Morrow

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Engineered Air Systems, Inc.

File: B-230878

Date: July 25, 1988

DIGEST

1. Prime contractor's decision to exclude the protester from competing for a small purchase order which would have required the protester to test and evaluate its own product was proper because the protester had an organizational conflict of interest.

2. Propriety of prime contractor's alleged termination of the protester's contract for default and the Department of Energy's decision to withhold funds under the protester's contract in response to its lawsuit are questions of contract administration and therefore are not reviewable under our bid protest function.

DECISION

Engineered Air Systems, Inc. (EASI), protests the award of a subcontract to the Brookside Group under purchase order No. 123-J-018, issued by the Reynolds Electrical Engineering Co., Inc. (REECo), a prime contractor of the Department of Energy (DOE) responsible for managing and operating the Nevada Test Site (NTS). The purchase order was issued noncompetitively pursuant to REECo's internal small purchase procedures for evaluation and testing of a fan blade problem on 35 skid mounted air conditioning units. EASI contends that REECo improperly excluded it from competing for the contract after rejecting its offer to perform these services at no cost.

We deny the protest.

EASI manufactured the air conditioners for REECo under a prior purchase order and REECo reports that the immediate purchase order became necessary after EASI failed to comply with its warranty. Regarding the prior purchase order, REECo reports that EASI filed a lawsuit against REECo on

August 11, 1986, for breach of contract and misrepresentation claiming actual damages of $326,869 and punitive damages of $2,000,000, despite having failed to deliver any air conditioning units. EASI made final delivery of the air conditioning units on December 1, 1986. However, REECo reports that defects were discovered in several units, which required EASI to effect repairs that were completed in April 1987. REECo accepted these units at that time and paid EASI the contract amount, except $100,000, which was withheld because of claims made by REECo against EASI in the lawsuit. In answering the suit, REECo counterclaimed that EASI defectively performed the contract resulting in monetary damages.

REECo reports that in December 1987, several air conditioners had fan blades which were cracking and breaking off, rendering several units inoperable. Consequently, EASI was contacted about making repairs to these units under the warranty provision. However, by letter dated February 26, 1988, EASI denied that it was obligated to make any repairs under the warranty and further advised that it would agree to evaluate the situation only if REECo would release the $100,000 being withheld due to the lawsuit. REECo reports that due to the position taken by EASI, the alarming failure rate of EASI's units, and the critical importance of the units it issued the current purchase order to Brookside, which produced the fan blade as EASI's subcontractor.

REECo states that under our Bid Protest Regulations the protest should be dismissed because the matter is before a court of competent jurisdiction. REECo further argues that the protest is untimely because EASI should have known that its February 26 offer would be rejected and, thus, its protest, filed on March 30, 1988, was more than 10 working days after the basis of protest was known. 4 C.F.R. § 21.2(a)(2).

We find that the protest is timely because the documentary evidence of the communications between REECo and EASI shows that REECo did not inform EASI of the decision to reject its offer until a March 14 letter and subsequently in a telephone conversation with EASI on March 17. Since EASI filed its protest within 10 working days of its March 17 conversation, the protest is timely. Further, the protest can not be dismissed because of the lawsuit EASI filed because the issues raised in the protest are not the same issues in the suit.

However, we do find that EASI was not eligible to compete for the contract and was properly excluded because of the potential conflict of interest presented by asking it to test and evaluate its own product. In view of the lawsuit

and current dispute concerning the warranty, it would not have been proper for REECo to have solicited an offer from EASI since there existed a possibility of bias and REECo was in need of complete objectivity. See Gould Inc., Advanced Technology Group, B-181448, Oct. 15, 1974, 74-2 CPD ¶ 205; Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94. Thus, it was not unreasonable for REECo to exclude EASI from the competition. Id. Moreover, we are not persuaded by EASI's contention that it offered to evaluate the fan blade problem with no increase in the cost of its prior contract because the offer was conditioned upon REECo releasing the funds being withheld in response to its lawsuit.

However, we note that the conflict of interest which reasonably required excluding award of the contract to EASI also required excluding award to Brookside, since, as EASI's subcontractor, it manufactured the fan blades which were to be tested and evaluated under the purchase order. Therefore, we find that REECo should not have awarded the contract to Brookside, notwithstanding REECo's belief that Brookside was familiar with the fan blade problem. Since the contract has already been awarded and performed, it is not feasible to recommend any corrective action. However, in the future, REECo should give due consideration to the conflict of interest impediments in contracting with certain contractors.

EASI contends that REECo did not properly terminate its prior contract for default and asks that we instruct DOE to pay it the $100,000 being withheld under the contract. The propriety of a decision to terminate a contract for default is a matter of contract administration to be resolved under the disputes clause of the contract in question and not reviewable under our bid protest function. See 4 C.F.R. § 21.3 (m); ST & E Technical Services, Inc., B-223435 et al., July 15, 1986, 86-2 CPD ¶ 70. We also are precluded from directing DOE to make payment of the funds being withheld pending the outcome of the litigation since it similarly involves a question of contract administration.

The protest is denied.

James F. Hinchman
General Counsel