DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES 26475
WASHINGTON, D.C. 20548

FILE: B-210426 DATE: October 7, 1983

MATTER OF: Chemonics International
Consulting Division

DIGEST:

Protest is sustained where agency's rejection of a proposal based on an alleged conflict of interest was unreasonable. Although the protester proposed to hire an employee of the agency and the employee accompanied the firm during its negotiations with the agency, the employee did not participate in the negotiations and there is no evidence that he exerted any improper influence on behalf of the protester. Since the protester has a substantial chance for award but for the agency's improper action, proposal preparation costs are recommended.

Chemonics International Consulting Division protests the rejection of its proposal by the Agency for International Development (AID) under request for proposals (RFP) No. 650-0047. The solicitation was for technical services, to be performed over a 4-year period, for the Sudan Agricultural Planning and Statistics Project. We sustain the protest.

Background

Proposals were received from two firms, Chemonics and Checchi and Company. Discussions were held with both offerors in Nairobi, and Chemonics was subsequently selected for contract award. Prior to the award, however, the regional legal adviser discovered a possible conflict of interest, and the procurement proceedings were suspended pending an Inspector General's (IG) investigation into the matter.

The alleged conflict of interest arose from Chemonics' proposed employment of an AID employee as a member of the team which would perform the contract.[1] At the request of the contracting officer, this employee accompanied the Chemonics negotiating team to Nairobi and was present during the firm's discussions with the contracting officer.

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[1] The employee worked in AID's Office of Agriculture on loan from the U. S. Department of Agriculture.

Before the IG's investigation was completed, the contracting officer notified Chemonics that it was proceeding with an award to Checchi. Chemonics filed a protest with this Office against any such action. AID subsequently notified GAO of its intent to award the contract during the pendency of the protest. See 4 C.F.R. § 21.4 (1983). AID stated that any further delay in the implementation of the Sudan project would create serious impediments to U. S. foreign assistance commitments.

Shortly before the contract was actually awarded to Checchi, however, the IG completed his investigation and determined that the circumstances did not support a referral to the Justice Department for prosecution of the employee. AID nevertheless proceeded with the award to Checchi. AID indicates that its decision primarily was based on a conclusion that the actions of the employee created a conflict of interest.

Analysis

AID states that even though the IG found no basis for criminal prosecution, the regional legal adviser concluded that a conflict of interest existed. The reasons for this conclusion appear to be the employee's attendance at the negotiations and the use of his official Government passport to travel to Nairobi. AID indicates that the regional legal adviser and the AID General Counsel concluded that these actions were inconsistent with the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered titles of U.S.C.), with 18 U.S.C. § 1544 (1976) (pertaining to improper use of a passport), and with the Office of Personnel Management regulations governing employee responsibilities and conduct at 5 C.F.R. § 735.101 et seq. (1983).

The responsibility for determining whether a firm has a conflict of interest and to what extent the firm should be excluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. N.D. Lea & Associates, Inc., B-208445, February 1, 1983, 83-1 CPD 110. In this case, we find that AID's determination to exclude Chemonics from the competition was unreasonable.

There is nothing to suggest that the employee exerted any improper influence on behalf of Chemonics here, or that the firm obtained any improper competitive advantage through the employee. See National Service Corporation, B-205629, July 26, 1982, 82-2 CPD 76; Riggins & Williamson Machine Co., Inc., B-186723, December 6, 1976, 76-2 CPD 463.

In fact, the record shows that the employee came to the Sudan at the request of the contracting officer, who was aware that he was an AID employee, for the sole purpose of discussing his experience and qualifications. Although AID emphasizes that Chemonics sent two messages which referred to the group coming to the Sudan as its "negotiating team," Chemonics explains that its choice of words resulted from the fact that the primary purpose of the trip was to attend the negotiations. Chemonics asserts that the employee was present at the negotiations solely as an observer, and that he did not participate in the negotiations. AID does not deny this, and nothing in the record indicates otherwise.

In addition, we note that in a sworn statement to the IG, the employee denied having any prior knowledge of the details of the Sudan project, and stated that his AID employment did not involve him in the project in any way. The sworn statement also shows that the employee informed his supervisor of his proposed employment by Chemonics, and that the supervisor raised no concern. While AID notes that the employee did not follow AID's established procedure for obtaining an advisory opinion on conflict of interest questions, there is nothing to suggest that this failure resulted from any improper motivations. Rather, it appears that the employee believed he should seek advice from the Department of Agriculture (the agency from which he was on loan) since he did consult with a counselor there.

The record before us simply contains no evidence that the employee's involvement undermined the integrity of the competition, and we therefore conclude that AID lacked a reasonable basis to reject Chemonics' proposal. See Satellite Services, B-206954, October 4, 1982, 82-2 CPD 308; J. L. Associates, Inc., B-201331.2, February 1, 1982, 82-1 CPD 99. Consequently, we sustain the protest.

Remedial Relief

Several months prior to the award to Checchi, Chemonics informed the contracting officer that one of its proposed key employees was no longer available. At the same time, Chemonics proposed two alternates for the position, both of whom were described as "100 percent available." The contracting officer never responded to Chemonics in that regard.

In support of proceeding with an award to Checchi, the AID/Sudan office indicated that there was no assurance that Chemonics could supply an acceptable candidate for the position and stated that it could not agree to further delay which would result from posting a Chemonics team. It also noted that Chemonics' proposal originally was selected over Checchi's primarily due to the superiority of Chemonics' key personnel. It stated that Checchi's proposed personnel were still available and were considered to be "of a high professional standard," and that Checchi's proposed costs were somewhat less than those of Chemonics. It concluded that in light of these facts, nothing could be "gained by further negotiations with Chemonics."

It is unclear from the record to what extent the decision to award to Checchi is actually supported by the change in Chemonics' proposed personnel, since AID has relied primarily on the alleged conflict of interest to justify its rejection of the proposal. In any event, it appears that the alternate candidates proposed by Chemonics were given no consideration by the contracting officer, even though he was aware of the change well before contract award and the candidates were represented as definitely available.

On these facts, we would ordinarily recommend that negotiations be reopened with Chemonics to determine the acceptability of the alternate candidates, and that Checchi's contract be terminated and award made to Chemonics if its proposal was determined superior. However, we do not believe this would be appropriate under the particular circumstances present here.

AID argues that even if acceptable candidates are still available, contract termination is not a practical remedy. It states that projects such as this require an initial period of cultivating relationships and developing rapport with Mission and host-country personnel, and therefore that one contractor's personnel cannot replace another's without an undesirable loss of momentum. It emphasizes the importance of the project to U. S. efforts in the Sudan and the need for the project's timely completion. We are not in a position to question this assessment.

Nevertheless, we believe that Chemonics is entitled to recover the costs of preparing its proposal. These costs are recoverable where the Government acted arbitrarily and capriciously with respect to a proposal, and the offeror had a substantial chance of receiving the award except for the agency's improper action. See M. L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 CPD 587.

Here, AID unreasonably excluded Chemonics' proposal from consideration and as a result, never determined the acceptability of the alternate candidates. Nonetheless, in light of the superior rating given its best and final offer, we believe it is fair to say that Chemonics had a substantial chance for award. We therefore believe the protester should be entitled to receive its proposal preparation costs since the agency's improper action precluded it from demonstrating the acceptability of the alternate candidates. Id. Chemonics should submit documentation to support its costs to the agency.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States