



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Consulting Engineers, Inc.

File: B-230305.2

Date: August 24, 1988

DIGEST

1. In procurement for architectural and engineering services, contracting agency's decision that disclosure of procurement information to the protester created an appearance of impropriety and justified setting aside recommendation of the initial evaluation board and beginning a new selection process was reasonable since disclosure showed that protester had had access to information about the initial selection process which was not to be released outside the government.

2. Where first selection process for architectural and engineering services is set aside due to appearance of impropriety created by disclosure of information about the procurement to the protester, and, as a result of second selection process, the protester's ranking is significantly lowered, contracting agency should review second evaluation of protester to ensure that it is reasonable.

DECISION

International Consulting Engineers, Inc. (ICE) protests award to any other offeror under solicitation No. N62474-87-C-7856 issued by the Navy for architectural and engineering (A-E) services for the design of three projects at the Naval Weapons Station, Seal Beach, California. ICE challenges the Navy's decision, based on an apparent disclosure to ICE of procurement information, to begin a new selection procedure under the solicitation after interviews had been completed with selected A-E firms and ICE was recommended for price negotiations. ICE also challenges the results of the second evaluation on various grounds. Since we find that the Navy should review the results of the second evaluation to ensure that ICE was considered fairly, we sustain the protest.

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The solicitation was issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which prescribes procedures for acquiring A-E services. Under these procedures, the contracting agency first must publicly announce its requirements and the evaluation criteria. An evaluation board then evaluates the A-E performance data and statements of qualifications of firms already on file, as well as data submitted by firms in response to the specific project. The evaluation board holds discussions with at least three firms and ranks them in order of preference for consideration by the selecting official, who determines the final ranking. Price negotiations then are held with the highest ranked firm. If agreement cannot be reached on a fair price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. See Charles A. Martin & Associates, 65 Comp. Gen. 828 (1986), 86-2 CPD ¶ 268. In this case, the selection was conducted by the Western Division of the Naval Facilities Engineering Command (NAVFAC). Because of the estimated cost of the project, Navy regulations required the final slate of firms recommended for price negotiations by the Western Division to be reviewed and approved by NAVFAC headquarters.

After notice of the procurement was published, 25 firms responded. The evaluation board at the Western Division selected five firms for interviews; two of the five later withdrew from the competition before the interviews were held. After the interviews were completed, the evaluation board submitted a list ranking the three firms interviewed in order of preference. The selecting official at the Western Division approved the slate as submitted; ICE was the highest ranked firm on the slate. In accordance with Navy regulations, the recommended slate was forwarded to NAVFAC headquarters for final approval in mid-January 1988. The record shows that during consideration of the recommended slate, NAVFAC personnel located in their files an unsatisfactory report relating to ICE's performance on a prior project at the Naval Air Station, Point Mugu, California. A NAVFAC official called the Western Division to inquire whether the unsatisfactory performance report had been considered in the evaluation of ICE. When told that the Western Division was unaware of the report, NAVFAC advised the Western Division to submit further justification for the recommended selection of ICE in view of the unsatisfactory report. The evaluation board members prepared such a justification and submitted it to NAVFAC headquarters.

In late January, an employee of ICE spoke with the contract specialist for the procurement at the Western Division. The parties disagree as to the precise contents of the conversation. The ICE employee says that he was told that ICE had

been selected for award but that NAVFAC was withholding final approval because of the Point Mugu unsatisfactory performance report. The contract specialist denies saying that ICE had been selected, but agrees that the existence of the unsatisfactory report was discussed. According to ICE, its employee's conversation with the contract specialist was the first notice ICE had of the unsatisfactory report. ICE was concerned because, contrary to Navy regulations, it had no opportunity to respond to the findings in the report and believed that it could have a serious adverse impact on consideration of ICE for this and other A-E procurements. In addition, ICE believes that the unsatisfactory report was motivated by a "personality conflict" between a Navy employee involved in the Point Mugu project and an employee of ICE, rather than any legitimate concern about ICE's performance. The Navy agrees that the report had not been properly processed and should have played no role in consideration of ICE for the procurement at issue. In fact, after the protest was filed, ICE was given an opportunity to respond to the report and the Navy ultimately decided to eliminate the report from ICE's file.

After the conversation with the contract specialist, the president of ICE called the Deputy Commander for Contracts at NAVFAC headquarters, the official responsible for reviewing and approving final selection of A-E firms recommended by the field divisions. Both agree that ICE's president said that he knew that ICE had been selected and that the selection was being delayed due to the unsatisfactory performance report.

The Deputy Commander states that based on this conversation, he concluded that ICE had had access to information concerning the selection process which was not to be released to competing firms and that this gave rise to an appearance of impropriety and bias toward ICE. After his conversation with ICE's president, the Deputy Commander spoke to the Commander at the Western Division, and states that he was told only that a vice-president of ICE formerly had worked for the Western Division. The vice-president is the ICE employee who spoke to the contract specialist in late January about the unsatisfactory performance report. The Deputy Commander then decided to set aside the recommendation of the initial evaluation board and begin a new selection process.

A new evaluation board was convened at the Western Division. Interviews were held with the three firms interviewed originally, including ICE, and two new firms added to replace the two original firms which had withdrawn from the procurement. The evaluation board ultimately submitted a slate

ranking the two new firms as the first and second most qualified. The board ranked ICE fifth of the five firms, below both the two new firms and the two firms interviewed originally, which had been ranked below ICE by the first evaluation board. On April 11, NAVFAC approved the selection for price negotiations of the highest ranked firm on the second evaluation board's recommended slate, Bernard Johnson Engineering, Inc.

We see no basis to conclude that the Navy's decision to set aside the recommendation of the first board and begin a new selection process was unreasonable. After his conversation with the president of ICE, NAVFAC's Deputy Commander was legitimately concerned about possible improprieties in the selection process and clearly was justified in investigating the apparent disclosure to ICE to determine whether any remedial action should be taken. Even though there is no indication in the protest record that ICE received other information during the selection process, we believe it was reasonable for the Deputy Commander to conclude that the disclosure which ICE revealed during the telephone conversation created an appearance of impropriety since it showed that ICE had had access to information about the selection process which was not to be released outside the government. We recognize that ICE believes it had no alternative but to raise the unsatisfactory performance report issue with the Deputy Commander; in our view, however, the Navy could reasonably conclude that the need to dispel the appearance of impropriety created by the disclosure to ICE outweighed the impact on ICE of the Navy's decision to convene a new evaluation board.

Viewing the circumstances of the procurement as a whole, however, we believe it would be appropriate for the Navy to review the results of the second evaluation to ensure that ICE was considered fairly. As noted above, ICE was ranked fifth of the five firms interviewed by the second board, below both the two new firms and the two firms interviewed originally, both of which had been ranked below ICE by the first evaluation board. It is unclear from the current record if this significant change in ICE's ranking was reasonable, since the second evaluation board's findings discuss only the top three firms and do not discuss the board's rationale for its ranking ICE last of the firms interviewed. For example, in its memorandum recommending Bernard Johnson as the most qualified firm, the board states that no other firm had the "wide range of complex, large relevant projects" involving the type of ordinance-related or blast-resistant structures called for by the evaluation criteria; the board refers to a total of 17 such projects by Bernard Johnson. In response, however, ICE maintains that

its subcontractor has performed 22 such projects. Since the board did not discuss its evaluation of ICE's qualifications, we are unable to determine if ICE's experience was properly considered in the evaluation.

In addition, according to the Navy, the Point Mugu unsatisfactory performance report on ICE--which the Navy ultimately eliminated from ICE's file--was discussed at a meeting attended by at least two members of the second evaluation board held before the second evaluation was begun. Although the Navy states that the matter was raised in an effort to ensure that the unsatisfactory report would not be considered in evaluating ICE, the discussion of the report with the board members may have unfairly created an unfavorable impression of ICE.^{1/}

Since we are unable from the current record to determine whether the protester's ranking by the second evaluation board was justified, and the particular circumstances here warrant close scrutiny to ensure that ICE was fairly considered, we sustain the protest.

Accordingly, we recommend that the Navy review the evaluation of ICE by the second evaluation board to ensure that it is reasonable. Based on that review, the Navy should either affirm the board's ranking, or, if the review reveals any basis to question the reasonableness of the board's evaluation, modify the rankings or conduct a new evaluation, as appropriate. The Navy should inform our Office of the results of its review and the reasons for its conclusions. In addition, since we sustain the protest on this ground, we find that ICE is entitled to recover the

^{1/} ICE also challenges the results of the second evaluation on several other grounds which we find to be without merit. For example, ICE argues that the second evaluation board was prohibited under Federal Acquisition Regulation (FAR) § 36.602-4 from considering Bernard Johnson and the firm ranked second by the board because neither firm had been selected for interviews in connection with the first evaluation. We disagree. FAR § 36.602-4 provides only that the "selection authority"--in this case, the Deputy Commander at NAVFAC--may not add firms to the slate of firms recommended by the evaluation board. That was not the case here; the evaluation board itself added the two firms.

costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

Milton J. Fowler
for Comptroller General
of the United States