

Murphy 20727

DECISION



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

FILE: B-220007 **DATE:** December 9, 1985
MATTER OF: NKF Engineering, Inc.

DIGEST:

1. Statements by two procurement officials that a consultant to an offeror learned the relative standing and strengths and weaknesses of competing proposals while he was employed by the government establish a reasonable basis for an agency's determination that the offeror probably received an unfair advantage in submitting its best and final offer. This determination, based on "hard facts" rather than suspicion or innuendo, justifies exclusion of the offeror's proposal from further consideration.
2. Agency is not required to refer to the Small Business Administration its determination to exclude an offeror's proposal because of the likelihood of an impropriety or conflict of interest in preparation of the proposal where there is no question as to the offeror's capability to perform or any other traditional element of responsibility.

NKF Engineering, Inc. protests the Naval Sea Systems Command's rejection of its proposal in response to request for proposals (RFP) No. N00024-83-R-4175(Q). NKF contends that the Navy erred in concluding that the firm had obtained an unfair competitive advantage and argues that the appearance of an impropriety or conflict of interest is not a sufficient basis upon which to disqualify an offeror.

We deny the protest.

Background

The Navy issued the RFP on March 22, 1983, soliciting offers to provide engineering services in the area of ship

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and submarine survivability, ship signatures, vibration and noise, fire protection, damage control, and safety. Of five proposals submitted on May 24, the Navy ranked NKF's technical proposal second and its cost proposal fifth, with an overall ranking of second.

Following the initial evaluation of proposals, the Deputy Director of the Survivability Sub Group, Naval Sea Systems Command, Yip Park, retired and became a consultant to NKF. The Navy believed that Mr. Park knew the result of the evaluation of the technical and cost proposals, as well as other information relating to the procurement. In part to mitigate any advantage NKF might obtain through its employment of Mr. Park, the Navy amended the solicitation to add additional tasks and to change both the technical evaluation factors and the weights accorded those factors. At the same time, the agency requested best and final offers.

In its best and final offer, NKF reduced its offered price by approximately 33 percent. Its technical score remained second-high, slightly below that of the highest-rated offeror. Its cost score was the highest, and it was ranked first overall.

While the Navy believed that its amendment of the solicitation counteracted any advantage that NKF might have gained through Mr. Park in the technical area, it concluded from NKF's substantial price reduction that the firm probably knew the relative technical and cost standings of its competitors. Believing that an award to NKF would appear to have resulted from an unfair competitive advantage and would bring into question the integrity of the procurement, the Navy disqualified NKF for having an organizational conflict of interest. The agency announced that award would be made to the firm ranked second overall, Weidlinger Associates. This protest followed.

NKF raises three issues. First, it contends that there is no evidence of improper conduct on the part of NKF, Mr. Park, or Navy procurement officials. Without "hard facts" showing an actual impropriety or conflict of interest, NKF contends, the Navy was not justified in finding the firm ineligibile for an award. Second, NKF states that the organizational conflict of interest provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 9.5 (1984), cited as the legal basis for the Navy's action,

do not encompass the situation in this case.^{1/} Finally, NKF argues that since it is a small business concern, the Navy was required to refer its decision to exclude the firm to the Small Business Administration (SBA) for consideration under the certificate of competency program.

Evidence of Improprieties

Until his retirement on September 30, 1984, Mr. Park, as noted above, served as Deputy Director of the group within the Naval Sea Systems Command that requires the services included in the protested procurement. He was designated as the Project Engineer/Program Manager for the procurement and was listed in the RFP as the contracting officer's technical representative. The Navy states that Mr. Park prepared a revision to the source selection plan that was used in the initial evaluation, developed the government's cost estimate, and was thoroughly familiar with the required work.

On October 25, 1983, after evaluation of the technical proposals, Mr. Park was appointed chairman of the Contract Award Review Panel for the procurement. This panel had the responsibility of, among other things, directing subsequent evaluation of proposals, determining the competitive range, and recommending an award to the selecting official. The procurement record filed with our Office does not reflect any meeting of the review panel before Mr. Park retired a year later. In an affidavit submitted by NKF, Mr. Park states that the evaluation of proposals was suspended until another procurement was completed, and that he never actually served as chairman of the review panel at issue here.

The Navy contends that Mr. Park knew the relative standing of each proposal in the technical and cost areas, as well as each proposal's strengths and weaknesses. In support of these allegations, the Navy has submitted two affidavits. In the first, the legal advisor for the procurement states that the members of the review panel also served as the review panel for another procurement.

^{1/} The Defense Acquisition Regulation (DAR), reprinted in 32 C.F.R. pts. 1-39 (1984), is applicable to this procurement because the RFP was issued before the April 1, 1984 effective date of the Federal Acquisition Regulation. Since differences in the two regulations are not relevant to this protest, we will observe the practice of the parties and refer to provisions of the FAR.

He states that during a meeting of the panel to consider the other procurement, the chairman of the technical evaluation group for the protested procurement briefed the panel on the strengths, weaknesses, and relative standing of each technical proposal. Also, the cost evaluator briefed the panel regarding cost proposals, and he specifically told the panel that NKF had proposed a high cost and was not in a competitive position.

In the second affidavit, the cost evaluator for the procurement states that he saw Mr. Park working on the source selection plan and that he had discussed the appropriate labor mix for the procurement with Mr. Park. He also states that in informal discussions he told Mr. Park that the NKF's estimated cost and fee were significantly higher than those of other offerors.

NKF responds to these allegations primarily through affidavits of Mr. Park. He states that--before his retirement--he never saw or discussed the technical or cost proposals and was never advised of their relative standing. He believes that the proposals were not even evaluated before he retired, since the procurement had been suspended until award of another contract. He states that he did prepare a revised evaluation plan and did discuss with the cost evaluator the appropriate labor mix for another procurement that was proceeding simultaneously, thereby suggesting that the cost evaluator has confused the two procurements.

NKF also provided affidavits of all employees participating in the preparation of its best and final offer, stating that they never spoke to or received information from Mr. Park except for a copy of his resume. The firm's best and final offer stated that Mr. Park was available as a consultant to work on the contract, and it included his resume. The NKF employees state that they had no information regarding the relative standing of the offerors, the Navy's cost estimate, or estimated labor mix. The revisions in NKF's cost proposal are attributed solely to questions presented by the Navy and to a desire to offer the lowest, reasonable estimated cost.

NKF's consultant agreement with Mr. Park specifically prohibits him from disclosing or using any secret or confidential information of others, including his former employer. Before entering the agreement, the president of

NKF requested that Mr. Park verify with Navy officials that Mr. Park's consulting with NKF would be appropriate and not create a conflict of interest. According to the president of NKF, Mr. Park reported that Navy legal counsel saw no reason why he could not provide consulting services to NKF or any other contractor.

In light of this factual record, NKF asks that we apply the standard of review applicable to the issuance of an injunction against a contract award where the disappointed bidder alleges improprieties or a conflict of interest. In CACI, Inc. - Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), the court reversed a judgment of the United States Claims Court enjoining an award because the lower court's inferences of actual or potential wrong-doing were based upon "suspicion and innuendo" rather than "hard facts." This standard is consistent with our traditional view that offerors should not be excluded because of a "theoretical" conflict of interest, Cardio-care, a division of Medtronic, Inc., 59 Comp. Gen. 355 (1980), 80-1 CPD ¶ 237, and we have applied the standard specifically to a protester's allegations of impropriety involving a former government employee assisting a proposed awardee with proposal preparation. See Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17.

We agree that it is appropriate to use the CACI standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in CACI was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. 719 F.2d at 1575, 1581-2. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system. Our role is to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety warranted excluding an offeror. See Chemonics International Consulting Div., 63 Comp. Gen. 14 (1983), 83-2 CPD ¶ 426. A reasonable basis must include more than mere innuendo or suspicion. Culp/Wesner/Culp, supra.

Here, we find that the potential for a decisive unfair advantage was reasonably established to the Navy by the

statements of two procurement officials, subsequently presented to our Office in sworn affidavits, that they had witnessed Mr. Park being told the relative standing of offerors and other confidential information about the procurement. We do not believe that the mere possibility that both Navy officials were mistaken, or, alternatively, that Mr. Park might not recall receiving the information, or that no advantage may actually have been received by NKF made the Navy's belief in the likelihood of a serious impropriety unreasonable. Also, we note that the procurement record contains no evidence that NKF took any steps, other than the standard restriction in its consulting agreement, to prevent improper use of Mr. Park's possible knowledge about the procurement, to apprise the Navy of any concern in this regard, or to address in any way the clear appearance that the firm would gain an unfair advantage by employment of Mr. Park. Therefore, we find that the Navy had a reasonable basis to conclude that an impropriety or conflict of interest was likely and to exclude NKF from the competition.

Conflict of Interest Regulations

The Navy states that its rejection of NKF's proposal was pursuant to the regulation governing organizational conflicts of interest. As NKF points out, the FAR, 48 C.F.R. § 9.501, states that an organizational conflict of interest exists when the work under a proposed contract may, without a restriction on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity. Such a conflict would arise where, for example, a contractor prepares and furnishes specifications for items to be competitively procured and then is allowed to furnish those items in the subsequent procurement. FAR, 48 C.F.R. § 9.505-2.

We agree with NKF that the situation here does not establish an organizational conflict of interest specifically encompassed by the procurement regulations. However, a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable regulations, where the needs of the agency or the nature of the procurement dictate the use of such restrictions. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94. We see little difference between excluding an offeror because of an unfair advantage gained helping prepare the statement of work, Nelson Erection Co., Inc., B-217556, Apr. 29, 1985, 85-1 CPD ¶ 482, and excluding an

offeror that has entered a consulting arrangement with a retired official who not only was involved in planning the procurement, but is reasonably believed to know the standing of other offerors and details of their proposals.

Certificate of Competency

The FAR, 48 C.F.R. § 19.602-1, requires a contracting officer, upon determining that a responsive small business lacks certain elements of responsibility (including "competency, capability, capacity, integrity, perseverance, and tenacity"), to refer the matter to the SBA. NKF argues that the Navy is required to refer the determination to exclude NKF to the SBA. The protester is joined in its opinion by SBA's Chief Counsel for Advocacy, who filed comments with our Office on this issue.

The Navy responds that FAR, 48 C.F.R. § 19.602-1(a) (2)(i), excludes from the certificate of competency program determinations that a small business concern is not responsible because it is "unqualified or ineligible" to receive an award under applicable laws and regulations. The Chief Counsel for Advocacy points out that we have questioned whether this regulatory exception overcomes a small business concern's right to a certificate of competency referral under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), when compliance with a traditional element of responsibility is at issue. International Business Investments, Inc., et al., 60 Comp. Gen. 275 (1981), 81-1 CPD ¶ 125.

We do not believe that the Navy's exclusion of NKF involves a question of responsibility. Some conflict of interest issues, such as whether an offeror's performance on a contract will be influenced by conflicting economic interests, involve the offeror's capability to perform and are, therefore, matters of responsibility. In this case, however, no one has questioned NKF's capability. Rather, the Navy believes that it is so likely that NKF received an improper advantage that the integrity of the competitive process in general and of this procurement in particular require exclusion of the firm. This question is not related to any of the traditional elements of responsibility, and it therefore, in our view, need not be referred to the SBA.

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The protest is denied.

Harry R. Van Cleve
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General Counsel