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Decision

Matter of: B.L. Harbert-Brasfield & Gorrie, JV

File: B-402229

Date: February 16, 2010

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Connie L. Baran, Esq., Laura J. Arnett, Esq., and Henry R. Richmond, Esq., Corps of Engineers, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably determined that awardee did not have an “unequal access to information” organizational conflict of interest is sustained where the record shows that the awardee’s design subcontractor, through the firm that was negotiating to purchase it, and in fact did purchase it shortly after contract award, had access to competitively useful, non-public information.

2. Protest that agency unreasonably determined that awardee did not have a “biased ground rules” organizational conflict of interest is sustained where the record shows that the firm that was in negotiations to purchase, and ultimately did purchase, the awardee’s design subcontractor, provided procurement development services to the agency that put it in a position to affect the competition in favor of the acquired subcontractor.

DECISION

B.L. Harbert-Brasfield & Gorrie, JV (Harbert/Gorrie), of Birmingham, Alabama, protests the award of a contract to Turner Construction Company, Inc. and its design partner, Ellerbe Becket (EB) (Turner/Ellerbe), of New York, New York, under request for proposals (RFP) No. W912HN-07-R-0112, issued by the Corps of Engineers, Department of the Army, for the design and construction of a replacement hospital at Fort Benning, Georgia. Harbert/Gorrie argues that the

agency unreasonably concluded that Turner/Ellerbe did not have or properly mitigated organizational conflicts of interest.

We sustain the protest.

BACKGROUND

The RFP contemplated a design/build contract for the design and construction of an approximately 700,000 square-foot replacement hospital at Fort Benning, Georgia. The project required site work and the design and construction of the facility and the utilities infrastructure. The procurement was conducted in two phases; under Phase I, the agency would evaluate offerors' past performance and technical capabilities. The agency then would select up to three of the most highly-rated offerors to receive the technical requirements package and provide technical and price proposals for evaluation under Phase II. Four firms responded to the Phase I solicitation. Ultimately, the agency selected McCarthy/Hunt, a Joint Venture, Turner/Ellerbe, and Harbert/Gorrie to participate in Phase II.

In June 2007, the agency awarded a contract to HSMM/HOK Martin Hospital Joint Venture (HSMM/HOK JV), which was to assist the agency with the preparation of both the design concept for the hospital and a technical review of the proposals submitted. In May 2008, HSMM/HOK JV's parent company, AECOM Technology Corporation (AECOM), executed a confidentiality agreement with EB in support of entering into negotiations for the possible acquisition of EB.¹ On June 24, 2008, the agency issued the Phase I solicitation for the design/build contract. In July 2008, additional funding allowed the agency to expand the scope of the project from an addition to a replacement hospital.

The Corps held an industry forum in August 2008 to inform the public and potential offerors about the upcoming contract. An AECOM senior vice president in charge of HSMM/HOK JV attended the forum and noticed that EB had expressed an interest in the project; according to the senior vice president, he knew that AECOM had been in confidential negotiations to acquire EB since July 2008. After the forum, the principal asked his AECOM supervisor about the potential for a conflict of interest if AECOM acquired EB, but the supervisor indicated that negotiations with EB "had not been productive." AR, Tab 4A, Declaration of AECOM Senior Vice President at ¶ 6. On this record, this was the first awareness by an AECOM employee that

¹ The record is unclear as to whether the two firms merged or AECOM acquired EB. Compare Agency Report (AR), Memorandum of Law at 9 (noting that "[o]n 26 October 2009, AECOM and EB publicly announced the acquisition of EB by AECOM.") with Intervenor's Comments on the AR at 5 (noting that "as of mid-September 2009, the AECOM/EB merger was still far from a done deal.") (emphasis added). For purposes of the decision here, the distinction is not material.

there might be a conflict of interest, given that AECOM was in negotiations to purchase a firm that had an interest in the procurement on which AECOM was advising the agency. AECOM did not communicate any concern to the agency. Within a few weeks of the forum, the AECOM senior vice president recalled, he learned that AECOM's negotiations with EB had been "suspended," and he consequently "was no longer concerned about any potential conflict of interest and did not raise the issue further with the Agency."² Id. at ¶ 7.

The agency's senior project manager for this procurement states that, in February 2009, he and the AECOM senior vice president exchanged emails regarding potential organizational conflicts of interest with the offerors on the design/build contract. According to the senior project manager, the AECOM senior vice president reported to him that he had "inquired with several offices involved in the HSMM/HOK JV and reported only teaming relationships." AR, Tab 3, Declaration of Senior Project Manager at ¶ 10. The agency made no further inquiry regarding these teaming arrangements.

On or about April 2009, according to the AECOM senior vice president, AECOM concluded its work preparing the Phase II Technical Provisions of the solicitation. He states that, to the best of his knowledge, AECOM was not in negotiations with EB at that time. AR, Tab 4a, Declaration of AECOM Senior Vice President at ¶ 8.

Contracting Officer's Contemporaneous Assessment of the Organizational Conflicts of Interest

Below is the contracting officer's account of when she first learned of AECOM's negotiations to purchase EB, and her response.

-- On 21 July 2009, [the agency program manager] scheduled a meeting with me to discuss information from [the senior vice president] of AECOM. [The AECOM senior vice president] informed me that AECOM was in negotiations with one of the offerors' subcontractors. [He] indicated he was bound by an AECOM non-disclosure agreement and could not disclose the name of the subcontractor. [The senior vice president] indicated that he was the only person on the AECOM/HOK Technical Evaluation Team who was aware of the confidential negotiations with the subcontractor.

-- I had no information to indicate which subcontractor was the subject of [his] potential conflict. I considered the fact that AECOM's

² Inasmuch as the record contains no prior communication between the agency and AECOM concerning the negotiations, it is unclear what the AECOM senior vice president meant by "further" raise.

negotiations were with a potential subcontractor for an offeror, not an offeror itself. I discussed the Source Selection Participation Agreements signed by the four AECOM employees with [him]. None of the Agreements revealed any potential conflict. I determined that [he] had not reviewed the proposals and that his recusal from any involvement with the Technical Review Board would avoid any potential conflict of interest.

-- On 21 July 2009, [he] prepared a Memorandum for Record memorializing the meeting and the events of 20 July 2009.³

Contracting Officer's Statement of Facts at 2-3. This exchange took place nearly 1 year after AECOM was first aware that the firm it was interested in purchasing, or merging with, was the design subcontractor to a firm competing in a design/build acquisition on which AECOM was advising the agency. The contracting officer did not mention that the information she received from the AECOM senior vice president indicated that AECOM's interest in purchasing EB dated from before the industry forum, and that AECOM learned of the possibility of a conflict of interest at the industry forum. The memorandum prepared by the AECOM senior vice president memorializing this meeting was also sent to agency counsel. AR, Tab 4a, Declaration of AECOM Senior Vice President, Exh. A.

The Technical Review Board, with HSMM/HOK JV's participation and support, completed its work in July 2009, and on or about August 24, 2009, the source selection authority reviewed the source selection evaluation board's recommendation and decided to award the contract to Turner based on its proposal, which included the services of EB as a subcontractor. The Corps made the award September 28, 2009. According to Turner, EB's directors approved the merger with AECOM on October 7, 2009, and obtained shareholder approval for the merger on October 22. EB announced the merger on October 23, 2009. This protest followed.

Organizational Conflicts of Interest

Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. Federal Acquisition Regulation (FAR) §§ 9.504(a), 9.505.

The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed.

³ It is not clear from the contracting officer's statement of facts to what events of July 20 she is referring. We assume the intended reference is to the events of July 21.

Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶129 at 12. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise “common sense, good judgment, and sound discretion” in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. We will not overturn the agency’s determination except where it is shown to be unreasonable. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra.

The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups. The first group consists of situations in which a firm⁴ has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR § 9.505-4. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.

The second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements.⁵ Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra at 13.

Relationship Between AECOM and EB

As a preliminary matter, the intervenor’s argument that there were no organizational conflicts of interests rests, in large part, on its assertion that the relationship between AECOM and EB was too attenuated to give rise to an organizational conflict of interest until the acquisition was completed. We disagree. As the cases cited by

⁴ While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. Id. at 13.

⁵ The third and final type of organizational conflict of interest is found in cases where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. The protester does not argue that there was this type of “impaired objectivity” conflict here.

Turner/Ellerbe in support of its argument indicate, the nature and extent of the relationship between the firms are relevant to determining the existence of a conflict of interest.⁶ See L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 14-15; American Mgmt. Sys., Inc., B-285645, Sept. 8, 2000, 2000 CPD ¶ 163 at 5-6; Professional Gunsmithing Inc., B-279048.2, Aug. 24, 1998, 98-2 CPD ¶ 49 at 3-4; International Mgmt. and Commc'ns Corp., B-272456, Oct. 23, 1996, 96-2 CPD ¶ 156 at 4-5. Here, in our view, the record shows that, as early as August 2008, AECOM's and EB's interests effectively were aligned as a result of the merger/acquisition discussions sufficient to present at least a potential organizational conflict of interest. The fact that negotiations between the firms may not have been continuous, or may have stretched over an extended period of time, does not allay the potential conflict. The record shows that the negotiations occurred during the active phases of this procurement. Under these circumstances, we think the relationship between the firms was sufficiently close to give rise to an organizational conflict of interest.

Allegations Arising Out of AECOM's Participation in the Procurement Planning Work

- Unequal Access to Information

The protester asserts that the agency unreasonably concluded that Turner/Ellerbe did not have an unequal access to information organizational conflict of interest or properly mitigated it.

In order to ensure that the agency has acted in a manner consistent with the FAR, contracting officers are required to give meaningful, deliberate consideration to information that may shed light on potential organizational conflicts of interest. Toward that end, agencies must not limit their consideration only to information that may have been furnished by a firm. The Analysis Group, LLC, B-401726, B-401726.2, Nov. 13, 2009, 2009 CPD ¶ 237 at 5. Where a prospective contractor faces a potential unequal access to information organizational conflict of interest, the conflict may be mitigated through the implementation of an effective mitigation plan. Axiom Res. Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 8-9. An agency's reliance on a contractor's self-assessment of whether an organizational conflict of interest exists or a contractor's unilateral efforts to implement a mitigation plan, however, is inconsistent with the FAR. L-3 Servs., Inc., *supra* at 12; Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 8. In other words, an

⁶ Our case law is consistent with the FAR, which defines "organizational conflict of interest" as meaning that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be impaired, or a person has an unfair competitive advantage." FAR § 2.101.

agency may not, in effect, delegate to the contractor itself complete responsibility for identifying potential organizational conflicts of interest, The Analysis Group, LLC, supra, or mitigating them. Johnson Controls World Servs., Inc., supra.

Competitively useful information giving rise to an unequal access to information organizational conflict of interest includes proprietary information beyond offerors' proposals, such as source selection information and insights into a solicitation's requirements. As discussed below, the record in this protest shows that AECOM, as the design contractor, was familiar with the details of the procurement. Access to such information gives rise to an unequal access to information organizational conflict of interest. See L-3 Servs., Inc., supra at 11.

AECOM's assistant general counsel, who advised AECOM in its negotiations to purchase EB, states:

AECOM was required to maintain the confidentiality of all EB proprietary information and limit its disclosure within AECOM (and to agents of AECOM) on a "need to know" basis. Further, the confidentiality agreement expressly prohibited AECOM and EB from disclosing to any third party, without prior written consent, the fact that any confidential information had been exchanged. . . . To maintain the confidentiality of the parties' discussions, the project would be referred to by its code "Project PACE" designation.

Intervenor's Comments on the AR, Exh. 2, Decl. of AECOM Assistant General Counsel at ¶ 5. This is the clearest statement in the record of the precautions taken by AECOM to ensure that information regarding its discussions with EB was not widely disclosed.

AECOM's efforts are deficient in several respects. There is no indication as to how many employees fit the "need to know" category, who they were, or how their need to know was determined. The assistant general counsel estimated that approximately 25 to 30 personnel participated in the initial due diligence review, id. at ¶ 10, and approximately the same number of personnel, and approximately the same personnel, conducted a second review. Id. at ¶ 16. Five AECOM employees, who may not be included in the approximately 25 to 30, attended a briefing hosted by EB management, id. at ¶ 8, and the AECOM directors--an undetermined number of individuals--were also aware of the negotiations. However many AECOM employees fit the definition of "need to know," the record contains no evidence of an effective plan, that was disclosed to and approved by the contracting officer and subject to monitoring by her, to ensure that information regarding AECOM's plans to acquire EB was kept confidential.

With respect to the other key factual element of the analysis here--the AECOM employees' work on the design contract--the record is similarly lacking with regard to evidence of a plan to prevent disclosure to EB of competitively useful information

derived from that work. In this regard, the agency identified 49 employees who worked on the design contract and who thus may have had access to competitively useful information. After the protest was filed, the agency obtained and submitted declarations from 42 of them; each declaration states that the individual did not have any knowledge of the acquisition negotiations and had no reason to, and made no attempt to, improperly influence the procurement. Only one declarant expressly stated that he did not discuss the procurement with anyone at EB. Of the 49 employees identified by the agency, seven did not submit any declarations. In addition, while presumably all of the 49 used e-mail in their work assisting the agency, there is no mention in the declarations (or evidence elsewhere in the record) of specific efforts to limit access by others to such email.⁷

The agency asserts that, to the extent that AECOM had access to competitively useful information through its work on the design contract, that information was fully disclosed to other offerors. Moreover, the agency argues that the open-ended nature of the procurement prevented AECOM from being able to supply EB with competitively useful information. In our view, it was precisely the breadth of the discretion left to the offerors in the Phase II competition that would have made any competitively useful, non-public information known to AECOM valuable to EB. To illustrate: had the competition been for an automobile, with a particular carrying capacity, towing capacity, and performance characteristics, there would likely have been a minimal chance that AECOM would have competitively useful information; the specifications, if not the precise vehicle, would be largely established and communicated to all the offerors on an equal basis through the solicitation. In such a situation, the range of possible responses would be relatively limited. In this procurement, in contrast, the requirement was to design and build a replacement hospital of 700,000 square feet costing several hundred million dollars. AECOM was in a position to obtain information regarding the agency's priorities, preferences, and dislikes relating to this broadly defined project. AECOM knew what the agency communicated to the offerors about the type of facility that it preferred—as well as what the agency did not communicate.⁸ On this record, we think it was unreasonable

⁷ The AECOM IT manager states that “[e]mployees of other AECOM affiliates outside of HSMM do not automatically have access rights to data on HSMM servers by virtue of their employment.” Intervenor’s Comments on AR, Exh. 3, Decl. of IT Manager at ¶ 3. In our view, this broad statement does not address our concern that competitively useful, non-public information was insufficiently safeguarded.

⁸ Moreover, the protester offers specific evidence into the record that it alleges indicates that not all of the agency’s preferences were communicated to all of the offerors. See Protester’s Comments on Supplemental Contracting Officer’s Statement of Facts, Jan. 26, 2010, Exh. B, Expert Decl. at ¶¶ 10-16. Specifically, the protester asserts that the agency had uncommunicated preferences with respect to the configuration of nursing stations, id. at ¶ 12.a., toilet room design, id. at ¶ 12.b., and parking garage configuration. Id. at ¶¶ 14-15.

for the agency to assume that AECOM did not possess competitively useful information based on its role in the procurement.

As noted above, AECOM argues that knowledge of its negotiations to acquire or merge with EB was limited to employees with a “need to know,” and that they kept that information confidential. The contemporaneous record contains no indication that that the contracting officer relied on this information from AECOM or even was aware of AECOM’s arrangements. In any event, in our view it would be unreasonable for the agency to rely on a de facto mitigation plan—namely, the assurance that the negotiations had and would only involve AECOM employees who would keep that information confidential—when, as discussed above, the efforts to maintain confidentiality were largely undisclosed to, unevaluated by, and unmonitored by the Corps—in a word, self-executing. L-3 Servs., Inc., supra at 12. Similarly with respect to the AECOM employees who worked on the design contract, without credible evidence that AECOM had systems in place to prevent the receipt of competitively useful information by EB, there is no reasonable basis to assume that the information was not made available to EB employees.

- Biased Ground Rules

The protester argues that Turner/Ellerbe also had an unmitigated biased ground rules organizational conflict of interest stemming from its work on the design contract. The record suggests that AECOM had special knowledge of the agency’s requirements that would have enabled it to give Turner/Ellerbe an unfair advantage in the competition. AECOM’s contract with the agency “consist[ed] of all services necessary in the preparation of design documents, including plans, specifications, supporting design analysis, design narrative, cost estimates, etc. to construct a replacement hospital.” AR, Exh. M, App. A to Design Contract at ¶ 1.

The agency and the intervenor offer several defenses. The agency’s senior project manager asserts that the Corps closely supervised AECOM’s efforts in drafting the solicitation, AR, Tab 3, Decl. of Senior Project Manager at ¶ 11, and that the offerors were given the opportunity to review and comment on the draft requirements. The agency did solicit input from the offerors on the draft solicitation, but the record does not establish that the agency closely supervised AECOM in drafting the solicitation. Moreover, even assuming that the agency closely supervised AECOM, it is unclear why it is reasonable to assume that the agency’s mere supervision then prevented AECOM from using its special knowledge of the agency’s requirements to give Turner/Ellerbe an unfair advantage in the competition. AECOM’s contract with the agency called for it to perform “all services necessary” for preparation of the design portion of the procurement, and nothing in the record suggests that it did anything less—supervised or not.

The agency asserts that there is no evidence that AECOM skewed the competition to the benefit of EB. This is not the standard used to resolve allegations of organizational conflicts of interest. Where the record establishes that a conflict of

interest exists, to maintain the integrity of the procurement process we will presume that the protester was prejudiced, unless the record establishes the lack of prejudice. See Marinette Marine Corp., B-400697, et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 28. Nor is the relevant concern simply whether a firm drafted specifications that were adopted into the solicitation; rather, we look to see whether a firm was in a position to affect the competition, intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2; L-3 Servs., Inc., supra at 5; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. In short, once an organizational conflict of interest is established, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur. See The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194 at 14; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra at 18.

The intervenor argues that at all times during the course of solicitation development, where AECOM might have been able to skew the competition in favor of EB, AECOM and EB were not in fruitful negotiations, and therefore the AECOM employees assisting the agency on this procurement would have had no knowledge of AECOM's interest in EB.⁹ Intervenor's Comments at 9-15. Although the protester disputes the intervenor's claim, we need not resolve this issue. Turner/Ellerbe's assertion that limited numbers of AECOM employees were aware of the negotiations and that they kept the negotiations confidential is based solely on the intervenor's post-protest representations. As noted above, the record contains no indication of how AECOM determined which AECOM employees had a "need to know" of the negotiations and how their confidentiality was ensured, or that AECOM had systems in place to wall off AECOM employees with a "need to know" from those AECOM employees uninvolved in the negotiations.

The agency also argues that the FAR precludes a finding that there was a biased ground rules organizational conflict of interest, pointing to FAR §§ 9.505-2(a) and (b), which set out certain circumstances in which contractors who prepare specifications or statements of work may not, regardless of mitigation, provide the product described in the specifications or the services described in the statement of work. Both of these exclusions are subject to limited exceptions. The exceptions merely prevent the otherwise automatic exclusion of a firm from the competition; they are not an indication that there can be no organizational conflicts of interest under the facts described in the exceptions. In fact, the overarching concern expressed in that section of the FAR is that a firm that prepares the specifications or work statement for a contract should not be allowed to compete, as a prime contractor or a subcontractor, for that contract. See FAR § 9.505-2. Even if an exception applied, therefore, the contracting officer would still need to exercise sound judgment, independently investigate the circumstances giving rise to the possible organizational

⁹ There is no contemporaneous documentation in the record to support the intervenor's account of the negotiations.

conflict of interest, and institute and monitor appropriate measures to mitigate or avoid the organizational conflicts of interest. See FAR § 9.505.

Based on the record here, we think that the agency lacked a reasonable basis for its conclusion that AECOM's assistance to the agency did not place it in a position to skew the competition, intentionally or not, in favor of EB, with whom it was in negotiations over the course of the competition, or that the conflict somehow was properly addressed. We therefore sustain the allegation that Turner/Ellerbe had a biased ground rules organizational conflict of interest.

RECOMMENDATION

We sustain the allegations that Turner/Ellerbe had an unequal access to information and a biased ground rules organizational conflict of interest. With respect to the biased ground rules organizational conflict of interest, the ordinary remedy where the conflict has not been mitigated is the elimination of that contractor from the competition. The Jones/Hill Joint Venture, supra at 22 n.26. Accordingly, we recommend that Turner/Ellerbe be eliminated from the competition and that, consistent with the terms of the RFP, the agency make a new award determination.¹⁰

We also recommend that Harbert/Gorrie be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). Harbert/Gorrie should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel

¹⁰ The agency has suggested that, if the protest is sustained, it will pursue a waiver of Turner/Ellerbe's exclusion from the competition based on any organizational conflict of interest, pursuant to FAR § 9.503. See Agency's Comments, Feb. 2, 2010. We previously have recognized an agency's authority to seek and obtain a waiver under the FAR. See, e.g., L-3 Servs., Inc., supra at 17 n.20. While the parties disagree as to whether waiver would be proper here, any such issues are premature at this point because no waiver has yet been issued.