

Shank



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MDT Corporation
File: B-236903
Date: January 22, 1990

DIGEST

1. Protest that bidder should have been disqualified from competing under solicitation for services for which the owner of the bidder's company formerly served as the contracting officer's representative under a predecessor contract, an alleged conflict of interest, is denied where there is no evidence that the former employee was privy to agency information which was not publicly available, or that any action of the former employee resulted in prejudice for or on behalf of the bidder.
2. The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the procurement officials, or that definitive responsibility criteria in the solicitation were misapplied.
3. An agency is not required to conduct a preaward survey when the information available to it is sufficient to allow the contracting officer to make an affirmative responsibility determination.

DECISION

MDT Corporation protests the award of a contract to Advanced Management for Medical Equipment, Inc. (AMME), under invitation for bids (IFB) No. DAMD17-89-B-0115, issued by the Army Medical Research Acquisition Agency, the contracting agency for the U.S. Army Medical Research Institute for Infectious Diseases (USAMRIID). The contract is for the maintenance of government-owned Castle (brand) sterilizers located at Fort Detrick, Frederick, Maryland, and at the Forest Glen Annex of the Walter Reed Army Institute of Research (WRAIR), Washington, D.C. In accordance with the IFB, the Army made two separate awards under the solicitation, each to the low bidder for one portion of the requirement. AMME was awarded the contract for Fort

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Detrick, and MDT was awarded the contract for WRAIR. MDT protests that the award to AMME was improper because of an alleged conflict of interest, and that AMME should have been rejected as nonresponsible.

We deny the protest in part and dismiss it in part.

MDT is now the parent corporation of Castle, the contractor under the predecessor contract for maintenance of the Army's Castle sterilizers at Fort Detrick. That contract covered a period of 1 year plus 4 option years.^{1/} The founder, sole owner and director of AMME, which was incorporated in April 1988, is a retired warrant officer who was the contracting officer's representative (COR) for administration of the predecessor contract at USAMRIID from July 1986 through May 1988. His duties as COR were reassigned as of June 1, 1988, and he retired from active duty as a warrant officer on August 31, 1988. The IFB for this procurement was issued on June 16, 1989, and award to AMME was made on August 28.

MDT initially protested to the Army but, before receiving a response to its agency-level protest, timely protested the award to our Office. The protester alleges that while serving as COR under the predecessor contract, the owner/director of AMME: (1) had access to and "most likely" used confidential information from medical maintenance files of the then-incumbent contractor (Castle) to obtain its pricing information; (2) planned and prepared to compete for the June 1989 follow-on contract for these services during Castle's performance of its contract, and approached one of Castle's employees in July 1987 and another in April 1988, concerning possible future employment; and (3) recommended that the agency not exercise Castle's fourth option (November 1, 1988 - October 31, 1989) for the performance of the contract, because of his plans to subsequently compete, thus allowing his personal interests to interfere with his administration of the predecessor contract.

MDT contends that these last two allegations constitute violations of the Office of Federal Procurement Policy Act Amendments of 1988 (OFPP Act), Pub. L. No. 100-679, 101 Stat. 4055 (1988), implemented by Federal Acquisition Regulation (FAR) § 3.104-3(e) (FAC 84-47). We note that the

^{1/} At the time the predecessor contract was awarded (November 1984), Castle was a division of Sybron Corporation. The record indicates that MDT became the successor in interest to Castle, Division of Sybron Corporation, during the fourth option year of Castle's contract.

the alleged improper actions occurred under a different procurement, that the option in question was exercised, and that the agency states that AMME's owner did not make any recommendations not to exercise the option, nor did he have any authority to do so. Moreover, the OFPP Act is inapplicable since its effective date was July 16, 1989, and the actions complained of all occurred well before this date.^{2/} In any event, the protester has not shown, and the record does not suggest, that the former government employee ever participated as both a government employee and as a representative for or on behalf of a competing firm with respect to the same procurement, which is the kind of situation to which the act applies. Thus, there is no basis for finding that there was a violation of the OFPP Act.

MDT also maintains that the awardee's participation in the procurement violates the Ethics in Government Act of 1978, 18 U.S.C. § 207 (1988), and further that, notwithstanding whether the conduct of the director/owner of AMME violated any statute or regulations, in view of his alleged personal financial interest in the predecessor contract while he was serving as COR, the Army's award to AMME involves the appearance of a conflict of interest, on the basis of which the firm should have been disqualified from participating in the procurement.

The allegation that award to AMME will result in a violation of the post-employment restrictions of 18 U.S.C. § 207 is primarily a matter for the Department of Justice, not our Office. Regional Environmental Consultants, 66 Comp. Gen. 67 (1986), 86-2 CPD ¶ 476. However, where there is an apparent conflict of interest, an agency may exclude an offeror from a procurement in order to protect the integrity of the federal procurement system, even if no actual impropriety can be shown, provided that the agency's determination is based on fact and not mere innuendo or suspicion. International Resources Group, Ltd., B-234629.2, Aug. 31, 1989, 89-2 CPD ¶ 196. Our role in resolving a bid protest allegation of an apparent conflict of interest or appearance of impropriety is to determine whether the agency has a reasonable basis for allowing an offeror to compete, in the face of an allegation or indication of an apparent

^{2/} We also note that this amendment was suspended effective December 1, 1989 by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, which provides that section 27 of the OFPP Act "shall have no force or effect during the period beginning on the day after the date of enactment of this Act and ending one year after such day."

conflict of interest. Laser Power Technologies, Inc., B-233369 et al., Mar. 13, 1989, 89-1 CPD ¶ 267. Based on our review of the record, we find no basis to disagree with the agency determination that there is no real or apparent conflict of interest which warrants exclusion of the awardee.

The Army states that the former COR's responsibilities under the predecessor contract were "limited to administrative 'technical' monitoring" of the performance of the contract, and that the COR "never had access to any confidential or proprietary information [or] to the contract file. . . ." The Army asserts that since the subject procurement involves a different contract than that under which the AMME official formerly served as COR, and since he did not serve as COR for 1 year prior to the issuance of the IFB for the subject procurement, retired from active duty 9 months prior to its issuance, and did not participate in its preparation, there was no appearance of an impropriety in his participation in the procurement or in the award of the contract to AMME.

That a former government employee is familiar with the work required by an IFB (or, for that matter, previously participated in the government's administration of a prior contract for such work), does not necessarily confer a competitive advantage upon a firm that later employs or is represented by that individual in competing for a procurement for the same (or similar) kind of work, in the absence of evidence that the former employee was privy to agency information concerning the procurement that was not available to other offerors. Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 88-2 CPD ¶ 314, recon. denied, B-231579.2, Nov. 29, 1988, 88-2 CPD ¶ 525. Here, the agency states that the former COR was never given access to Castle's line item prices under the predecessor contract and, more significantly, that those prices constituted public information. The prior award was also under an IFB, and the awardee's line item prices were made public at the bid opening. The protester has not alleged that the owner/director of AMME had access or was privy to the bid prices offered by MDT under the current IFB which resulted in the award to AMME. Accordingly, MDT's allegations concerning AMME's knowledge and use of Castle's prices do not provide any evidence of improper, unfair advantage accruing from the alleged conflict of interest.

The Army states that the propriety of AMME's participation in this procurement was considered and approved by its ethics officer prior to the Army's award of the contract. On the basis of our review of the record, we do not find any evidence that the actions of the owner/director of AMME

resulted in prejudice for or on behalf of AMME, or suggest any impropriety in the conduct of the procurement and the award of the contract to AMME. Thus we have no basis to conclude that the Army's determination was unreasonable.

The protester also challenges, in general, the agency's determination of the awardee's responsibility and contends that the Army did not apply definitive responsibility criteria set forth in the solicitation. MDT maintains that since the awardee is a recently formed corporation it could not provide a satisfactory record of performance or two references from firms for which it has satisfactorily completed contracts, as requested by the IFB. In addition, the protester contends that the prior work experience and references of the awardee's employees cannot satisfy these requirements. MDT also objects that the Army determined AMME to be responsible without conducting a preaward survey on the firm.

The Army determined that MDT was a responsible concern, and, absent a showing of possible fraud or bad faith or misapplication of definitive responsibility criteria by the agency, we will not review an affirmative determination of responsibility since it is based in large part on subjective business judgments of the contracting officer. 4 C.F.R. § 21.3(m)(5) (1989); Pan Am World Servs., Inc., B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283.

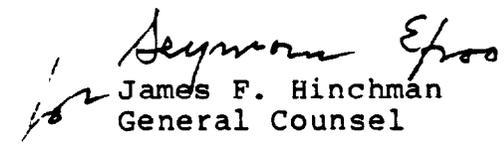
MDT argues that an IFB requirement that the bidder provide evidence of its employees' capability to maintain Castle sterilizers constitutes a definitive responsibility criterion. However, definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement to measure the bidder's ability to perform the contract. Management Eng'g, Inc.; KLD Assocs., Inc., B-233085; B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156. Since the requirement in question does not constitute a standard that can be applied objectively rather than subjectively, we will not review the agency's affirmative responsibility determination. Id.

MDT also alleges bias on the part of the agency based on the general conduct of the procurement, and in particular on the fact that the agency permitted MDT to certify to its small business status and complete the standard representations and certifications under section "K" after bid opening. Since procurement officials are presumed to act in good faith, in order to show otherwise, a protester must submit convincing evidence that they had a specific and malicious

intent to harm the protester. Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222. None of the agency actions pointed to by MDT provides a basis to establish bias. In particular, we have consistently held that failure to certify size status does not require rejection of a bid since that information is not required to determine whether the bid meets the IFB's material requirements, and may be certified after bid opening. See, e.g., Willis B. Simmons, Inc., & Assocs. et al., B-226477, Mar. 17, 1987, 87-1 CPD ¶ 299. Similarly, we have held that the certifications and representations in section "K" have no bearing on the material aspects of a bid, and a bidder's failure to complete section "K" may be waived and corrected after bid opening as a minor bidding irregularity. See Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273. Consequently, we find that the agency's actions were neither improper nor indicative of any bias.

It was also not improper, as MDT alleges, for the agency to elect not to conduct a preaward survey since the record indicates that it had adequate information to support its responsibility determination. See Automated Datatron Inc., 68 Comp. Gen. 89 (1988), 88-2 CPD ¶ 481.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel