



The Comptroller General
of the United States

Washington, D.C. 20548

Linda

Decision

Matter of: D.K. Shifflet & Associates, Ltd.

File: B-234251

Date: May 2, 1989

DIGEST

1. Since the Small Business Administration has conclusive authority to determine small business size status for federal procurements, the General Accounting Office does not consider size status protests.
2. Protest that a conflict of interest exists where agency awarded a contract for the evaluation of programs to the same contractor that assists agency in developing programs under a separate support services contract is denied where agency reasonably determines that there are adequate safeguards in place to prevent the contractor from conducting biased evaluations of the programs.

DECISION

D.K. Shifflet & Associates, Ltd., protests the award of a contract to Prospect Associates under request for proposals (RFP) No. NCI-CO-74110-40, issued by the National Cancer Institute (NCI) for evaluation of cancer communications programs. The protester objects to the Small Business Administration's (SBA) determination that Prospect is a small business and NCI's failure to require Prospect to recertify its size status when the solicitation was amended to reduce the estimated number of labor hours to perform the contract. Shifflet also alleges that the award creates a conflict of interest since Prospect will be evaluating the same programs it is developing for NCI under a separate support services contract.

We dismiss the protest in part and deny it in part.

NCI is responsible for researching and disseminating information relating to the cause, prevention, diagnosis, and treatment of cancer. One of the major objectives of NCI's Office of Cancer Communications (OCC) is to design, develop, evaluate, and promote cancer communications

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programs to improve public knowledge and attitudes relating to cancer and its prevention, and to encourage individuals to adopt healthful behavior that will reduce their risk of developing cancer.

The RFP was issued as a total small business set-aside calling for award of a cost-plus-fixed-fee level of effort contract to perform evaluations of OCC's current cancer education programs. The RFP states that proposals will be evaluated based on the demonstrated capabilities of the offerors in relation to the needs of the project as set forth in the RFP. The specific evaluation factors are technical approach (40 percent); personnel (30 percent); staffing and management (20 percent); and facilities and resources (10 percent).

Prospect and the protester were the only firms that submitted proposals. Both proposals were determined technically acceptable and included in the competitive range. On April 28, 1988, the RFP was amended to reduce the number of estimated labor hours for contract performance from 125,000 to 47,500 hours. Although the amendment was sent to the 60 firms that had initially requested the RFP, Prospect and Shifflet were the only firms that responded to the amendment. When Shifflet responded to the amendment in May, it recertified its size status as a small business; Prospect did not. Best and final offers were due in June. Because Prospect's final technical score was higher than Shifflet's and its evaluated cost was lower, Prospect was selected for award.

On October 27, the contracting officer gave the protester notice of the proposed award to Prospect. Shifflet then protested the proposed award to the agency. Shifflet challenged Prospect's size status, arguing in part that NCI should have required Prospect to recertify itself as a small business after the amendment to the RFP was issued on April 28. Shifflet also argued that the award to Prospect gave rise to an organizational conflict of interest.

The contracting officer referred to SBA that part of the protest challenging Prospect's small business size status. On December 20, the SBA Philadelphia regional office determined that Prospect was a small business concern for this procurement. On January 4, 1989, the contract was awarded to Prospect. On January 9, Shifflet appealed the SBA determination to SBA's Office of Hearing and Appeals, and filed its protest with our Office on January 24. On April 4, SBA issued a decision reversing the regional office's initial determination and finding that Prospect is not a small business.

To the extent that Shifflet challenges the award to Prospect on the basis of its size status, we point out that our Office neither makes nor reviews size status determinations, since SBA is empowered to conclusively determine matters of small business size status for federal procurement purposes. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1988); Newgard Industries, Inc.--Reconsideration, B-226272.2, Apr. 17, 1987, 87-1 CPD ¶ 422. Although on appeal SBA ultimately found that Prospect is not a small business, the award to Prospect, after the initial SBA determination that Prospect was small, was proper since Federal Acquisition Regulation (FAR) § 19.302(h)(1) permits award based on this initial determination. Moreover, since the SBA decision on appeal was not issued until after the award, it is prospective only and does not apply to the current procurement. See FAR § 19.302(i) (FAC 84-12). Furthermore, to the extent that Shifflet contends that the contracting agency should have required Prospect to recertify its size status when it responded to the April 28, 1988 amendment to the RFP, we find this issue as academic in light of SBA's decision. Therefore, no useful purpose would be served by our consideration of this allegation.

The protester also alleges that the contract award to Prospect for the evaluation of the cancer communications programs is improper and creates a conflict of interest, since Prospect will be evaluating the same programs it either developed or for which it provided substantial assistance in developing under a separate support services contract. The support contract calls for Prospect to provide assistance to OCC in the planning, development, implementation, and evaluation of the cancer education programs. The protester contends that because of Prospect's involvement in OCC's program development efforts, Prospect has an interest in showing that the programs are effective, since a showing to the contrary would reflect poorly on Prospect's own efforts. The protester contends that even with the standard procedures OCC states are in place to prevent biased evaluations, a contractor can design the studies and questionnaires, and interpret the evaluation results, to ensure that the programs are shown to be successful. Finally, the protester contends that the executive summaries relating to the programs often are the only portion of a report that is submitted to senior management and Congress, and the conclusions contained in the summaries are not guided by standard procedures.

OCC responds that it, not Prospect, is responsible for determining what cancer education programs will be developed, and that Prospect's involvement in program development

is limited to the specific task orders issued by OCC under the support services contract, such as gathering material as support for proposed programs, identifying institutions with links to target audiences, and preparing materials for dissemination. Thus, OCC maintains that Prospect does not have a major investment in having OCC's programs shown to be effective, since Prospect's performance under its support services contract is based on how successfully it performs the discrete tasks it is assigned, and not whether the OCC programs are effective.

Most importantly, OCC states that there are safeguards in place to prevent Prospect from conducting biased evaluations of the cancer education programs. Preliminarily, OCC states that it guards against potential contractor bias by requiring its project officer to work closely with Prospect and review its work under the task orders. More specifically, OCC states that the evaluations must be conducted in accordance with standard procedures set forth in OCC's "Communication Programs Evaluation: Evaluation Master Plan," which was developed for OCC by the protester. With regard to preventing bias in the design of the surveys and questionnaires, OCC states that prior to implementation of the surveys, it, along with the Office of Research and Methodology at the National Center for Health Statistics, Public Health Service, will review all research designs, surveys and questionnaires prepared by Prospect. Furthermore, OCC states that the Office of Management and Budget (OMB) is required to perform the final review and clearance of these evaluation methods prior to their implementation.

With regard to preventing bias in the interpretation of the surveys and questionnaires, NCI states that the OCC project officer will receive from Prospect the raw data and data tapes upon which the interpretation is based. The project officer is required to review the data against the contractor's interpretation to ensure that it is sound. Finally, OCC responds that the senior managers at NCI are provided a complete copy of the study results and not just the executive summaries as alleged by the protester. In view of these safeguards, OCC states that there is no conflict of interest involved in Prospect's performing the evaluation contract.

Contracting officials are required to avoid, neutralize or mitigate potential significant organizational conflicts of interest on the part of prospective contractors so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's

objectivity. FAR §§ 9.501, 9.504, and 9.505; Associated Chemical and Environmental Services, et al., B-228411.3 et al., Mar. 10, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 248. A contractor is not prohibited from evaluating its own work so long as there are proper safeguards to ensure objectivity and to protect the government's interests. FAR § 9.505-3 (FAC 84-40). The responsibility for determining whether an actual or apparent conflict of interest will arise if a firm is awarded a particular contract, and to what extent the firm should be excluded from the competition, rests with the contracting agency. We will not overturn the agency's determination in this regard except where it is shown to be unreasonable. See Arthur Young & Co., B-226626, June 12, 1987, 87-1 CPD ¶ 591. Here, we find that OCC reasonably determined that the award to Prospect for the cancer communications evaluation programs was proper despite Prospect's support services contract.

We note that the statement of work for the support services contract is very broad in scope and calls for Prospect to develop program plans which include specific objectives, strategies, tactics and evaluation plans. It is unclear from the record whether Prospect has been heavily involved in OCC's program development under the support services contract or whether Prospect's involvement has been limited to minor tasks such as gathering data and preparing materials for dissemination. Therefore, while a potential conflict of interest could exist if Prospect is issued a task order to evaluate a program it had major responsibility for developing under the support services contract, we believe that the award to Prospect was reasonable based on the numerous safeguards built into the process to prevent Prospect from manipulating the design of the survey and interpretation of the evaluation results to establish the effectiveness of the programs. As discussed above, the fact that two other entities which are not a part of OCC review the proposed surveys and questionnaires prior to their implementation provides an additional independent and objective review of the contractor's methodology. The contractor also is required to conduct its evaluation in accordance with the procedures in OCC's Master Evaluation Plan. In addition, the OCC project officer is to work closely with Prospect and to monitor and review its performance under the evaluation contract. As part of this responsibility, OCC's project officer is required to review and analyze Prospect's interpretation of the surveys and questionnaires to ensure it is sound. Further, performance under the evaluation contract is on a task order basis, and, as a result, OCC can exercise care and directly control the scope of Prospect's work to ensure that the firm does not evaluate a program in which it was heavily involved. In our

view, all of these procedures and safeguards work together to prevent Prospect's objectivity from being impaired, and are sufficient to show that the agency's determination to award to Prospect notwithstanding its support services contract was proper.

The protest is denied.



James F. Hinchman
General Counsel

