The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Department of the Air Force--Request for Reconsideration

File: B-234060.2

Date: September 12, 1989

DIGEST

Prior decision in which we sustained a protest and recommended termination of the contract is affirmed where the record showed that awardee improperly obtained source selection sensitive information concerning its competitor's product and where request for reconsideration does not establish any factual or legal errors in the prior decision.

DECISION

The Department of the Air Force requests reconsideration of our decision in Litton Sys., Inc., B-234060, May 12, 1989, 68 Comp. Gen. ___, 89-1 CPD ¶ 450. In that decision, we sustained Litton Systems, Inc.'s, protest under request for proposals (RFP) No. F33657-88-R-0096, the production phase of a competition between Loral Systems Manufacturing Company and Litton for advanced radar warning receivers (ARWR) on the basis that Loral improperly obtained source selection sensitive information concerning Litton's system during a critical period in the ARWR competition.

We affirm our decision and recommendation.

The protest issue which we sustained--the improper disclosure of Litton source sensitive information--was based primarily on an affidavit unsealed in United States District Court that had been filed in support of requests for search warrants in connection with the Operation Ill Wind investigation, a criminal investigation of alleged improprieties concerning certain Department of Defense procurements.

The affidavit, prepared by a special agent of the Federal Bureau of Investigation (FBI) based on information obtained through wiretaps and other means, described improper conduct involving the ARWR competition which was limited to Litton and Loral. The affidavit stated that the Deputy Assistant

Secretary of Acquisition for Tactical Systems provided sensitive procurement information to a private consultant who in turn passed the information to a senior vice-president of Loral in return for money. With respect to the ARWR competition, the affidavit stated that the consultant informed Loral of the results of the Air Force official's visit to Litton in October 1987 to evaluate Litton's ARWR development. The consultant gave Loral an opportunity to review and copy portions of a "book" describing Litton's methodology which was prepared for a briefing Litton gave the Air Force concerning its ARWR progress. The affidavit also stated that in December 1987 the consultant obtained a paper relating to a classified briefing, which the Air Force official attended, that discussed Litton's dynamic electromagnetic environment simulator (DEES) testing of its ARWR. The affidavit further states that the consultant "has continued to provide . . . [Loral] with information about the competition that he obtains from . . . [the Air Force official]." These disclosures of information began 10 months before the production RFP was issued.

While not disputing the affidavit's contents, the Air Force argued that remedial action was not required because Litton had failed to establish that the information disclosed was proprietary, had been disclosed by an Air Force official, or had provided Loral with a competitive advantage.

We found that whether or not the information disclosed was proprietary, the record established that every page of the "book" was marked by Litton "F-16 RWR Competition Source Selection Sensitive" at the direction of the Air Force. We found that it was also clear that Loral was not entitled to access to the "book" which detailed and explained Litton's ARWR system. Further, we found that, although the affidavit did not state that the Air Force official gave the consultant the "book," given the close and continual relationship and joint actions between the consultant and the high ranking Air Force official as described in the affidavit, the clear implication in the affidavit was that the "book" was provided by the Air Force official.

We further noted that the affidavit indicated that the consultant received a paper prepared for a classified briefing on ARWR DEES testing which was limited to government officials, including the high-level Air Force official.

The affidavit also stated that the consultant knew of the briefing from the Air Force official and told Loral that he would obtain the papers concerning the testing from the government official. While the affidavit did not indicate whether Loral received a copy of the DEES testing paper, the

affidavit stated that the consultant received a copy of this classified information and continued to provide Loral with information about the competition that he obtained from the Air Force official.

Based on the record, whether or not the Air Force official was involved in the actual release, we concluded that procurement sensitive documents in the Air Force's possession concerning Litton's product were obtained by Loral.

We then found that even if, as the Air Force argued, this information did not give Loral an advantage in the competition, in our view, the propriety of an award decision should not turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we concluded that the integrity of the system would be best served by a termination of the contract.

We recommended that the Air Force terminate Loral's contract, and then determine how it can best meet its needs for these systems in a manner which will ensure the integrity of the competitive process. We also awarded protest costs.

On reconsideration, the Air Force first argues that our decision departs from our Office's rule that where a protester's proprietary or procurement sensitive information has been leaked to a competitor, the protester must establish competitive prejudice. Second, the Air Force argues that our decision was based on wiretap evidence which may ultimately be suppressed in a criminal proceeding. The Air Force points out that the United Stated District Court enjoined the Air Force from using the wiretap information as a basis to suspend the high-level agency official named in the affidavit because the Air Force did not provide the official an opportunity to challenge the legality of the use of the wiretap evidence. Finally, the Air Force argues that our remedy of terminating the contract for the convenience of the government harms the government "operationally and financially" by increasing the procurement costs and further delaying the procurement for a needed military item.

As stated, the Air Force first contends that to sustain a protest in similar prior cases, we have required a finding of competitive prejudice where a competitor improperly

obtained another competitor's source sensitive or proprietary information. See, e.g., Management Servs., Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD ¶ 74. The Air Force argues our decision in Litton Sys., Inc., 68 Comp. Gen. ___, supra, is a departure from prior precedent. We disagree.

Where a protest decision has involved a protester's entitlement to the award, we have considered the prejudice to the protester resulting from the agency's improper action. See Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96. Here, we did not sustain Litton's protest because we found that Litton should have received the award, or even that Loral's proposal was incorrectly evaluated, as Litton alleged. Rather, we sustained the protest solely on the basis that Loral's improper conduct, by itself, without regard to its effect on the award selection, compromised the integrity of the competitive process. Our decision to sustain Litton's protest is consistent with prior precedent where the integrity of the competitive process was at issue. See Informatics, Inc., 57 Comp. Gen. 217, 78-1 CPD ¶ 53 and Swedlow, Inc., 53 Comp. Gen. 139 (1973), aff'd, 53 Comp. Gen. 564 (1974), 74-1 CPD ¶ 55.

Next, the Air Force contends that our decision was improperly based on wiretap evidence which may ultimately be suppressed in a criminal proceeding. As indicated above, the Air Force points out that the United States District Court recently restrained it from suspending the high-level agency official named in the affidavit because the Air Force did not provide him an opportunity to challenge the underlying wiretap pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, et seq. (1982).1/ It is the Air Force's position that our decision places it at odds with the district court ruling.

Initially, we note that neither the Air Force nor Loral questioned this Office's consideration of the evidence obtained from the wiretap in the original protest submissions. In fact, it was Loral who provided a copy of the redacted affidavit to our Office and to all interested parties. Neither Loral nor the Air Force presented any evidence to refute the contents of the affidavit. Indeed, Loral officials have publicly admitted that they did receive documents with respect to the ARWR procurement, though they

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1/ The statute prohibits the use of wiretap information obtained in violation of law in any proceeding before any authority of the United States or a state or political subdivision. See 18 U.S.C. § 2515.

insist the information did not change Loral's proposal. The affidavit in question has been used without objections in other bid protest proceedings of this Office. Furthermore, the Omnibus Crime Control Act, in pertinent part, permits only an aggrieved person in a civil or criminal proceeding to object to the use of wiretap evidence. 18 U.S.C. § 2518(10)(a). Here, the Air Force and Loral do not claim to be aggrieved persons as defined by the Act which is limited to a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. See 18 U.S.C. § 2510(11).

The FBI affidavit constituted probative evidence and was only one source of available evidence in the record that legitimately cast doubt on the integrity of the procurement process. We have previously relied on information from criminal investigations in determining the propriety of a procurement decision. See, e.g., Ware Window Co.; Saleco-Ware Window Co., B-233367; B-233168, Feb. 6, 1989, 89-1 CPD ¶ 122; Carson & Smith Constructors Inc., B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560.

Regarding our recommendation, the Air Force reports that it has a legitimate military need for this item and that termination of Loral's contract may unreasonably delay the program and substantially increase the costs of this procurement, since termination could result in resolicitation costs ranging from $60 to $300 million, exclusive of termination costs that might be payable to Loral.

As the Air Force knows, our recommendation was based on our conclusion that Loral's actions in this case seriously undermined the integrity of the competitive process. In view of our concern, we are unpersuaded by the Air Force's assertion of increased costs, which we find to be speculative, or its assertion of unreasonable delay, which the Air Force has not substantiated. Even if termination of the Loral contract may result in increased costs for this procurement, we nevertheless cannot ignore the serious harm to public confidence in the procurement system caused by the circumstances here. As for delay, in our prior decision we recommended that the Air Force terminate the tainted contract and take whatever actions it deems necessary to procure the requirement in a way that is consistent with preserving the integrity of the procurement process. We therefore see no need to modify our recommendation.

We also affirm the protester's claim for costs, including those incurred during this reconsideration. The protester should file its claim directly with the Air Force. If the

parties are unable to agree on the amount within a reasonable time, this Office will determine the amount to be paid. 4 C.F.R. § 21.6(e) (1988).

Our prior decision and recommendation are affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States