



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Space Services Incorporated of America;
Space Vector Corporation

File: B-237986; B-237986.2

Date: April 16, 1990

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William S. Zanca, Esq., Captain Fredrick P. Origel, and Major Stephen H. Kessinger, Strategic Defense Initiative Organization, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency did not act unreasonably in determining not to exclude a firm, which is performing systems engineering and technical assistance work for another agency, due to an organizational conflict of interest or because of an unfair competitive advantage, where the firm was not in a position to favor its own capabilities and did not participate in the development of the statement of work.

2. Contracting agency satisfied the requirement for meaningful discussions where it led an offeror into the areas of its technically acceptable proposal which the agency considered as reflecting a less than desirable technical approach.

3. Protest that agency failed to properly conduct cost evaluation is denied, where protester is not prejudiced by the evaluation.

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DECISION

Space Services Incorporated of America and Space Vector Corporation protest the award of a contract to Space Data Corporation under request for proposals (RFP) No. SDIO-89-R-0006, issued by the Strategic Defense Initiative Organization (SDIO), Department of Defense, for flight test services. Space Services contends that SDIO did not conduct a proper cost evaluation of proposals and failed to conduct meaningful discussions. Space Services and Space Vector both contend that Space Data should not be eligible for award because a subcontractor to Space Data has an organizational conflict of interest and provided Space Data with an unfair competitive advantage.

We deny the protests.

The SDIO issued this RFP on August 3, 1989, to obtain flight test services under a cost-plus-award-fee contract in support of the Kinetic Functional Integration Testing (KFIT) program for the Sensor and Interceptor Technology Directorate of the SDIO. In providing the flight test services, the contractor is required to provide launch vehicles and associated launch services for 6 suborbital experiments, with options to provide launch vehicles and associated services for an additional 14 experiments. The contractor is responsible for overall program management of the flight test services; planning the flight experiments to meet SDIO requirements; flight test systems engineering and integration; design planning and development and integration of flight test items; and planning flight test operations for the experiments.

The RFP listed technical, management, and cost as major evaluation areas. The technical and management areas were of equal importance and more important than the cost area. The RFP advised that offerors were required to demonstrate an understanding of the technical requirements, engineering skills and experience and an overall management philosophy and team structure capable of meeting the flight test requirements in an innovative, cost effective way. The RFP required a technical proposal addressing the statement of work and eight sample flight experiments and a pallet exercise. These experiments were sample launches representative of the flights that would be required in the KFIT program. The offerors' responses to the sample experiments and technical proposals were to be used to test offerors' understanding of flight test scenarios and their technical and management skills. The RFP under cost advised that the cost evaluation would be based on an assessment of

each offeror's proposed cost to include realism, reasonableness, and completeness.

A pre-proposal conference was conducted and questions and answers were provided to prospective offerors prior to receipt of proposals. SDIO also established a bidder's library to provide more information on the experiments and mission requirements. Offerors were cautioned not to "regurgitate" the information in the library but to use their own analytical capabilities to provide their best solutions.

Space Data, Space Services, and Space Vector submitted proposals by the September 29 closing date. A source selection evaluation committee (SSEC) determined all three proposals to be within the competitive range. Discussions were held with each offeror and SDIO requested best and final offers (BAFO) by November 3. After evaluating BAFOs, the SSEC selected Space Data for award on November 13, since its technical and management proposals were rated significantly superior to those of the other offerors. Space Data's evaluated cost was also found to be lower than that of the other offerors.

The technical and management areas were rated under a color code system with blue denoting an exceptional rating, green an acceptable rating, yellow a marginal rating, and red an unacceptable rating. The SSEC rated Space Data blue (exceptional) overall in the technical area while Space Services received an overall rating of green, and Space Vector was rated between green and yellow. For the management area, the SSEC gave Space Data an overall rating that was mostly green but part blue, while Space Services and Space Vector received an overall rating of between green and yellow.

The most noteworthy strengths in Space Data's proposal were its thorough analysis of the flight experiments; superior design development and integration of flight test elements; sound hardware designs; and demonstrated extensive experience in similar mission programs. Space Services's most notable weaknesses were that the proposed launch vehicle, pallet and guidance systems restricted the objectives and flexibility of the possible flight experiments; inadequate target tracking and acquisition plans; and a lack of overall experience in integrating a diverse range of launch vehicles. Space Vector's most notable weaknesses were its failure to address certain critical technical issues; its cursory responses to the RFP

planning considerations; risky pallet and target module designs; and limited experience in certain key areas.^{1/}

Offerors were notified of their non-selection on November 29 and these protests followed. On January 11, 1990, SDIO awarded Space Data the contract in the face of the protest due to urgent and compelling circumstances.

Space Services and Space Vector first contend that Teledyne Brown Engineering (TBE), a subcontractor to Space Data, provided Space Data with a competitive advantage and that Space Data should have been precluded from competing under the RFP due to an organizational conflict of interest because TBE is a systems engineering and technical assistance (SETA) contractor for the United States Army Strategic Defense Command (USASDC), which is an executing agency of the SDIO. Space Services and Space Data argue that TBE, as the SETA contractor for USASDC, possessed actual knowledge of SDIO's experiment requirements and of SDIO's preferred flight test equipment and missile ranges. Further, they allege that, even though TBE may not have been directly responsible for drafting the statement of work, the specifications, or the actual experiments, the work TBE performed under its SETA contract provided SDIO with the technical background for these experiments.

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 if a contractor (1) provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, or (2) prepares or assists in preparing a work statement to be used in competitively acquiring a system or provides materials leading directly and without delay to such a work statement, the contractor generally may not be awarded a contract to supply the system. FAR §§ 9.505-1 and 9.505-2 (FAC 84-46). However, where more than one contractor is involved in the preparation of the work statement, the agency need not

^{1/} Space Services has not disputed, and Space Vector has not timely disputed, the relative evaluation of the technical and management proposals. See Space Vector Corp., B-237986.3, Jan. 17, 1990, 90-1 CPD ¶ _____, aff'd, B-237986.4, Feb. 26, 1990, 90-1 CPD ¶ 232.

exclude the contractor from the follow-on contract. See FAR § 9.505-2(b)(1)(iii). These restrictions are intended to avoid putting a contractor in a position to favor its own capabilities. ETEK, Inc., 68 Comp. Gen. 537 (1989), 89-2 CPD ¶ 29.

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. Id. 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.

SDIO asserts that TBE has no organizational conflict of interest because of the USASDC contract, since TBE did not develop specifications or experiments which were incorporated in this RFP. SDIO also argues that FAR § 9.505-1 does not preclude TBE from competing for the contract because the government is acquiring launch vehicles and services and not a major system for which TBE has provided a majority of the engineering and technical direction. Moreover, SDIO contends that even if, for the sake of argument, TBE's SETA contract did provide information which led to the development of some of these experiments TBE was not required to be excluded because other contractors were involved in preparing the work statement.

The responsibility for determining whether an actual or apparent conflict of interest will arise if a firm is awarded a particular contract, and to what extent the firm should be excluded from the competition, rests with the contracting agency. We will not overturn the agency's determination in this regard except where it is shown to be unreasonable. D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419. Here, we find that SDIO did not unreasonably determine that Space Data was eligible to compete for this contract, despite TBE's SETA contracts with the USASDC.

The record indicates that TBE provides systems engineering and technical assistance to the USASDC Ground Based Interceptor Experiment office under its SETA contract. SDIO indicates (and nothing in the record contradicts) that the support provided by TBE did not touch on any relevant technical, programmatic or other information that was directly connected with the statement of work or the eight sample experiments and the pallet exercise. Although TBE

provided assistance to the USASDC's Army Lightweight Exoatmospheric Projectile (LEAP) program, that contract was terminated on September 30, 1988. From our review of the pertinent task orders performed by TBE under its SETA contract, only a minimal number actually touch upon the flight test services being procured under the RFP. Moreover, of the 20 potential flight experiments to be launched under the contract, the USASDC was responsible for providing only 10 of the experimental payloads, and TBE performed SETA work in connection with only 1 of these experiments, the Army LEAP program. While the protesters speculate that TBE may have possessed certain inside information about the actual experiments which provided it an unfair advantage, the record does not substantiate this allegation. Moreover, SDIO did establish a bidders' library to make available information pertinent to the work and the experiments.

We do not find that TBE performed services that led directly, predictably, and without delay to the RFP's statement of work, nor do we find it reasonable to conclude that the flight test services being procured here reflect a major system for which TBE had provided the technical engineering and assistance. In this regard, the RFP is not for acquisition of the experiments themselves which are alleged to have been designed by TBE, but rather for the acquisition of launch vehicles and associated services for the sample flight test experiments.

We also note that the conflict of interest clause contained in TBE's SETA contract with USASDC only excludes TBE from competing on other USASDC contracts.^{2/}

Moreover, we agree with SDIO that TBE is not in a position to favor its own capabilities, since all offerors competed based upon the sample experiments, not the actual experiments, and because these experiments were designed by SDIO with the assistance of contractors other than TBE. While Space Services and Space Vector argue that certain task orders under TBE's contract demonstrate that TBE possessed unique knowledge, we find that whatever knowledge it gained was due solely to TBE's status as a prior

^{2/} This is in contrast to the conflict of interest clause contained in this RFP which precluded the winning contractor from competing on any future competitive procurement sponsored by any contracting activity of the Department of Defense.

contractor for the Army which SDIO was not required to equalize. See ETEK, Inc., 68 Comp. Gen. 537, supra. Accordingly, we do not find that Space Data had an organizational conflict of interest or possessed an unfair competitive advantage due to its subcontract arrangement with TBE.

Space Services next argues that SDIO failed to conduct meaningful discussions regarding the 17.2 inch diameter pallet which it proposed as a standardized pallet to accomplish the RFP launch requirements.^{3/} Space Services alleges its proposed pallet size was based upon SDIO's answer to a question at the pre-proposal conference that advised offerors to standardize on a pallet, based upon their own engineering judgment, which could range anywhere from 43 centimeters (16.9 inches) up to 104 centimeters (40.9 inches). Space Services alleges that SDIO advised, at the debriefing, that a primary deficiency in its proposal was Space Services's 17.2-inch diameter pallet, which SDIO was concerned could not accommodate a 33-inch diameter liquid rocket motor target for the ultraviolet seeker experiment.^{4/} Space Services argues that the perceived deficiency in its pallet design should have been pointed out during discussions because it had no reason to view its pallet design as a deficiency without direction from SDIO.

The requirement for meaningful discussions includes advising offerors of deficiencies in their proposals and offering them the opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Elec. Int'l, Inc., B-232295.2, Dec. 21, 1988, 88-2 CPD ¶ 610. Agencies are not, however, obligated to afford offerors all encompassing discussions and where a proposal is considered to be acceptable, and in the competitive range, an agency is not obligated to discuss every aspect of

^{3/} The pallet is a device that is part of the launch vehicle (missile), is encased in hardware integrated between the rocket booster and the payload shroud, and contains certain guidance electronics, communications telemetry, inertial measurement unit, batteries, attitude control and coolant.

^{4/} The record shows SDIO's concerns about Space Services's relatively small diameter pallet applied to more than this one experiment, but extended to Space Services's entire technical approach, which SDIO considered less desirable in part because this pallet provided less flexibility in potential experiments.

the proposal that receives less than the maximum possible rating. Agencies are only required to reasonably lead offerors into those areas of their proposals needing amplification. Syscon Servs., Inc., 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258.

SDIO reports that during oral discussions it did express concern to Space Services about the 17.2-inch diameter pallet. The record shows this question and Space Services's response were as follows:

"Government: The diameters of the payload^{5/} are wider than 17 inches. How can we [the government] go vertically with requirements of 33 inches and 800 pounds?

"Offeror: Larger diameters have been flown on the Black Brant. There are two options; use pallets that can handle the Aries boosters or use the Starfire 4. This option is not priced because it is in the process of being qualified."

The SSEC determined that Space Services's proposed launch vehicle (Black Brant), pallet and guidance system restricted flight experiment objectives^{6/} and in particular that the pallet diameter severely limited growth potential for future experiments.^{7/} SDIO also notes that although the 17.2-inch diameter pallet was a valid engineering approach, it was not considered most advantageous because the smaller diameter

^{5/} The payload, which is to be integrated with the pallet, is in the nose (shroud) of the missile and contains the target that is the subject of the experiment.

^{6/} Although Space Services argues that SDIO never stated requirements for a 33-inch diameter payload and that its choice of the Black Brant was based upon the fact that it was the only rocket motor described in depth in the bidder's library, briefing material was provided to Space Services showing payloads of between 24 and 26 inches and the "Bidders' Library" contained a document stating a preference for a 30-inch diameter target. Further, as previously noted, offerors were cautioned not to regurgitate the information in the library but to use their own analytical capabilities.

^{7/} The RFP stated that "the contractor shall incorporate in his pallet design the ability to incorporate evolutionary improvements in flight support technology."

of the pallet had caused several engineering problems in past experiments.

It is true that Space Services proposed a limited alternate solution to the pallet problem in its BAFO; that is, it proposed a Starfire II rocket booster which could accommodate a larger target. However, this alternate was only proposed for the ultraviolet seeker experiment; Space Services elected not to change its pallet design for the other seven experiments or defend its choice of the smaller pallet.

Space Services claims that SDIO's response to question No. 60 at the pre-proposal conference misled it into standardizing on the 17.2-inch pallet since that answer indicated that offerors should attempt to standardize on a pallet between 16.9 inches and 40.9 inches. However, that same answer also stressed that offerors should use their own engineering judgment. Indeed, a primary and oft stated purpose of the experiment and pallet exercise responses was to evaluate the understanding, innovativeness, creativity, and experience of each offeror so that the SDIO could assess the offerors' relative qualifications in satisfying the SDIO's flight test requirements. To accomplish this purpose, the RFP required each offeror to use its own best engineering judgment in selecting such things as appropriate missile range, rocket boosters, pallet design, etc., to perform these flight experiments. Consequently, even assuming question No. 60 was part of the RFP,^{8/} we do not find Space Services could therefore propose pallets without completely considering SDIO's mission requirements.

Under the circumstances, we think SDIO's question (quoted above) was sufficient to have alerted Space Services to SDIO's concerns with its proposed pallet design. See Development Alternatives, Inc., B-235663, Sept. 29, 1989, 89-2 CPD ¶ 296; Syscon Servs. Inc., 68 Comp. Gen. 698, supra. In this regard, the concern expressed in this question does not appear to be limited to one experiment, but rather is related to the potential operational flexibility limitations of the smaller diameter pallet for all contract work. Moreover, we find that Space Services's answer to the question and its decision to propose the Starfire II booster as an alternate solution demonstrates that it was aware that there was concern with its proposed pallet design. Therefore, we find SDIO conducted

^{8/} The RFP was not amended to incorporate the pre-proposal responses.

meaningful discussions on this point.^{9/} Furthermore, SDIO was not required after BAFOs to reopen discussions to resolve deficiencies that Space Services created by not adequately justifying its original pallet design. See Swiftships, Inc., B-235858, Oct. 13, 1989, 89-2 CPD ¶ 349.

Finally, Space Services argues that SDIO failed to conduct a proper cost realism evaluation of proposals because SDIO did not normalize^{10/} the cost of certain government furnished (GFE) rocket boosters proposed by Space Data. Space Services argues that it also would have proposed GFE boosters if it had known that no cost would be assigned for the equipment.^{11/}

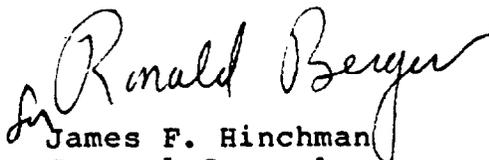
^{9/} Space Services in its comments on the agency report and the informal conference argues for the first time that SDIO also failed to point out the deficiencies in its proposal regarding its choice of Black Brant rocket boosters and its selection of White Sands Missile Range for conducting all launch experiments. However, we find that these new and independent grounds of protest are clearly untimely, since they were filed more than 10 days after the January 5, 1990, debriefing, when Space Services admits it was apprised of these deficiencies. See Space Vector Corp., B-237986.3, *supra*. In any case, our review shows Space Services was also apprised of SDIO's concerns in these areas. For example, during discussions, Space Services was asked: (1) You have proposed White Sands for all flights, what analysis did you perform to come to this conclusion?; (2) The Ultraseek experiment will not fit on that range. Did you look at Kwajalein?; and (3) Did you consider eastern and western ranges.

^{10/} Normalization is a technique sometimes used within the cost analysis process in an attempt to arrive at a greater degree of cost realism. It involves the measurement of at least two offerors against the same cost standard or baseline in circumstances where there is no logical basis for differences in approach or in situations where insufficient information is provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. See Dynalectron Corp., et al., 54 Comp. Gen. 562, at 574 (1975), 75-1 CPD ¶ 17.

^{11/} Space Services also contends that Space Data's past performance was not considered in assessing the realism of Space Data's proposed cost. However, the record demonstrates that Space Data's experience was reasonably considered in the proposal evaluation.

Although we do not agree that the costs of the GFE rocket booster should necessarily have been normalized, we need not consider this contention, since there is no evidence that Space Data was prejudiced by SDIO's decision not to normalize the GFE booster costs. By Space Services's own figures, if the GFE booster costs were normalized, Space Data's cost still remained low. While Space Services argues that it was prejudiced because it would have considered proposing GFE boosters, we are not persuaded that its decision to utilize its own boosters was anything other than the exercise of its own business judgment and proposal preparation strategy, since it had the opportunity to propose GFE boosters but it elected not to do so.^{12/} See Hughes Aircraft Co., B-222152, June 19, 1986, 86-1 CPD ¶ 564. In any event, the RFP placed more weight on the technical and management evaluation factors and in view of the significantly superior technical evaluation of Space Data's proposal and SDIO's determination that Space Data's costs were reasonable, we do not find that Space Services's proposal would have fared any better chance at receiving the award even if it had received a lower evaluated cost.

The protests are denied.


James F. Hinchman
General Counsel

^{12/} The Space Services proposal states that "[o]ur conclusion with regard to the possible use of surplus booster motors is that they would not meet our overall objective of providing the SDIO with maximum mission success capability and minimum risk to the SDIO investment in interceptor and sensor technology."