

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-185843

DATE: July 1, 1976

MATTER OF: Columbia Research Corporation

61066

98359

DIGEST:

1. Where offeror's proposed project manager and principal investigator would be in position of evaluating adequacy and applicability of reliability standard which he originated under prior contract, agency's rejection of such proposal as not within the competitive range pursuant to unweighted evaluation criterion dealing with conflicts of interest is sustained. Since major proposal alteration would have been required to eliminate conflict, it was not unreasonable to reject proposal without negotiation.
2. Contractor's cost estimate should not be considered controlling in selecting contractor for cost-reimbursement type contract.
3. Even if protester's allegation regarding change in agency's requirements during negotiations with other offeror is correct, rejection of protester's proposal without negotiation is not objectionable since rejected offer was outside competitive range for reasons which remain basic to procurement.
4. Although awardee performed literature search in support of another firm's prior contract to develop reliability standard and such standard was to be evaluated under awardee's subsequent contract with agency, no objectionable conflict of interest is perceived in award of subsequent contract. In addition, conflict of interest is not apparent from fact that awardee's board of directors includes individuals involved in regulated industry generally affected by contract and fact that awardee has had prior dealings with firms in such industry.
5. Allegation, filed after contract award, that consideration should have been given to issuance of requirement as small business set-aside is untimely filed and therefore dismissed.

This is a protest filed by Columbia Research Corporation (Columbia) under request for proposals No. RS-76-12, issued by the U.S. Nuclear Regulatory Commission (Commission).

The procurement stems from the Commission's review of an application for a permit to construct the Clinch River Breeder Reactor, a Demonstration Liquid Metal Fast Breeder Reactor. The applicant has submitted a Preliminary Safety Analysis Report which contains technical information related to the design and construction of the facility and which serves as a primary source of information in assessing the radiological health and safety and environmental aspects of the proposed facility. The instant negotiated procurement was initiated to satisfy the Commission's need for technical assistance by an independent contractor in reviewing the Clinch River applicant's Reliability Program.

The procurement was negotiated and contemplated award of a cost-plus-fixed-fee contract. Proposals were to be evaluated by numerical and narrative scoring techniques against certain evaluation factors listed in their relative order of importance. On the basis of the numerical scoring of the weighted evaluation factors, the evaluation panel determined that three firms, including the protester, could be considered to be within the competitive range. However, the solicitation also contained certain unweighted additional criteria which were to be considered in the selection process, including the contractual and organizational relationships which might give rise to an apparent or actual conflict of interest. (The Commission believes it is not possible to weight this factor to properly account for the infinite range of conflict of interest situations which may exist.) The panel ultimately decided to eliminate Columbia from the competitive range because of an organizational conflict of interest. It determined that Columbia would be placed in a conflicting role of evaluating a reliability standard included in the Clinch River Preliminary Safety Analysis Report which Columbia's principal investigator had developed. It was concluded that such a situation could affect the firm's ability to render independent, unbiased judgment and advice to the Commission. The panel believed that this conflicting role could not be eliminated without a major revision of Columbia's proposal.

Essentially, the protester believes that the solicitation's evaluation criterion concerning conflicts of interest may have been misapplied in excluding the protester and that this criterion was erroneously applied in selecting NUS Corporation (NUS) for award. Columbia alleges that it was improperly denied the opportunity to negotiate and to submit a best and final offer, as

contemplated in Federal Procurement Regulations (FPR) § 1-3.805-1. The protester believes that negotiations would have been beneficial to the Government and that an award to Columbia would have resulted in a \$14,974 savings, the difference between its offer and the award price.

Regarding the rejection of its proposal, Columbia argues that there is no conflict of interest when an individual who has participated in the preparation of a Government standard assists the Government in judging the degree to which an applicant had conformed to that standard. The firm contends that such individual is highly qualified to ascertain the degree of compliance of third parties by virtue of the individual's exposure. However, the Commission was unwilling to permit the originator of a reliability standard to evaluate for the Commission the adequacy and applicability (among other aspects) of that standard. In this connection, the solicitation's statement of work provided in part:

"TASK 2. * * *The contractor shall perform independent reliability analyses for these critical areas, taking into account the scope of this contract. The analyses will be based on, but not limited to, the data in the [reliability standard, among other documents]."

Contrary to the protester's understanding, the conflict as explained by the Commission did not concern the originator's evaluation of compliance with the proposed reliability standard. Rather, the Commission reports that although this reliability standard has been adopted by the Energy Research and Development Administration, it has not yet been accepted by the Commission and its acceptability for purposes of compliance with its licensing regulations must still be determined through this review process. In our opinion, it was not unreasonable to perceive a conflict in Columbia's proposal since analysis of the reliability standard would have been performed by the originator of that standard.

In addition, we find no basis for objecting to the Commission's conclusion that the conflict could not be cured without replacing the individual involved and to its unwillingness to permit the major proposal alteration required to correct the situation. Since this individual was proposed as project manager and as principal investigator, it was not unreasonable for the Commission to reach this conclusion.

As to the significance attributed by Columbia to its lower estimated cost of contract performance, generally that fact should not be considered controlling in selecting the contractor for a cost-reimbursement type contract. FPR § 1-3.805.2. In this connection,

we also note that in rebuttal to the agency report, Columbia questioned whether the Government's specification was revised during this procurement because of the cost increase negotiated with NUS. Although the record does not indicate the basis for the negotiated increase in cost, we would not in any event object to the rejection of a proposal without negotiation even if requirements were changed where, as here, the rejected offeror is considered to be outside the competitive range for reasons which remain basic to the procurement. Iroquois Research Institute, 55 Comp. Gen. ___ (1976), 76-1 CPD 123. For the reasons stated, it does not appear that negotiations with Columbia would have served any useful purpose.

Columbia also argues that the contract should not have been awarded to NUS because of a conflict of interest with that firm. The contractor, it is alleged, has obtained substantial revenues through its participation with applicants in the preparation of reliability or safety programs for submission to the Commission. It is further argued that NUS has had long standing identification and business dealings with the utility industry, of which the license applicant is a member. Columbia also questions the objectivity of NUS since the contractor's board of directors includes two retired chairmen of utility companies and the Executive Vice President of a construction firm with a substantial interest in the construction of nuclear power plants.

The Commission recognized that NUS has had numerous relationships with various organizations in the nuclear industry. It reports that NUS was under contract for less than \$10,000 with General Electric Company to conduct a general literature search pertaining to reliability failure rate data to be used by General Electric in support of its role as contractor to the applicant for the Clinch River Plant. During negotiations the firm advised the Commission that it would not enter into any additional contracts with General Electric, or with any other organizations, for work on the Clinch River Plant which would result in a conflict of interest. The Commission reports that it examined and evaluated the contractual relationship between NUS and General Electric. It considers its contractual relationship with General Electric as being remote from the substance of the work to be performed under the proposed contract and has concluded that this appearance of conflict is insignificant and too theoretical to warrant exclusion from the competitive range. It is aware of no current relationship, contractual or organizational, which would place NUS in a conflicting role and might result in biased judgment or advice under the instant contract or give it an unfair competitive advantage.

We find the Commission's position to be persuasive since it appears that NUS's involvement with General Electric in the Clinch River project was in the nature of a literature search and support function and that NUS was not ultimately responsible for the reliability standard included in the Clinch River Preliminary Safety Analysis Report. As to the firm's prior business dealings with firms included in the utilities and nuclear power industries and the composition of its board of directors, we are not persuaded that such general considerations would call into question the objectivity of the firm's management in the absence of some more direct conflicting connection with the instant contract.

Finally, Columbia has objected to the Commission's alleged failure to determine the availability of the required services from small business concerns. The record, however, shows that a number of small business concerns submitted proposals for this procurement and each, including the protester, was evaluated by the Commission. To the extent that Columbia protests the Commission's refusal to permit a small business set-aside, the protest is dismissed as untimely raised since our Bid Protest Procedures require that any protest based upon an alleged impropriety apparent from the solicitation prior to the closing date for receipt of initial proposals must be filed prior to such date. 4 C.F.R. 20.2(b)(1976). In this case, the protest was filed after Columbia's proposal was rejected and this allegation is therefore dismissed as untimely filed.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States