obligation to equalize any advantage enjoyed by AEC due to background information it may have gathered during performance of Task 8, see S.T. Research Corp., B-233309, Mar. 2, 1989, 89-1 CPD ¶ 223; any such advantage was due solely to AEC's status as a prior contractor. In any case, although ETEK complains that DOE has not provided it with all relevant information in a timely manner, it appears from the record that DOE has in fact released all such information, and that firms other than AEC thus were afforded a meaningful opportunity to compete for this procurement. Id.

ETEK argues that the solicitation's evaluation factors essentially ensured award to AEC by placing undue emphasis on a firm's experience with IEA's solar energy program. In this regard, ETEK notes that one of the subfactors under the most important evaluation factor measured a firm's experience in the IEA solar program, while another addressed a firm's knowledge of the IEA solar implementing agreement.

Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of a particular factor so long as it reasonably relates to the agency's needs in choosing a contractor that will best serve the government's interests. See Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517. Here, the record reveals that DOE selected the two subfactors at issue because it determined that firms experienced with the IEA solar program or with the efforts of related international organizations would more likely perform the work in a successful manner than ones that did not. We think this clearly was a reasonable factor to consider, and there is no evidence that the evaluation factors actually were structured to benefit AEC or other similarly situated firms. Accordingly, we find nothing improper in DOE's use of these

two subfactors to ascertain the offeror most advantageous to the government. See Transco Contracting Co., B-228347.2, July 12, 1988, 88-2 CPD ¶ 34.

The protest is denied.



James F. Hinchman
General Counsel