

**Matter of:** EcoTek LSI  
**File:** B-254506.2  
**Date:** January 11, 1994

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Ronald E. Cone, Department of Energy, for the agency.  
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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#### DIGEST

1. Protest that firms selected for award under solicitation for laboratory services contracts have organizational conflicts of interest which preclude award--because they had also been proposed as subcontractors to the facility environmental restoration management contractor (ERMC) and in that role could determine the extent of testing to be performed under the laboratory services contracts--is dismissed as premature where protest against award of ERMC contract has been sustained and agency is reevaluating proposals.
2. Protest that discussions were inadequate is denied where agency's questions to protester during discussions were reasonably calculated to lead protester into significant areas of weakness in its proposal which were susceptible to correction.

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#### DECISION

EcoTek LSI protests the selection of the joint venture of Thermal Analytical Division of Thermo Electron Corporation and Roy F. Weston, Inc. (TMA/Weston) for award and the award of a contract to International Technology Corporation (ITC) under request for proposals (RFP) No. W239000, issued for analytical laboratory services at the Department of Energy's (DOE) Hanford Site in Washington. The solicitation was issued by the Westinghouse Hanford Company (WHC) as the

management and operations (M&O) contractor at Hanford. EcoTek contends that an organizational conflict of interest precludes award to TMA/Weston and ITC. In addition, EcoTek alleges that WHC failed to afford it meaningful discussions concerning perceived weaknesses in its proposal.

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

As an M&O contractor for the Hanford Site, WHC has responsibility for the management of on-going environmental restoration and waste management activities, and for ensuring that these activities are conducted in accordance with environmental regulatory requirements. In this regard, DOE, the Environmental Protection Agency (EPA), and the Washington State Department of Ecology have negotiated an agreement--the Hanford Federal Facilities Agreement and Consent Order, or "Tri-Party Agreement"--setting forth the procedures and activities required for the Hanford Site to comply with the applicable environmental statutes and regulations. The Tri-Party Agreement (TPA) requires DOE to obtain analytical laboratory services to meet the sampling analysis needs for the on-going environmental restoration effort. On August 5, 1991, at the direction of DOE, WHC issued RFP No. W239000 for the analytical laboratory services necessary to meet the requirements of the TPA.

As amended, the solicitation contemplated the award of three fixed-price contracts, including a primary contract for approximately 80 percent of the estimated sample requirements and two secondary contracts for approximately 10 percent each of the estimated sample requirements over an 8-year performance period (with an option for 5 additional years). The RFP provided for evaluation of proposals based on a combined management/technical/local facility factor and price. The management/technical/local facility factor encompassed five evaluation criteria--(1) quality, which was stated to be the most important; (2) interim facility compliance; (3) corporate resources and commitment; (4) corporate experience; and (5) personnel resources and organization--which were stated to be relatively equal in importance. The solicitation assigned a 60-percent evaluation weight to the management/technical/local facility factor, and a 40 percent weight to price.

Seven offerors submitted proposals in response to the solicitation; six--EcoTek, ITC, TMA/Weston, Lockheed Analytical Services and two firms--were included in the competitive range and after discussions were requested to submit best and final offers (BAFO). Based upon its evaluation of BAFOs, WHC rated ITC's proposal highest for the primary award. WHC found that ITC's BAFO contained a detailed discussion of its proposed approach, indicated a strong combination of experience, resources, personnel,

capacity and corporate commitment, and offered the lowest price. WHC therefore awarded the primary contract to ITC. WHC then evaluated the remaining offers for award of the two secondary contracts. WHC rated Lockheed's and TMA/Weston's proposals highest and awarded both firms contracts.

#### ORGANIZATIONAL CONFLICT OF INTEREST

EcoTek argues that the award to ITC and the selection of TMA/Weston were precluded by organizational conflicts of interest as a result of those firms' involvement in DOE's procurement for an Environmental Restoration Management Contractor (ERMC) at the Hanford Site.

#### Background

The ERMC solicitation, issued in April 1992, contemplated award of a contract to provide technical and management staff to plan, procure, manage, and integrate the activities required--including characterization, remediation, decontamination, and decommissioning of waste sites and facilities--to accomplish the environmental remediation of the Hanford Site in accordance with the environmental laws and regulations and the TPA. Although the ERMC specifications provided for the ERMC to furnish management and support services and possess the in-house capability to conduct the majority of remedial investigations and feasibility studies necessary to define and quantify the nature and extent of contamination, the ERMC was not itself expected to perform the actual remediation work. Rather, the specifications provided for the ERMC to subcontract remedial design, decommissioning, decontamination, construction, transportation, and other remedial and corrective services.

On January 19, 1993, DOE awarded the ERMC contract to Bechtel Hanford, Inc. Bechtel proposed to award a subcontract to ITC for remedial investigation and feasibility study work and for use of ITC's laboratories to furnish supplementary analytical capacity. Bechtel also proposed to award a subcontract to TMA for health physics/industrial hygiene work and for use of TMA's laboratories to furnish supplementary analytical capacity. Bechtel recognized in its proposal that:

"[T]he laboratory/analytical services currently under contract to WHC will be assigned to the ERMC to cover the projected base program sample load. [Bechtel] commits to use these assigned services preferentially, with the [ITC] and TMA capabilities as supplementary capacity as necessary to meet [Environmental Restoration] Program and regulatory requirements."

Subsequent to the award to Bechtel, two of the unsuccessful offerors filed bid protests with our Office questioning the technical and cost evaluation. DOE therefore did not authorize Bechtel to proceed with performance and the proposed awards of subcontracts to ITC and TMA were not made (and thus not presented to the contracting officer for the required authorization). By decision dated October 12, 1993, our Office sustained one of the protests against the award to Bechtel. We recommended that DOE reevaluate proposals to determine the most probable cost to the government; if this was not possible with the information available to the agency, we recommended that the agency revise the solicitation if necessary, conduct discussions, and request revised proposals. DOE has advised us that it is currently in the process of determining whether it will be necessary to reopen negotiations or whether it can determine the most probable cost simply by reevaluating proposals.

#### Analysis

WHC's laboratory services solicitation included clause I-1, "Organizational Conflicts of Interest--Special Clause," which provides that:

"It is WHC policy to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage. The offeror shall provide to WHC . . . a statement which describes in a concise manner all relevant facts relating to the work to be performed hereunder where the offeror has a possible organizational conflict of interest with respect to. . . .

"a. Being able to render impartial technically sound and objective assistance or advice, or

"b. Being given an unfair competitive advantage.

"After review of the particular circumstances by WHC the issue will be referred to [DOE]. The sole responsibility for determination of a conflict of interest or the absence of such resides with the cognizant [DOE] Contracting Officer." [Emphasis in original.]

EcoTek argues that the ERMC contractor's (Bechtel) proposed award of subcontracts to ITC (to perform remedial investigation/feasibility study work), and to TMA (to perform health physics work), will create an organizational conflict of interest since those roles would permit the subcontractors to determine the location, number and type of samples to be analyzed by their own companies under the WHC laboratory contract.

EcoTek's allegation of organizational conflicts of interest is premature. EcoTek at most is alleging potential future conflicts which could occur only if ITC and TMA are awarded subcontracts under the ERMC contract to perform remedial investigation/feasibility study work or health physics work. Since, as a result of our decision sustaining the protest against the award to Bechtel, we have recommended reevaluation and, if necessary, the reopening of negotiations, there simply is no basis at this juncture for concluding that there is any actual or potential conflict of interest. In any event, even if Bechtel ultimately retains the ERMC contract, before it could award a subcontract to ITC or TMA it would be required to satisfy DOE that no organizational conflict of interest would thereby be created. Or, as DOE suggests, DOE could choose not to assign the analytical services contracts to the ERMC, or could instruct the ERMC to manage the analytical laboratory services requirements directly and not involve ITC (or TMA) in the process. Thus, EcoTek's argument is premature and, in any case, appears to be without merit.<sup>1</sup>

#### MEANINGFUL DISCUSSIONS

EcoTek contends that WHC failed to advise it during discussions of the perceived weaknesses in its proposal and that, as a result, the discussions were not meaningful; EcoTek claims it suffered competitive prejudice as a result. Based on our review of the record, there is no basis for

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<sup>1</sup>We previously have recognized the validity of a contracting agency's determination that an organizational conflict of interest would be created where a contractor's performance of a government contract could create additional commercial work for it, see Radiation Safety Servs., Inc., B-237138, Jan. 16, 1990, 90-1 CPD ¶ 56. DOE reports, however, that because of the required approval process, the ERMC subcontractors will not be in a position to determine the extent of the sampling program they will perform in their laboratories. In particular, DOE notes that under the TPA, sample analysis plans to support environmental restoration of the Hanford Site must be reviewed and approved not only by DOE, but also by EPA and the Washington State Department of Ecology.

concluding that there was any inadequacy in the discussions process. While EcoTek may not have been advised of all of the perceived weaknesses in its proposal, it was advised of the significant weaknesses which were susceptible to correction and which reasonably led to WHC's decision not to select EcoTek for award.

WHC concluded that EcoTek's proposal was contingent on formation of a complex organizational structure, involving the use of multiple subcontractors, all of which were "absolutely essential" if EcoTek was to meet the capacity and capability requirements of the RFP; EcoTek's proposed organization offered very little excess capacity or redundant capability, and the elimination of any single subcontractor would have rendered the proposal unacceptable. WHC determined that EcoTek's complex organization with multiple subcontractors generally posed an increased risk with respect to effective management, control and communications and, in particular, raised substantial concerns with respect to quality assurance. WHC brought to EcoTek's attention its concerns in this regard when it advised the protester by letter dated April 28 as follows:

"From the proposal submitted it appears that your proposal is contingent upon the future formation of a corporation composed of multiple independent entities after the projected award date of orders under this RFP. It also appears that no entity alone, including, but not limited to, EcoTek itself has the requisite financial or technical capability to meet all the responsibility and/or responsiveness requirements of the RFP. . . . Consequently, please provide information clarifying the responsibility of the yet-to-be-formed corporation to meet all the requirements of the RFP in order to continue to be considered by WHC to be a responsible offeror.

Clarify the organizational and management structure [of] the corporation to be formed. . . .

"[Provide a] description of the management plan/oversight of all subcontracts. . . . The description should include plans for movement and control of samples and documentation between facilities."

Although EcoTek responded by furnishing additional detail concerning its management approach, its response did not

alleviate WHC's concerns with respect to the contingent nature or complexity of its proposed organization.

Under the evaluation criterion for corporate resources and commitment, the solicitation required offerors to describe (and provided for the evaluation of) "specific financing and funding plans" and "sources of necessary capital and current credit ratings." WHC advised EcoTek in its letter of April 28 of its concern that the proposed joint venture was still unformed, with the organization and interests of each member uncertain, and the financial arrangements not yet finalized. Although EcoTek responded by generally explaining its proposed sources of financing, WHC found that EcoTek's answer, while permitting a determination of financial responsibility, nevertheless rendered its proposal relatively risky since its proposed financing was substantially less certain than that offered by other offerors. Specifically, WHC noted that EcoTek's financial ability to perform was dependent upon post-award review and approval by commercial financial institutions and successful bond issues by the Native American tribes participating in EcoTek's proposal. In our view, WHC's questions concerning the proposed organization and financing were reasonably calculated to lead EcoTek into the areas requiring amplification, and therefore afforded it meaningful discussions in this regard. See SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.

While the agency did not advise EcoTek of its determination that the firm's corporate experience was lacking compared to ITC's and TMA/Weston's, it was not required to do so under the circumstances--corporate experience is a matter of historical fact that generally is not subject to change such that an offeror's competitive standing will be improved.

Computer One, Inc., B-249352.2, Feb. 23, 1993, 93-1 CPD ¶ 252. We note, moreover, that EcoTek has not furnished any additional information during the protest process concerning its experience which would warrant a higher evaluation in this area.<sup>2</sup>

The protest is dismissed in part and denied in part.

Robert P. Murphy  
Acting General Counsel

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<sup>2</sup>In its comments filed on November 3, 1993, EcoTek argues that given WHC's evaluation of the weaknesses in its proposal, it was improper to include the proposal in the competitive range. Under our Bid Protest Regulations, however, protests generally must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1993). Since EcoTek was advised of the perceived weaknesses in its proposal at its debriefing on August 19, 1993, approximately 2 1/2 months prior to raising these arguments, its protest in this regard is untimely.