

14716.1
Miller - Moe



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cleveland Telecommunications Corporation

File: B-247947

Date: July 15, 1992

Michael Waller and David Williams for the protester, Darleen A. Druyan, Don Bush and Paul Brundage, Esq., National Aeronautics and Space Administration, for the agency, Behn Miller Moe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

Protest against the proposed award of a contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), is denied where the protester, who alleged that the procuring agency improperly favored a particular 8(a) contractor, fails to show that the procurement officials acted fraudulently or in bad faith.

DECISION

Cleveland Telecommunications Corporation (CTC) protests the proposed award of a contract to Tal-Cut for an Ultra High Frequency (UHF) trunked radio communications system. The contract is to be awarded under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), which authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged businesses. In its protest, CTC contends that the agency selected Tal-Cut for this contract award in bad faith.

We deny the protest.

BACKGROUND

On October 8, 1991, NASA announced in the Commerce Business Daily (CBD) that it was seeking sources to provide a UHF trunked radio communications system for the National Aeronautics and Space Administration (NASA) Lewis Research Center located in Cleveland, Ohio. The CBD notice advised

contractors that in addition to the basic system, installation, testing and training services would be required.

By letter dated October 31, the SBA Cleveland District Office formally requested that NASA consider placing this requirement under the 8(a) program and further requested that NASA consider CTC for the award.

On November 5, the NASA technical and contracting personnel met with CTC to discuss this requirement.¹ During this meeting, CTC explained its past experience and qualifications, and presented references from past contracts and a capability statement in the form of a company profile brochure; CTC also indicated that the company's experience was primarily with telephone and computer systems--which are not the type of wireless system involved in this requirement. At the meeting, the NASA RF Spectrum Manager questioned the company's Vice President of Engineering and Operations about his experience with RF projects. In response, the company official stated that he had performed the installation of a UHF trunked system at a local police station.

Based on this conference and further review of the documentation submitted by CTC, the NASA technical staff determined that CTC lacked the RF design and installation experience necessary to perform this requirement.² By memorandum dated November 15, the RF Spectrum Manager informed the NASA small business officer of the technical team's determination and suggested that the agency have SBA locate another potential 8(a) firm. With regard to CTC's lack of RF experienced personnel, the RF Spectrum Manager expressed his concern that if CTC received contract award, the firm would be placed in the position of learning RF engineering as it attempted to perform the task, which would both threaten the success of the system and pose undue time delays. Because

¹On October 30--prior to issuing a formal request that the requirement be satisfied under the 8(a) program--the SBA contacted NASA's radio frequency (RF) Spectrum Manager--who was in charge of the project and was listed as the point of contact in the CBD synopsis--and arranged a conference call between the SBA official, NASA and CTC. During this phone conference, the November 5 presentation date was arranged.

²Upon investigating the CTC vice president's claim, the NASA RF Spectrum Manager learned that the police station did not have a trunked communications system; in this regard, the RF Spectrum Manager was further advised that CTC had only been tasked to integrate a phone system into the existing local police radio network.

of SBA's interest in awarding this requirement to CTC, however, the RF Spectrum Manager nonetheless recommended that the agency provide CTC with a second opportunity to demonstrate any RF experience which the firm held.³

By letter dated December 4, the NASA small business officer asked CTC to provide the agency with additional information pertaining to the company's experience in the area of RF technology. In this letter, the small business officer advised CTC that:

"It has been the experience of other [g]overnment facilities that have acquired UHF trunking systems that RF knowledge and experience is essential. . . . We require the successful contractor to be able to demonstrate this RF capability. To afford [CTC] the maximum opportunity to present their capabilities for this proposed contract, we are asking that you submit, in writing, a demonstration of your knowledge of RF technology, along with supporting references. . . . In closing, we must stress that the contract being contemplated is extremely vital to the safety and security of the NASA Lewis Research Center. It is because of this criticality that we are demanding the highest level of knowledge and expertise."

By letter dated December 6, CTC responded to the NASA request. In this letter, CTC first conceded that:

"[a]s you recall in our [November 5] meeting, CTC . . . has somewhat limited experience in RF Communications installation."

To rectify its apparent lack of in-house RF experience, CTC advised NASA that to perform this requirement, CTC intended to form a joint venture with another 8(a) company--Celsius Transit Communications, Inc.--which had extensive RF engineering experience.

On December 9, the NASA small business officer forwarded this December 6 correspondence--which included a capability statement prepared by Celsius--to the RF Spectrum Manager for review. After evaluating this documentation, the RF

³Apparently, the RF Spectrum Manager speculated that CTC could hire an in-house RF engineer and thereby qualify for performance of this task. Additionally, the RF Spectrum Manager was concerned that perhaps CTC had misunderstood the agency's RF needs.

Spectrum Manager determined that Celsius did not have the requisite RF experience. Specifically, the RF Spectrum Manager found that while Celsius was well qualified in the installation of mobile radios, the company did not demonstrate any specific RF design or installation experience; in this regard, although Celsius claimed to be an authorized installer and distributor for Motorola Corporation--an RF equipment manufacturer--the RF Spectrum Manager's subsequent reference check with Motorola failed to confirm this claim.⁴

By memorandum dated December 17, the RF Spectrum Manager notified the NASA small business officer that Celsius--and accordingly the CTC-Celsius proposed joint venture--did not appear sufficiently qualified in RF technology for this requirement. In the same memorandum, the RF Spectrum Manager further suggested providing CTC with a draft statement of work (SOW) to ensure that the firm understood the scope of RF experience which NASA required for this task.

During the assessment of the CTC-Celsius RF capabilities, the RF Spectrum Manager received a telephone call from another 8(a) firm--Tal-Cut--who requested consideration for this requirement;⁵ the RF Spectrum Manager advised Tal-Cut to contact the NASA small business officer about its interest in this award. Upon receiving Tal-Cut's inquiry, the NASA small business officer telephoned the Assistant District Director of the Cleveland SBA, who then authorized NASA to consider both Tal-Cut and CTC for this requirement.⁶

By separate letters dated December 24, the NASA small business officer issued a copy of the draft SOW for this requirement to CTC and Tal-Cut, and invited each firm to submit a "capability statement" demonstrating its experience with RF technology.

⁴The RF Spectrum Manager also suspected that neither CTC nor Celsius understood the scope of this communications requirement since Celsius's capability statement made no reference to well-known RF engineering capabilities necessary to perform this requirement--such as power budgeting, programming repeaters, or conducting propagation studies.

⁵Tal-Cut contacted the RF Spectrum Manager on December 10, apparently after learning of this requirement via the October CBD synopsis.

⁶Because the estimated value of this procurement did not exceed \$3,000,000, formal competition under the 8(a) program was not required. See Federal Acquisition Regulation (FAR) § 19.805-1(a) and 13 C.F.R. § 124.311(a) (1992).

On January 6, 1992, Tal-Cut submitted its capability statement which consisted of an introductory letter and the resume of Tal-Cut's RF engineer. On January 17, Tal-Cut's president, RF engineer, and technical manager made an oral presentation to the NASA small business officer, procurement specialist and RF Spectrum Manager. During this meeting, the RF Spectrum Manager extensively questioned the Tal-Cut engineer about his background--as set forth in his resume--and determined that this individual was well-qualified in the areas of RF design and installation. The RF Spectrum Manager also interviewed the Tal-Cut technical manager and determined that he was both strong in computer skills and knowledgeable about RF systems.

On January 23, CTC submitted a capability statement which consisted of an introductory letter and a profile of a new non-8(a) proposed joint venture partner--Cleveland Communications, Inc. (CCI)--who was well-qualified in RF technology.⁷ On January 31, CTC and CCI made an oral presentation to the NASA small business officer, procurement specialist and RF Spectrum Manager; apparently, a Cleveland SBA representative also attended this meeting. Based on this presentation, the RF Spectrum Manager determined that CCI had the requisite RF expertise necessary to successfully perform this requirement. However, notwithstanding the technical acceptability of CCI, the RF Spectrum Manager selected Tal-Cut to perform this requirement for the following reason.

Shortly after the January presentation by CTC-CCI, NASA decided to require GE equipment for this procurement.⁸

⁷NASA had requested that Tal-Cut and CTC submit their capability statements by January 6. By letter dated January 3, CTC requested additional time to submit its capability statement; in response, NASA extended CTC's submission deadline to January 27.

⁸In supplemental comments, CTC contends that the agency's designation of GE as the equipment source for this requirement is improper. This argument is untimely. The record shows that on January 23--as evidenced in its capability statement submission to the agency--CTC knew that NASA was conducting discussions with GE to provide equipment for this requirement. Our Bid Protest Regulations require that a protest be filed within 10 working days of when the basis for protest is first known; accordingly, CTC should have raised any objections to the NASA-GE discussions within 10 days of discovering that these negotiations were taking place. See 4 C.F.R. § 21.2(a)(2); Tero Tek Int'l, Inc., B-242743.3, Oct. 3, 1991, 91-2 CPD ¶ 288. In any event, CTC itself recommended selecting GE as the equipment source

Apparently, GE will not sell any equipment unless the buyer agrees to allow a GE-authorized consultant to supervise the installation; here, after learning that the agency intended to select GE equipment for this requirement, GE advised NASA that CCI would be the designated consultant overseeing the UHF trunked radio system's installation.⁹

After receiving this information, the NASA technical evaluators determined that regardless of its 8(a) firm selection, CCI would be supervising this requirement; accordingly, because Tal-Cut had experienced RF personnel on its staff, the RF Spectrum Manager determined that the combination of CCI supervision and Tal-Cut performance represented the best technical choice for this requirement.

On February 10, the NASA small business officer contacted the Assistant District Director for the Cleveland SBA and informed him that Tal-Cut was the selected 8(a) candidate for this award. On February 21, the SBA director, the NASA small business officer and the RF Spectrum Manager engaged in a telephone conference to discuss the agency's prospective selection.¹⁰ At the conclusion of this conference, SBA authorized proceeding with an 8(a) award to Tal-Cut.

On February 25, NASA issued an offering letter to SBA; by letter dated February 26, SBA accepted the requirement into the 8(a) program on behalf of Tal-Cut. After receiving notification from SBA that another 8(a) firm had been selected for contract award, CTC requested a debriefing. On February 28, the NASA small business officer and RF Spectrum Manager explained the selection decision to CTC and CCI representatives by means of a telephone debriefing; the Cleveland SBA Assistant District Director was present during this telephone conference.

By letter dated March 13, CTC filed this protest with our Office. In its protest, CTC alleges that the agency improperly favored Tal-Cut in its technical evaluation of the firm's capability statement and that the RF Spectrum

for this requirement since--as stated in its January 23 capability statement--GE's equipment represented "the most technically capable system."

⁹The record shows that there were two possible GE consultant candidates; CCI was selected by GE to oversee this requirement since that firm has more experience.

¹⁰Prior to this conference, the small business officer detailed the agency's selection of Tal-Cut in a memorandum to SBA, dated February 19.

Manager was biased against CTC. As explained below, we find no basis for these allegations.

DISCUSSION

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. Because of the broad discretion afforded to SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program generally is limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. See 4 C.F.R. § 21.3(m)(4) (1992); Digital Equip. Corp., B-245910, Jan. 13, 1992, 92-1 CPD ¶ 58. Where, as here, a protester asserts that contracting officials acted in bad faith, the protester must present evidence that the procuring agency intended to harm the protester. See Oliver Prods. Co., B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ ____.

The Selection of Tal-Cut

In its protest, CTC first contends that the selection of Tal-Cut was made in bad faith since--according to the protester--the CTC-CCI joint venture is more technically qualified and has demonstrated more corporate experience than the awardee.

From the outset, CTC was on notice that the agency required the contractor for this procurement to possess extensive expertise in the area of RF design and installation.¹¹ In this regard, as noted above, the small business officer's December 4 letter clearly advised CTC that for this requirement, the agency was "demanding the highest level of knowledge and expertise" in the RF area.

¹¹To the extent CTC alleges that the agency improperly required that the contractor possess extensive RF expertise for this task, the protest is untimely. The timeliness of CTC's objection is governed by 4 C.F.R. § 21.2(a)(2)--which requires protests to be filed within 10 working days of when the protest basis is known or should have been known. See Laidlaw Envtl. Servs. (GS), Inc., B-245587; B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82 (absence of solicitation closing date invokes 10-day timeliness rule). Here, the agency specifically informed CTC in writing on December 4 that "RF knowledge and experience is essential"; if CTC intended to challenge this requirement, it should have done so within 10 days of its receipt of the December 4 letter.

Contrary to CTC's assertions, the record clearly demonstrates that because Tal-Cut had an experienced in-house RF engineer on its staff, the RF Spectrum Manager--with the concurrence of the other NASA technical evaluators--determined that Tal-Cut was superior to the CTC-CCI joint venture in terms of technical qualifications for this requirement; specifically, the RF Spectrum Manager found that because of its in-house engineer, unlike CTC--who did not have any suitably experienced in-house RF personnel--Tal-Cut would not be faced with learning a new engineering area in its performance of this task.¹² According to NASA, performance of this requirement by CTC would result in an impermissible learning curve which would threaten the reliability of the system and result in significant time and cost risks.

To make a showing of bad faith, the protester must present facts that reasonably indicate that the government actions complained of were improperly motivated; CTC has made no such showing here. On the contrary, the record clearly shows that the agency's selection decision was based on its conclusion that Tal-Cut offered superior technical qualifications. CTC's disagreement with the agency's technical evaluation does not establish bad faith on the part of agency personnel. Compex Corp., B-236884, Dec. 13, 1989, 89-2 CPD ¶ 552. Moreover, SBA specifically approved the award selection decision in all respects.¹³ Id. Given the agency's need for the highest degree of RF expertise as well as the agency's reasoned basis for its award selection, we find no evidence of bad faith in the agency's selection of Tal-Cut for award. See SJS Petroleum Prods., Inc., B-239534, Aug. 28, 1990, 90-2 CPD ¶ 164.

¹²CTC contends that the selection of Tal-Cut was made in bad faith since the RF Spectrum Manager never verified whether Tal-Cut had any corporate experience in the RF area. Our review of the RF engineer's resume submitted by Tal-Cut supports the RF Spectrum Manager's determination that this firm holds the requisite RF experience to perform this requirement.

¹³The record shows that SBA specifically questioned the RF Spectrum Manager about his selection of Tal-Cut and determined that the agency's selection of this firm was strictly based on the company's superior technical merits, as opposed to any personal preference. We also find it significant that despite its claim of bias and bad faith on the agency's part, the record shows that on April 23, 1992, the NASA Lewis Research Center awarded a \$500,000 telecommunications contract to CTC under the 8(a) program.

CTC-CCI Joint Venture Eligibility

In order to be considered eligible for an 8(a) service contract award, SBA regulations require that the 8(a) partner of any joint venture perform 50 percent of the labor required under the contract. See 13 C.F.R. § 124.321(f). Apparently, after the January 23 CTC-CCI oral presentation, the RF Spectrum Manager questioned the joint venture's eligibility for this contract award since CTC did not demonstrate--in response to specific inquiries--that it would be performing 50 percent of the labor required under this task.¹⁴ In its comments on the agency report, CTC asserts that NASA never requested information on what percentage of the labor CTC would perform. CTC contends that the agency's failure to make such an inquiry is additional evidence that NASA discriminated against CTC in its award selection.

We need not decide whether NASA did in fact question CTC about the percentage of labor which the firm intended to perform under this contract since, notwithstanding the agency's reservations about the 8(a) eligibility of the CTC-CCI joint venture, the record clearly demonstrates that the determinative factor in the agency's rejection of CTC for this requirement was that firm's lack of in-house RF qualified personnel.¹⁵ Given the agency's technical preference for an 8(a) contractor with in-house RF experience, the record here clearly demonstrates that even if NASA had concluded that CTC retained its 8(a) eligibility under the CTC-CCI joint venture, Tal-Cut nevertheless would have been selected for award.

¹⁴Since it was clear that CCI--as the experienced RF contractor--would be guiding CTC through its performance of this requirement, the RF Spectrum Manager was unable to conclude how CTC could--standing alone--perform 50 percent of the actual labor.

¹⁵In this regard, our in camera review of several of the RF Spectrum Manager's memoranda--to his supervisors and the SBA--as well as the protester's transcript of the February 28 telephone debriefing confirms that the basis for CTC's rejection was its lack of in-house RF experienced personnel.

RF Spectrum Manager

In supplemental comments, CTC also suggests that the RF Spectrum Manager was biased against CTC since he is a support contractor employee rather than a government employee. CTC contends that an "evident conflict of interest" tainted the agency's selection process.¹⁶

We have reviewed the record and find no basis for this allegation. First, although the RF Spectrum Manager is a contractor employee, the record shows that at every decision-making stage, he consulted with and received the approval of his supervising NASA technical personnel. Additionally, despite CTC's allegations of unequal treatment, the record shows that because of the RF Spectrum Manager's direct recommendations, CTC was afforded three separate opportunities to demonstrate its RF capabilities. Finally, the record does not indicate and the protester does not explain how the RF Spectrum Manager stands to benefit from Tal-Cut's performance of this contract.

By sworn affidavit dated May 19, the RF Spectrum Manager has denied all allegations of impropriety and bias; the RF Spectrum Manager specifically asserts that he has no connections with Tal-Cut or its individual employees and that prior to this procurement he never encountered or dealt with the firm. The record also shows that the RF Spectrum Manager has only been located in Ohio since September 1991, when he began working in this position at the NASA Lewis Research Center.


The crux of CTC's presumption of bias appears to lie in the fact that the agency did not select CTC even though it was the firm which was initially recommended by SBA. This does not provide a basis for inferring any impropriety on the agency's part, however, since a mere recommendation by SBA does not guarantee a contract award to that firm. See Bucky X-Ray Int'l Corp.--Recon., B-231353.2, Aug. 23, 1988, 88-2 CPD ¶ 172.

Since the protester has presented no evidence to substantiate its allegations of bias, and we see none

¹⁶The RF Spectrum Manager has provided services to the agency under a support services contract since September 1991; his specific job description is to support the NASA RF Managers on this task.

elsewhere in the record, we find no basis for questioning the agency's selection of Tal-Cut for this award.¹⁷

The protest is denied.


James F. Hinchman
General Counsel

¹⁷In a supplemental filing, CTC also alleges that the agency selected a standard industrial classification (SIC) code designed to preclude CTC from consideration for award. The SIC code was not assigned to this procurement until February 25, 15 days after Tal-Cut had been selected by the RF Spectrum Manager for award. Since the record shows that the SIC code classification was not a factor in the RF Spectrum Manager's evaluation process, we fail to see how the SIC code selection evidences bad faith on the part of the agency against CTC. The record also shows that SBA conferred with and approved the agency's classification of this procurement under SIC Code 7373.