



The Comptroller General
of the United States

Washington, D.C. 20548

Ashley

Decision

Matter of: ESCO, Inc.
File: B-225565
Date: April 29, 1987

DIGEST

1. Incumbent contractor need not be excluded from competition because of an alleged organizational conflict of interest where (1) the contractor neither prepared the statement of work nor provided "material leading directly, predictably, and without delay" to the statement of work, and (2) did not provide systems engineering services for items to be supplied under the contract as prohibited by applicable regulations.
2. A contracting agency need not await the results of an Inspector General's investigation into the alleged mischarging of the government before making award where the contracting officer, after a preliminary investigation, reasonably determines that there is insufficient evidence to conclude that the firm selected for award lacks a satisfactory record of integrity and business ethics.
3. Although contracting agency improperly considered an incumbent contractor's possession of a source code for a computer-aided drawing system to be an important factor in evaluating corporate resources, because the agency envisioned no revisions to the system and instructed offerors not to propose revisions, the error did not materially affect the agency's selection and the protester was not prejudiced by the impropriety; a protest on this basis is therefore without merit.
4. A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that the awardee submitted a technically superior proposal and offered the lowest probable cost to the government.

DECISION

ESCO, Inc. protests the proposed award of a contract to Johnson Engineering Corporation under request for proposals

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No. 9-BE3-79-5-182P. The National Aeronautics and Space Administration (NASA) issued the solicitation for manned spacecraft crew station services at the Lyndon B. Johnson Space Center in Houston, Texas. ESCO questions the qualifications of Johnson Engineering and NASA's evaluation of proposals. We deny the protest.

BACKGROUND

The solicitation, issued May 16, 1986, requested proposals to supply the following services on a cost-plus-fixed-fee basis: (1) the engineering, maintenance, servicing, logistics, fabrication, documentation, operations, and other support for crew station development and integration, and (2) operation of the Mockup and Trainer Complex, including design, development, and fabrication of mockups, trainers, and support equipment.

Proposals were to be evaluated on the basis of mission suitability and cost, which were equally and most important; company experience and past performance, of somewhat less importance; and other factors (phase-in plan and acceptance of contract provisions), of considerably less importance. Mission suitability was to be numerically weighted and scored, while company experience and past performance were to be evaluated as excellent, good, fair, poor, or unsatisfactory, and the other factors were to be rated as satisfactory or unsatisfactory.

NASA received five proposals and found those submitted by Johnson Engineering, the incumbent contractor for most of the required services since 1975, and by ESCO to be in the competitive range. After conducting discussions and evaluating best and final offers, NASA rated the two offerors as follows:

	<u>Johnson Engineering</u>	<u>ESCO</u>
Mission Suitability		
Technical Under- standing and Approach	462	396
Management	223	157
Corporate Resources	<u>220</u>	<u>197</u>
Total	905	750

Company Experience	Excellent	Good
Past Performance	Excellent	Excellent
Other Factors	Satisfactory	Satisfactory

Johnson Engineering's evaluated costs were approximately \$45.5 million and ESCO's were \$47.7 million.

NASA selected Johnson Engineering for final negotiations leading to award of a contract. ESCO protested to our Office before award, and NASA has withheld award pending our decision in accord with the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c) (Supp. III 1985).

QUALIFICATIONS OF JOHNSON ENGINEERING

Organizational Conflict of Interest

ESCO contends that award to Johnson Engineering is prohibited by two provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 9.5 (1986), governing organizational conflicts of interest. ESCO first argues that Johnson Engineering should be excluded from the competition because it allegedly assisted in preparing the statement of work.

The FAR generally requires contracting officials 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. 48 C.F.R. §§ 9.501, 9.504, and 9.505. In particular, the FAR provides that if a contractor (1) prepares or assists in preparing a work statement to be used in competitively acquiring a system or services, or (2) "provides material leading directly, predictably, and without delay to such a work statement," then the contractor generally may not supply the system or services. 48 C.F.R. § 9.505-2(b)(1). This restriction is intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities. Coopers & Lybrand, B-224213, Jan. 30, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ ___.

ESCO alleges that starting in August 1985, NASA worked with Johnson Engineering to prepare the statement of work in this procurement. According to ESCO, specific Johnson Engineering employees provided NASA with flow charts, systems diagrams, and other information for use in preparing the RFP. In response, NASA has provided affidavits by the president of Johnson Engineering and the NASA employee

responsible for preparing the statement of work stating that Johnson Engineering had no role in preparing the statement of work. The NASA employee believes that ESCO has misinterpreted an event that occurred in January 1986, when Johnson Engineering, to support a request for an increase in indirect labor under its current contract, supplied the agency with flow charts and diagrams detailing its procedures for acquisition, subcontracts, and property management. According to NASA, this material was not directly related to or used in preparing the solicitation, but may have led ESCO to believe that Johnson Engineering participated in formulating the statement of work. Based on this record, we cannot conclude that Johnson Engineering wrote the statement of work or that the information that the firm provided NASA was material "leading directly, predictably, and without delay" to its preparation.

ESCO also argues that NASA should have excluded Johnson Engineering from the competition because the firm provides systems engineering services to NASA. The FAR requires that a contractor providing systems engineering and technical direction for a system that does not have "overall contractual responsibility for its development, its integration, assembly, and checkout, or its production," may not be awarded a contract to supply the system. - 48 C.F.R. § 9.505-1(a).^{1/} Thus, there is no prohibition of a systems engineering contractor developing or producing a system if the entire effort is conducted under a single contract.

For the FAR restriction to be applicable in this case, Johnson Engineering (1) must have performed systems engineering services under its prior NASA contract for a system that it did not also have responsibility to develop and produce, and (2) the supply of such system must be included in the current procurement. The statement of work for the support services contract previously performed by Johnson Engineering is similar to that in the solicitation here. While systems engineering services were required, in each case the contractor had developmental and production responsibility. For example, Johnson Engineering was required to perform systems engineering for mockup and trainer equipment, but the firm was also responsible for the design, fabrication, installation, and testing of the

^{1/} The regulation defines "systems engineering" to include a combination of substantially all of the following: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. 48 C.F.R. § 9.505-1(b).

equipment. NASA contends that the new contract will not include the delivery of any items for which Johnson Engineering was only required to provide systems engineering services under its prior contract. We find nothing in the solicitation, evaluation documents, or other materials in the record to contradict the agency's view, and, therefore, we deny this basis of the protest.

Responsibility

ESCO questions whether Johnson Engineering possesses the satisfactory record of integrity and business ethics required for a prospective contractor to be determined responsible. FAR, 48 C.F.R. § 9.104-1(d). ESCO provided an affidavit by the former subcontracts administrator for Johnson Engineering stating that in January 1986, the individual observed other employees preparing the firm's proposal during time charged to NASA under the contract. ESCO contends that "if proven," the competitive advantage enjoyed by Johnson Engineering as a result of preparing its proposal at government expense would "undermine any semblance of a fair competition."

NASA has provided our Office with an affidavit by the president of Johnson Engineering. He denies any knowledge of his employees working on the proposal during time charged to NASA and states that he issued a written directive prohibiting employees from working on the proposal on government time and asking them to provide voluntary, unpaid labor after normal working hours and on weekends. The president further states that any expenses related to proposal preparation were charged to a separate bid and proposal account and included with the firm's general and administrative (G&A) expenses. The contracting officer confirms that the expenses for preparation of Johnson Engineering's proposal are accounted for in the firm's G&A expenses, rather than in amounts charged directly to the NASA contract.

Although NASA believes it has insufficient evidence to question Johnson Engineering's responsibility, because of the serious nature of the alleged impropriety the agency has referred the matter to its Office of Inspector General. In our view, NASA appropriately responded to ESCO's contention, and in the absence of additional evidence, we have no reason to believe that NASA contracting officials have acted unreasonably.

EVALUATION OF PROPOSALS

DASH Software

ESCO maintains that NASA has a "compelling need for rapid and low cost access" to the source code for a computer-aided drawing system controlled by Johnson Engineering in order to make future modifications to the system; it alleges that this need prejudiced the technical evaluation in favor of Johnson Engineering.

In 1981, Johnson Engineering developed a computer-aided drawing system, referred to by the parties as DASH (Drawing Access and Storage Handler) software, for use in producing crew compartment configuration drawings. The development was jointly funded with NASA, and although the agency has subsequently purchased modifications to DASH, Johnson Engineering retains ownership of the system and the source code. To provide future access to the DASH software, in March 1986 NASA acquired a perpetual license to use DASH on a single central processing unit. The solicitation, as amended, indicated that DASH would be furnished by NASA to the successful offeror for use in performing the contract, and that if modifications to the software become necessary, the contractor would be directed to accomplish the change through Johnson Engineering. Offerors were instructed "not to propose DASH revisions as this software will be provided in a completed form."

NASA acknowledges that any future modifications to DASH must be purchased from Johnson Engineering, but it claims that no modifications are currently contemplated. The agency states that if enhancements subsequently prove necessary, they will be paid for with funds from the "subcontract pool," a fixed amount which the solicitation required to be included in all cost proposals. Yet, in evaluating Johnson Engineering's proposal, agency evaluators considered ownership of the source code a strength because of the "quick-response expertise" this provided.

Since ownership of the source code would only be relevant if revisions to the DASH software are envisioned, and NASA does not contemplate such revisions and instructed offerors not to propose revisions, we believe it was unreasonable for the agency to evaluate Johnson Engineering's ownership of the source code as a strength. Nevertheless, we find that the error was not material to the selection decision. Corporate resources was the least important component of the mission suitability criterion. Under corporate resources, Johnson Engineering had no weaknesses, and it had additional strengths, receiving 30 out of 50 possible

points (ESCO received 40). A reduction in Johnson Engineering's score to offset the credit improperly given for source code ownership would not materially improve ESCO's relative score for mission suitability (the total scores were 905 and 750). Consequently, we deny this basis of the protest.

Cost Evaluation

In its comments on the agency report, ESCO generally questions the agency's determination that Johnson Engineering's proposal offered the lowest cost to the government, without suggesting any way in which NASA might have acted improperly.

The solicitation set forth the estimated number of direct labor hours in 14 job categories needed to perform the contract. In addition, the solicitation required offerors to include in their proposals predetermined amounts for travel and subsistence, direct materials, and subcontracts. The major difference between the two cost proposals was ESCO's higher proposed indirect costs (overhead and G&A) for itself and its major subcontractor, although ESCO's higher direct labor rates were also significant. Johnson Engineering proposed costs of \$45,327,415, and NASA -- estimated that performance by the firm would actually cost an additional \$200,000. ESCO proposed costs of \$49,294,874, and NASA's estimate for ESCO was \$47,660,000. NASA's lower estimate for ESCO's costs primarily resulted from the agency's conclusion that ESCO had over-estimated workman's compensation costs for the state of Texas. Our review of the record filed in this case provides no basis upon which to question the agency's cost determination.

Technical Evaluation

ESCO questions many conclusions reached by the NASA evaluators concerning the protester's and Johnson Engineering's proposals. The evaluation of technical proposals is primarily the responsibility of the contracting agency, and our Office does not make an independent evaluation of their merits. Rather, we examine the agency's evaluation to assure that it is reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. The protester bears the burden of showing that the evaluation is unreasonable, and the fact that it disagrees with the agency does not render the evaluation unreasonable. GTE Government Systems Corp., B-222587, Sept. 9, 1986, 86-2 CPD ¶ 276. We have examined each of the alleged improprieties raised by ESCO, and we do not conclude that the selection of Johnson Engineering was unreasonable.

1. Proposed Project Manager

Johnson Engineering proposed as its project manager the president of the company, who is also the project manager under the firm's current contract with NASA. ESCO believes that NASA should have considered the proposed project manager as a major deficiency. The protester points out that Johnson Engineering is headquartered in Boulder, Colorado, and it claims that the project manager's responsibilities as chief executive officer of Johnson Engineering inevitably will result in a degradation of his performance as project manager when, as planned, the level of effort required under the contemplated contract increases.

NASA found that the project manager possessed extensive experience with respect to crew station support services and, based upon a reference check, rated his performance under the current contract as superior. The agency concluded that his position as the chief executive officer assured top management attention (and the proper allocation of resources) to any problem, and it considered the project manager to be a major strength of Johnson Engineering's proposed management approach and key personnel.

During discussions, contracting officials questioned the amount of time that the project manager would devote to his position as president of the firm. Johnson Engineering responded that in the past the corporate duties of this individual had only required his absence for 2 working days a month. The firm stated that "total operating authority" at corporate headquarters in Colorado had been given to the vice president of the company, that the project manager was selling his home in Colorado and moving to the Houston area, and that he would work at least 40 hours per week--i.e., 2,080 hours per year--as project manager. In view of the project manager's unquestioned prior performance and the measures proposed concerning his future commitment to the project, we find no basis to question the reasonableness of the evaluation in this regard.

2. ESCO's Management

ESCO proposed to subcontract to Wyle Laboratories engineering, drafting, and programming effort required under the solicitation for work relating to engineering and design, crew compartment configuration drawings, and crew station development and integration. NASA initially considered this team arrangement with Wyle to represent a major weakness because it limited the ability of the project manager and NASA to manage the effort. In particular, agency evaluators concluded that crew station

- development would be hindered by assigning direct responsibility for design and integration to Wyle when responsibility for fabrication and testing was assigned to ESCO; they believed that close coordination between these functions was required. Further, they concluded that ESCO's assignment of responsibility for personnel reviews and disciplinary actions concerning Wyle personnel to the Wyle engineering and design supervisor, rather than to the ESCO project manager, would limit the ability of the ESCO's project manager to resolve personnel problems. The evaluators believed that the high percentage of work subcontracted to Wyle would render more difficult NASA's interaction with the contract effort on an operational level and overall administration of the contract. In short, the agency concluded that the arrangement was too complex, especially for an untested team.

NASA evaluated ESCO's proposed management structure more favorably after conducting discussions with the firm. It noted that ESCO and Wyle had developed a close relationship during the proposal preparation phase and expressed confidence in their professional approach and management capabilities. Nevertheless, NASA believed that the "teaming arrangement still leaves a more complex organizational structure than desired" and considered the arrangement a minor weakness. The agency also criticized ESCO for (1) not centralizing subcontracting, but proposing instead that section chiefs deal directly with subcontractors, and (2) proposing to process all purchases through its home office. Largely as a result of these perceived weaknesses, ESCO's received a final score of only 157 of the 255 points available under the management factor. Johnson Engineering, on the other hand, received 223 points under this factor.

ESCO questions the evaluation of its team arrangement with Wyle. It points out that the FAR provides that the government will "recognize the integrity and validity of contractor team arrangements" and "not normally require or encourage the dissolution" of them. 48 C.F.R. § 9.603. It states that an amendment to the solicitation, responding to a question submitted at the preproposal conference, informed offerors that although the procurement was set aside for small business, it was permissible for a small business firm to team with a large business, so long as the majority of the effort was performed by the small business. ESCO suggests that NASA's concerns regarding its team arrangement are "speculative and unfounded."

We find nothing in the regulation cited by ESCO prohibiting a contracting agency from evaluating the probable effectiveness of a management structure including subcontracts. Agencies may evaluate an offeror's proposed use of subcontractors if the solicitation apprises prospective offerors of this possibility and the basis for the evaluation is reasonable. See DBA Systems, Inc., B-224306, Dec. 31, 1986, 86-2 CPD ¶ 722. In this case, the RFP described in detail the importance of proposed management approaches and organizations in the evaluation, and specifically instructed offerors proposing to use subcontracts to "define the work to be subcontracted and describe how you will organize to assure effective management control." We do not find that NASA either placed undue emphasis on this aspect of ESCO's proposal or had no reasonable basis for its evaluation.

ESCO objects to numerous other aspects of the evaluation, including virtually every weakness NASA found in the firm's proposal. Although we have examined all of ESCO's contentions, our discussion has been limited to those areas necessary for resolution of this protest. Because of the significant disparity in overall scores for mission suitability noted above (905 points for Johnson Engineering versus 750 for ESCO), even if ESCO were correct in its other allegations, its resulting score would not exceed that of Johnson Engineering. In view of Johnson Engineering's higher score for mission suitability, its superiority with regard to company experience, and its evaluated cost of approximately \$2 million less than ESCO, we believe that NASA's selection was proper.

We deny the protest.

Harry R. Van Cleve
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General Counsel