



Comptroller General
of the United States

Washington, D.C. 20548

147003

Decision

Matter of: Person-System Integration, Limited

File: B-243927.4

Date: June 30, 1992

Bernard R. Corbett, Esq., for the protester, Mark Green for Tiger Joint Venture, an interested party, Charles J. McManus, Esq., Eric A. Lile, Esq., and Thomas Basil, Esq., Department of the Navy, for the agency, Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's general allegations that proposed awardee's employees had wide-ranging access to procurement sensitive information that should have operated to exclude the awardee from the protested procurement for training services constitute mere suspicion or innuendo and cannot themselves serve to exclude the proposed awardee.
2. Information relating to protester's performance under a specific delivery order for aircraft training associated with one fighter aircraft which may have been given to proposed awardee's employee does not give rise to a conflict of interest where the information could not be used to the proposed awardee's competitive advantage under the protested procurement.
3. Where solicitation contains a broad statement of work generally defining the scope of an omnibus support training contract under which specific delivery orders will be placed and where the work statement does not form the basis for competition, the fact that the proposed awardee (as well as the protester) may have provided input to the agency which may form the basis for some of the delivery orders to be issued after the award is made does not constitute an organizational conflict of interest.

DECISION

Person-System Integration, Limited (PSI) protests the proposed award of an indefinite delivery, indefinite quantity contract to Tiger Joint Venture (TJV) under request for proposals (RFP) No. N61339-90-R-0023, issued by the Naval Training Systems Center (NTSC) for Instructional Systems

Development (ISD) support services for the design and implementation of fighter training programs for the F-14, F-15, F-16 and Advanced Tactical Fighter aircraft; and the Navy's TOPGUN aviation school. ISD support also includes analyzing the Navy's needs for training and monitoring the implementation of training systems. The protester contends that one member of the successful joint venture--Information Spectrum, Inc. (ISI)--has a conflict of interest which should exclude the proposed awardee from consideration for award.

We deny the protest.

BACKGROUND

The RFP was issued on April 18, 1990, contemplating the award of an indefinite quantity contract against which individual delivery orders defining specific tasks would be placed when the Navy required ISD services. The scope of the contract was defined in generic terms in the statement of work (SOW) because the Navy has a continuing need for a "wide range of items" relating to training for "current and emerging" weapons systems.

In addition to addressing technical requirements,¹ offerors were required to propose fixed labor rates for 10 different direct labor categories as well as general and administrative (G&A) rates for travel and material costs. Material costs themselves were not part of the price competition as they were fixed by the RFP for evaluation purposes. During the course of the contract, the government would be responsible for paying for materials under conditions set forth in the delivery orders.

Seven initial proposals were received by May 25 and, following an initial evaluation and discussions, the competitive range was reduced to three offers, including those of the protester and TJV. Best and final offers (BAFO) were solicited and received on March 19, 1991 and, as a result of the final evaluation, PSI was ranked third technically and second to TJV in terms of price. On May 1, the Navy notified the unsuccessful offerors that it intended to make an award to TJV; on May 15, PSI protested that decision to

¹Under the RFP, offerors were comparatively rated on the factors of personnel qualifications, program management, quality of past performance and technical approach. (Technical approach was to be demonstrated by an offeror's response to a hypothetical problem involving the design of a training system for a new aircraft.)

this Office (B-243927.2) on the basis that, through a principal joint venturer--ISI--the proposed awardee had a conflict of interest.

We dismissed PSI's first protest as the result of the Navy's decision on June 20 to withhold the award to TJV and investigate the allegations concerning a possible conflict of interest. PSI subsequently filed a claim for its protest costs, B-243927.3, which was dismissed pending the receipt of the results of the Navy's investigation. By letter dated February 11, 1992, the Navy released the results of its investigation and notified unsuccessful offerors, including PSI, that TJV had been reinstated as the proposed awardee under the RFP. This protest followed on February 25, reiterating the protester's contention that TJV has a conflict of interest and should, therefore, be excluded from consideration for award.

PROTEST AND RESPONSE

PSI's principal grounds of protest fall into three categories, each of which, in the protester's view, constitutes a sufficient reason for the Navy to exclude TJV from the procurement on the basis that its principal joint venturer, ISI, has a conflict of interest which accorded the awardee an undue competitive advantage in the protested procurement.

Prior to outlining these allegations, we note that they involve actions taken by ISI and PSI under both firms' previous ISD support contracts with the Naval Air Systems Command (NAVAIR) in Arlington, Virginia. Under ISI's support contract (No. N00600-89-D-0262), the firm was tasked to perform such functions as reviewing and analyzing F-14 aircrew and maintenance training and the F-14 Navy Training Plan. The principal purpose of PSI's contract (No. N00019-89-D-0050) was the development of training materials for the F-14A/A(PLUS) aircraft; however, in the summer of 1990, the agency placed a delivery order for F-14D training under PSI's contract and, as a result, both PSI and ISI worked together in conjunction with F-14D training. We also note that PSI was NTSC's omnibus support contractor for ISD services for a number of aircraft under contract No. N61339-87-D-0007, which was awarded in April 1987 and which reached its funding ceiling in 1990. The present procurement represents a portion of the requirements covered by PSI's former omnibus contract with NTSC.

PSI's grounds for protest may be summarized as follows:

1. General allegations that two ISI employees--Mr. Barasha, who left the employ of the NAVAIR shortly before the submission of initial proposals and Mr. Magnus, who worked

for ISI on its F-14D support contract with NAVAIR--had wide-ranging access to funding and source selection sensitive information related to the instant procurement.

2. Specific allegations, supported by affidavits from PSI officials, to the effect that Mr. Magnus, by the Navy's direction in August and September of 1990, on three occasions solicited and received from PSI proprietary information relating to the protester's own training support contract for F-14 fighters. In each instance, PSI maintains that the information was beneficial to ISI in responding to the protested RFP.

3. An allegation that ISI, by virtue of performing delivery orders under its F-14D support contract with NAVAIR, contributed substantially to the development of the SOW contained in the protested RFP and, therefore, should be excluded because it has an organizational conflict of interest.

The Navy's investigation--which involved a review of affidavits from the protester, ISI, TJV and various Navy officials--resulted in the agency's February 1992 determination that there was not sufficient reason for excluding TJV on the basis of any conflict of interest posed by its principal joint venturer, ISI. With respect to the general allegations that Mr. Barasha and Mr. Magnus had routine access to procurement sensitive information, the Navy maintains that the record of its investigation shows that they did not. With respect to the three instances where Mr. Magnus solicited information from PSI, the Navy maintains that he never personally received the information and argues that, in any event, the information was not of a nature which would have provided any advantage to a competing offeror in the preparation of a proposal under the protested RFP.

Finally, the Navy maintains that ISI's work under delivery orders issued pursuant to its F-14 support contract with NAVAIR did not contribute substantially to the development of the SOW in the protested RFP. In addition, the Navy states that PSI has performed similar work for it under its omnibus training support contract with NTSC which, in essence, was the predecessor contract to the one being awarded under the competed RFP.

For the reasons set forth below, we find that the record supports the Navy's determination not to exclude TJV from the protested RFP.

ANALYSIS

General Allegations Regarding Messrs. Barasha and Magnus

PSI generally alleges that Mr. Barasha, by virtue of his former NAVAIR employment in the F-14 program office in Arlington, Virginia, and Mr. Magnus, by virtue of his work under ISI's F-14 support contract with NAVAIR for ISD services, had wide-ranging access to information pertaining to Navy funding levels and source selection decisions.

An agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system so long as the determination is based on facts and not mere innuendo or suspicion. Our review is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation of an apparent conflict of interest. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210.

The NAVAIR office in Arlington, Virginia, in which the ISI employees worked is not the contracting office for the protested procurement. The contracting office conducting this procurement is NTSC in Orlando, Florida. NTSC contracting officials have submitted statements to the effect that neither Mr. Barasha nor Mr. Magnus ever had access to the type of information described by PSI, and the individuals themselves have submitted similar statements. Further, ISI and TJV officials responsible for the preparation of the proposed awardee's offer have submitted statements indicating that they never received such information from any source. In addition, as part of the Navy's investigation, the contracting officer examined TJV's proposal and found no indication that the firm's prices were influenced in any way by information contained in PSI's proposal. Rather, the contracting officer concluded that TJV's pricing strategy was similar to the strategy it had used in a number of other competitive ISD procurements.

In contrast, PSI has provided no details as to why it believes that the two ISI employees had wide-ranging access to "government-only" information relating to the procurement. In view of the strong denials by the two individuals, and considering the fact that the procurement was conducted at an office that was physically separate from the location of both of the individuals, we conclude that the protester's general arguments constitute nothing more than mere suspicion or innuendo and cannot by themselves serve as a basis for excluding TJV from the competition. Holmes & Narver, supra.

Specific Allegations Regarding Mr. Magnus

PSI has provided affidavits from two of its officials which allege that on three occasions in August and September 1990, the protester was directed by the Navy to furnish procurement sensitive information regarding its NAVAIR ISD contract to Mr. Magnus, who was working for ISI under a support contract ISI had with the Navy. PSI's employees state that the information was actually delivered to Mr. Magnus. Mr. Magnus' affidavit acknowledges that he asked PSI for the information but denies that the information itself was ever delivered to him.

Where allegations of a conflict of interest arise in the context of one competing offeror's having information not generally available to other offerors--such as proprietary data from another firm participating in a procurement--the information must be competitively useful in order to justify the offeror's exclusion. Holmes & Narver, Inc., supra. In our view, it is irrelevant whether Mr. Magnus ever actually saw the information at issue since, as explained below, none of it can be described as competitively useful in the context of the present procurement. Id.

All of the information solicited by the Navy from PSI through Mr. Magnus in August and September 1990 had to do with details of a delivery order to develop a "transition training syllabus" for the F-14D fighter that the Navy was proposing to issue under PSI's contract for ISD services relating to another F-14 model. The process of developing the specifics of, and obtaining approval for, the delivery order involved a "negotiation" between the Navy and PSI in which the information at issue was exchanged.

The record shows that, in response to the requests made by Mr. Magnus on behalf of the Navy, PSI provided: (1) a breakdown of \$7,032 of proposed material costs for commonly-available items such as slides and viewgraphs to be used in developing the transition syllabus; (2) a memorandum explaining that PSI wanted to use a previously unapproved support engineering subcontractor, who manufactured the computer-based training (CBT) equipment used for the F-14D, in order to "augment PSI's in-house CBT capabilities" and avoid delays in contract performance; and (3) a one-page analysis of the estimated difference in price between CBT and video-taped training so that the Navy could determine whether it could afford the taped training under the delivery order.

While the protester generally alleges that this information provided ISI with a competitive advantage under the RFP, given the nature of the solicitation, we fail to see how such information, even if received by ISI, could have been

useful. As stated earlier, the RFP required offerors to submit prices for their direct labor and G&A rates. This constituted the sole basis for price competition. Material prices were fixed for evaluation purposes. Thus, the fact that ISI could have known that PSI was proposing \$7,032 in material costs for its F-14D delivery order could not have helped the proposed awardee in formulating its offer under the RFP.

Moreover, the terms of the RFP were very general owing to the uncertain nature of the Navy's emerging requirements which were to be definitized only when the terms of a delivery order were set after an exchange between the Navy and its contractor. Offerors under the RFP were rated on the basis of the qualifications of their own personnel, not on the basis of subcontractors who might have to be used on specific delivery orders in the future. Thus, we find that the information relating to why PSI chose to use one particular subcontractor for an F-14D transition syllabus, which was not likely to be reordered under a contract awarded pursuant to the protested RFP, to be of no competitive value to TJV in responding to the solicitation.

Likewise, the protester's estimate of the difference in cost between CBT and videoc-taped training for what the agency describes as a one-time effort for the F-14D transition syllabus with "exactly defined" deliverables does not, in our view, provide any competitively useful information to an offeror under the current RFP in view of its broad technical evaluation factors and its use of overall labor and G&A rates in the price comparison.

These conclusions were presented to PSI in the Navy's report and the protester's comments on that report contains no substantive rebuttal to the agency's position that the information requested by Mr. Magnus was not "competitively useful." Accordingly, we have no basis for objecting to the Navy's decision not to exclude TJV because one of its employees requested, and may have received, data from PSI in conjunction with his duties under ISI's NAVAIR contract in 1990. Holmes & Narver, Inc., supra.

Organizational Conflict of Interest

PSI urges that TJV be excluded from the competition because ISI has an organizational conflict of interest. In support of this, the protester argues that under its support contract with NAVAIR, ISI has been tasked to perform analyses of the F-14 Navy Training Plans for aircrew, maintenance and operator training and that the results of these analyses will form the "baseline recommendations" for an update of existing ISD products and the Navy's training plan for the F-14. PSI submits that ISI has in effect

provided material which "established the technical requirements for the work to be accomplished under the instant procurement."

The Federal Acquisition Regulation (FAR) requires that if a contractor: (1) prepares or assists in preparing "a work statement to be used in competitively acquiring a system or services," or (2) "provides material leading directly, predictably, and without delay to such a work statement," the contractor generally may not supply the system or services. FAR § 9.505-2(b)(1). This restriction is intended to: (1) avoid the possibility of bias in situations where a contractor would be in a position to favor its own capabilities, S.T. Research Corp., B-233309, Mar. 2, 1989, 89-1 CPD ¶ 223; or (2) avoid the possibility that the contractor, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. See National Credit Union Admin.; Schreiner, Legge & Co.--Recon., B-244680.2; B-244680.3, Apr. 1, 1992, 92-1 CPD ¶ 239. The protester has not alleged that ISI will be in a position to favor its own capabilities as a result of performing a contract awarded under the RFP; rather, PSI alleges that ISI's contribution to the SOW gives the firm an unfair competitive advantage as the result of special knowledge of the Navy's future requirements.

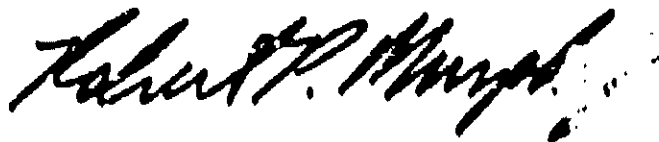
The Navy contends that ISI's work does not result in an organizational conflict of interest as alleged by PSI. The agency reports that ISI, under its NAVAIR support contract, and PSI, under its predecessor NTSC omnibus support contract, have both performed ISD analyses which produce information that is used in developing future agency requirements for training. However, the agency also notes that contractor-generated input of this nature is under strict review and control of the agency, and that the Navy retains the basic decisionmaking function regarding the establishment of its requirements. Also, the Navy notes that, at present, the actual taskings and funding levels for delivery orders under the contract to be awarded are uncertain.

The Navy further points out that the RFP does not specify any actual work to be performed since this will be left to individual delivery orders which are to be issued as needs arise. Our review of the RFP confirms that it contains a very broad SOW which merely lists in general terms what types of analyses, designs, systems development and production, etc. may be required under future delivery orders. It is not specific to any one of the five aircraft programs covered by the contract. The technical evaluation factors in the RFP do not appear tied directly to the generalized outline in the SOW; for example, an offeror's

technical approach is to be evaluated in the context of its response to a hypothetical training problem rather than any response to the ISD functions listed in the SOW.

Under these circumstances, where the agency is using the technical recommendations of at least two of its previous ISD contractors, including the protester, to aid in its effort to define future training requirements, where the agency itself does not presently know the details of those future requirements and where the details of the future requirements do not affect the evaluation factors under which firms are competing for the award of an omnibus services contract, there is no basis for concluding that ISI, by virtue of providing technical recommendations to the Navy under its prior contract, has gained an unfair competitive advantage in the present procurement. National Credit Union Admin.; Schreiner, Legge & Co.--Recon., supra.

The protest is denied.


for James F. Hinchman
General Counsel