



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Radiation Safety Services, Inc.

File: B-237138

Date: January 16, 1990

DIGEST

Contracting agency reasonably determined that an organizational conflict of interest existed and properly excluded the protester from competing for a contract to survey general licensees using equipment containing radioactive material (under a general license granted by the contracting agency), where the protester provides consulting services to these general licensees and performs service work for the equipment in question, because it may appear to the general licensees that the Nuclear Regulatory Commission endorses the protester to perform service work, thus creating an unfair competitive advantage which is specifically prohibited under applicable agency statutory and regulatory provisions.

DECISION

Radiation Safety Services, Inc. (RSSI), protests the determination by the Nuclear Regulatory Commission (NRC) that RSSI is ineligible for award under request for proposals (RFP) No. RS-NMS-89-008 because of an actual or potential conflict of interest.

We deny the protest.

Under this RFP, the NRC is seeking a contractor to survey 3,000 users of specified devices, such as measuring gauges and tritium exit signs, which contain small amounts of radioactive materials. Such users are not issued specific licenses by NRC but, instead, rely upon a general license granted by NRC which is applicable to all users of designated classes of devices. These users (general licensees) are required to operate, maintain and dispose of the devices in accordance with applicable NRC regulations. The purpose of the survey is to determine the extent to which users comply with these regulations.

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Based on its technical review, NRC's source evaluation panel (SEP) determined that RSSI's involvement in providing commercial services on the devices for general licensees, which are the subject of the study, created an organizational conflict of interest and recommended that RSSI be disqualified from the competition pursuant to NRC regulations. 41 C.F.R. § 20-1.5403. The contracting officer concurred, and by a letter dated September 13, 1989, so advised RSSI. RSSI filed a protest in our Office on September 27, contending that there is no actual conflict of interest and, in any event, that the contracting activity misapplied its regulations by rejecting RSSI's proposal rather than waiving the conflict as is permissible under the regulations. NRC is withholding award pending the resolution of this protest.

We have consistently held that 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 a firm should be excluded from the competition, rests with the procuring agency; we will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629. The Federal Acquisition Regulation (FAR) § 9.501 (FAC 84-46), recognizes that an organizational conflict of interest exists when the nature of the work to be performed under a proposed government contract may impair the contractor's objectivity in performing the work, or result in an unfair competitive advantage to the contractor. Moreover, a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictates the use of such a restriction, even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

The NRC, because of its function as licensor and regulator of nuclear devices, is particularly sensitive to conflicts of interest and its regulations implementing the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2210(a) (1982), impose a more precise standard than does the FAR. In particular, NRC's implementing regulations, which were included in the RFP, provide that a contracting officer's determination to waive an organizational conflict "shall be strictly limited to those situations in which: (1) the work to be performed under contract is vital to the NRC program; (2) the work cannot be satisfactorily performed except by a contractor whose interests give rise to a question of conflict of interest, and (3) contractual and/or technical

review and supervision methods can be employed by NRC to neutralize the conflict." 41 C.F.R. § 20-1.5411.

RSSI's proposal states that RSSI is licensed by the NRC and the Illinois Department of Regulatory Safety to collect and analyze leak tests and perform installation, relocation, shutter testing, testing of safety devices, and radiation surveys for fixed and portable gauges, gas chromatographs, and x-ray fluorescence analyzers. In addition, the firm has made recommendations based upon operational and health physics considerations for generally licensed gauging applications, and it has performed safety evaluations for submittal to NRC to calculate possible hazards resulting from damage to tritium light sources. RSSI further states that it is capable of taking emergency action if a health or safety hazard is discovered during a field audit.

As a result of the SEB evaluation of RSSI's proposal, the contracting officer determined that award of a contract under this RFP would put RSSI in a position to obtain immediate commercial work from general licensees, if during an audit RSSI determined that a hazard exists. The NRC concluded that an unfair competitive advantage would result from: (1) the potential for obtaining commercial work directly incident to performing an NRC contract, (2) the appearance that the NRC endorsed or sponsored RSSI to perform these services commercially, and (3) the ability to obtain detailed information about 3,000 users of these regulated devices, which information RSSI had previously sought from the NRC under a Freedom of Information Act request. The NRC also found that the close relationship between RSSI's commercial work and the work to be performed under the RFP created a problem of potential bias, since survey results which showed that additional tests or installation work was needed could create more commercial work for RSSI.

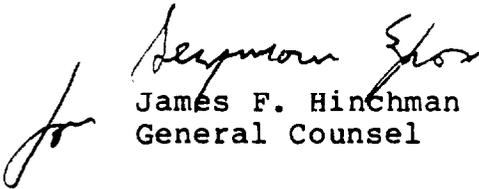
RSSI specifically acknowledged in its proposal that there was a potential conflict of interest, because it offers consulting and laboratory services to clients who are general licensees. RSSI stated that "the nature of the service and the separation of staff minimize the potential for conflict of interest," and, in effect, asserted that any conflict would be mitigated. In its comments on the agency report, RSSI argues that there is no conflict of interest because the services it provides relating to the equipment being surveyed was not performed for the general licensees who are the subject of this survey. RSSI also alleges that general licensees normally do not require the skills and expertise which RSSI markets. In addition, RSSI points out that it promised to notify the NRC if a general licensee,

who was part of the survey, was a past client, to mitigate any possible conflict. RSSI discounts the NRC's concern that general licensees will believe RSSI has been endorsed by the NRC, arguing that future actions have nothing to do with the present competition.

We disagree. It is the concern that RSSI could be given an unfair competitive advantage in the future which led the NRC to conclude that RSSI had an organizational conflict of interest. NRC had before it information that: (1) RSSI acknowledged in its proposal that there was a potential organizational conflict of interest; (2) RSSI's corporate experience statement contained a recitation of prior service work on equipment which is subject to this survey; (3) RSSI had previously sought a customer list of general licensees from the NRC; and (4) RSSI had failed to alleviate the agency's concern that subjects of the survey would believe that the NRC endorsed RSSI. Based on this information, NRC's determination that RSSI had an organizational conflict of interest was reasonable. We also note that even if an actual conflict of interest does not exist RSSI cannot eliminate the appearance of a conflict, which we have held is a sufficient basis on which to reject a proposal due to the government's strict policy in avoiding conflicts of interest. Deloitte Haskins & Sells, B-222747, supra.

RSSI also argues that even if there was a conflict of interest, RSSI offered sufficient mitigation measures, and under the applicable regulations that is all that is required. We disagree. Under NRC's regulations, set forth in the solicitation, once a contracting officer finds a conflict, he must impose conditions which avoid the conflict, supply justification to waive the conflict, or disqualify the offeror, 41 C.F.R. § 20-1.504(c) (emphasis added). Mitigation is insufficient because it only reduces the conflict, it does not eliminate it. Further, here a waiver is not appropriate because, contrary to the protester's belief, the work could be satisfactorily performed by contractors whose performance would not give rise to an organizational conflict of interest. Accordingly, only the third alternative of disqualification was appropriate in these circumstances.

The protest is denied.


James F. Hinchman
General Counsel