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DECISION

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

FILE: B-209662.2
B-209662.3

DATE: April 4, 1983

MATTER OF: Orkand Corporation; Falcon Research and Development Company

DIGEST:

1. Where RFP indicates that, if offeror's proposal reveals an apparent conflict of interest, offeror will be permitted to negotiate a special contract clause to lessen the effects of such conflict, agency determination to not hold discussions with an offeror which had an apparent conflict of interest was unreasonable. Since offeror with apparent conflict of interest was otherwise technically acceptable, award to another offeror on basis of initial proposals without discussions was inappropriate and based on premature nonresponsibility determination.

2. Agency which improperly awarded contract on initial proposals has decided to terminate contract for convenience and to negotiate with original offerors. Agency's proposed method of remedying erroneous award, requiring other offerors to reveal substantially similar pricing information as a prerequisite to participating in negotiations, is not objectionable. Protester's price under the awarded contract is already disclosed and the other offerors have not objected to the proposed disclosure.

3. Allegation that one of the offerors under labor surplus area set-aside procurement will not perform enough contract work in a labor surplus area to be eligible for award is dismissed. Issue deals with a matter of responsibility; before awarding contract to any offeror, agency will have to affirmatively determine the awardee to be responsible. Our Office does not review affirmative determinations of responsibility in these circumstances.

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4. Apparent conflict of interest contained in a proposal is properly a matter for discussions between contracting agency and small business offeror with apparent conflict of interest rather than for referral to Small Business Administration for certificate of competency review. This is especially so where RFP indicated that offeror with apparent conflict of interest will be allowed to negotiate a contract clause designed to lessen effects of conflict of interest.

Orkand Corporation (Orkand) and Falcon Research and Development Company (Falcon) have filed protests under request for proposals (RFP) No. WA 82-B090, issued by the Environmental Protection Agency (EPA) to obtain statistical and mathematical services in support of vehicle emission control activities. Both protesters contend that there were irregularities in the procurement process.

We deny both protests.

The solicitation, a labor surplus area set-aside, was issued on August 18, 1982, and required submission of initial proposals by September 17. Offers were submitted by Falcon, Orkand, and Leo Brieman, Ph.D. Orkand's offer was the lowest cost proposal and Falcon's offer was the second lowest. Even though the RFP stated that award would be made to the "technically acceptable--low responsible offeror," the contracting officer made award to Falcon on September 29 on the basis of initial proposals. This decision was based on a determination that because there was an apparent organizational conflict of interest, Orkand was nonresponsible.

Orkand protested to our Office on the basis that, since Orkand is a small business concern, the matter of its non-responsibility should have been referred to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures. After review of the protest, EPA determined that the contracting officer had erred in rejecting Orkand without referring the matter to SBA in accord with Federal Procurement Regulations (FPR) § 1-1.708-2 (1964 ed., amend. 192).

EPA belatedly referred the matter to SBA. By letter of November 15, 1982, SBA advised EPA that it would perform a COC review only if EPA would state in writing that it would terminate the Falcon contract for convenience and award to Orkand if the SBA issued a COC to Orkand. EPA would not guarantee award to Orkand if it was found to be competent by the SBA because, in EPA's view, even if SBA determined that Orkand was responsible, Orkand would still have an apparent conflict of interest in its proposal.

Upon reexamination of the matter, EPA determined that the contracting officer should have held discussions with Orkand regarding the apparent conflict of interest contained in its initial proposal rather than making an award to Falcon without discussions on the basis of initial proposals. EPA reported to our Office on November 16 that it had decided to terminate Falcon's contract and was going to resolicit the requirement and that the second negotiated procurement would be limited to the original three offerors. Accordingly, EPA terminated Falcon's contract effective November 29. On December 7, Orkand withdrew its original protest with our Office.

Falcon protested the termination of its contract on December 7. Falcon contends that the original award to it was proper and that the EPA's proposed resolicitation from the original three offerors will result in an auction in contravention of FPR § 1-3.805-1(b) (1964 ed., amend. 153) because EPA is going to allow offerors to revise their offers (price and technical) and Falcon's previously awarded contract is a matter of public record. Falcon also contends that EPA's proposed remedial actions are the result of "an obvious overreaction to Orkand's bid protest, which may not have been filed timely." In addition, Falcon argues that Orkand does not qualify as a labor surplus area contractor and, therefore, is not eligible for this set-aside award.

On January 31, 1983, Orkand filed a letter with our Office which indicated that it was interested in Falcon's protest and that it was reviving the earlier protest which it had withdrawn on December 7. Essentially, Orkand questions the validity of the award to Falcon in the first place and wants our Office to decide whether the matter of its

alleged organizational conflict of interest should have been referred to the SBA for resolution under COC procedures or whether it should now be resolved through negotiations between EPA and Orkand.

The contracting officer rejected Orkand's initial proposal on the basis that Orkand was nonresponsible because its proposed project manager had an apparent conflict of interest. The proposed project manager is an employee of a subcontractor listed in Orkand's proposal. That subcontractor and the proposed project manager, in particular, currently represent Subaru of America before the Manufacturing Operations Division of EPA, which is the division of EPA procuring these services in support of its vehicle emission control activities. The RFP contained a clause, entitled "Organizational Conflict of Interest Representation," in which Orkand had certified that it had no conflict of interest. The "Conflict of Interest Representation" clause also stated:

> "If this representation, as completed by the offeror, or other information available to the Contracting Officer, indicates the existence of an organizational conflict of interest, the Contracting Officer will determine whether a conflict does exist. If the Contracting Officer determines that a conflict exists, the offeror shall not receive an award unless the conflict can be adequately avoided, eliminated, or neutralized through the inclusion of a special clause in the contract. The offeror will be permitted to negotiate the terms of such a special clause."

Essentially, EPA argues that the contracting officer should not have rejected Orkand outright, but should have negotiated with Orkand to see if a real conflict of interest existed or whether the effects of the conflict could be "avoided, eliminated, or neutralized" by incorporating a special clause in the contract as allowed by the terms of the RFP. Thus, EPA concludes that award to Falcon without holding discussions was improper. EPA also points out that the Technical Evaluation Panel found Falcon's proposal to be unacceptable due to concerns about the individual listed by Falcon as its project manager. Even though the contracting

officer apparently resolved any problems related to Falcon's project manager to his own satisfaction, EPA reports that discussions with Falcon would have been appropriate concerning the issue.

We agree with EPA's position. The contracting officer should not have found Orkand to be nonresponsible without at least giving Orkand an opportunity to cure the apparent conflict of interest. The above-quoted RFP provision makes it clear that, in a situation such as this, discussions are contemplated. The purpose of such discussions is to see if the conflict can be eliminated or whether a contract clause can be fashioned to lessen the effects of such a conflict. Our review of the technical evaluation memorandum shows that of the three offerors, only Falcon was initially found to be technically unacceptable. In accord with 10 U.S.C. § 2304(g) (1976), written or oral discussions generally must be held with all responsible offerors who submit proposals within the competitive range. The determination of the competitive range is primarily a matter of administrative discretion which we will not disturb absent a clear showing that the determination is unreasonable. Joule Technical Corporation, B-197249, September 30, 1980, 80-2 CPD 231. The purpose of holding discussions is to give offerors within the competitive range an opportunity to resolve any deficiencies. ABC Management Services, Inc. (Reconsideration), 53 Comp. Gen. 584 (1974), 74-1 CPD 67. In view of the terms of the RFP, which contemplated negotiation of a clause if necessary to lessen the effects of any conflict of interest, we cannot find EPA's determination that Orkand is within the competitive range and entitled to discussions concerning its apparent conflict of interest to be unreasonable. We agree with EPA that the contracting officer's determination that Orkand was nonresponsible was premature. We also agree with EPA that, in these circumstances, the decision to award to Falcon on the basis of initial proposals was inappropriate.

In view of our conclusions, above, we must next review EPA's proposed remedial actions. EPA terminated Falcon's contract because of its determination that the award was improperly made. EPA proposes to reopen the competition, but limited to only the three original offerors. EPA further proposes to require Orkand and Leo Brieman, Ph.D., to reveal the prices they quoted for the basic period in

their initial proposals because EPA revealed Falcon's basic period price when it erroneously awarded the contract to Falcon. Falcon contends that this approach will result in a prohibited auction.

While the FPR prohibits auctions (FPR § 1-3.805-1(b) (1964 ed., amend. 153)), the record shows that Orkand has agreed to release of its price; the other offeror, Leo Brieman, Ph.D., has been advised he will have to reveal his initial price and has not objected, insofar as the record indicates. Further, Falcon cannot complain that disclosure of the other offerors' prices will work to its competitive disadvantage. Accordingly, we do not object to EPA's proposed method of remedying the erroneous award.

Concerning Falcon's charge that Orkand's original protest was the catalyst which caused EPA's "overreaction" and that Orkand's original protest may have been untimely, we consider the timeliness of that protest to be irrelevant. Once EPA reviewed the matters raised by Orkand's protest, it acted within its authority in attempting to remedy prior improprieties. See, for example, NonPublic Educational Services, Inc., B-207306.2, October 20, 1982, 82-2 CPD 348.

With regard to Falcon's contention that Orkand will not perform enough of the work in a labor surplus area and is, therefore, ineligible, this issue of protest deals with an aspect of Orkand's responsibility. Bradford Dyeing Association, Inc., B-208026, August 18, 1982, 82-2 CPD 151. Before any award can be made to Orkand, it will have to be determined to be responsible. Since we no longer review challenges to an agency's affirmative determination of a firm's responsibility in these circumstances, this portion of Falcon's protest is dismissed. Bradford Dyeing Association, Inc., supra.

Finally, concerning whether Orkand's apparent conflict of interest is properly a matter for discussion or for resolution by the SBA as part of its COC review, we find, as indicated above, that it is a matter for discussion between EPA and Orkand. We have held that in negotiated procurements, it is appropriate to use traditional responsibility factors as technical evaluation criteria and to judge technical proposals on that basis. Further, if a small business is found to be technically deficient in such areas,

COC procedures are not applicable. See Anderson Engineering and Testing Company, B-208632, January 31, 1983, 83-1 CPD 99. However, we are not finding that, should EPA find Orkand to be nonresponsible, it need not refer the matter to SBA for its review. We are merely holding that the conflict of interest matter is an appropriate subject for discussions and technical evaluation.

The protests are denied.

Milton J. Socolar

for Comptroller General
of the United States