



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Biomedical Research Incorporated

File: B-249522

Date: November 25, 1992

Robert L. Middleton, Esq., Brian A. Mizoguchi, Esq., and Buel White, Esq., Verner, Liipfert, Bernhard, McPherson and Hand, for the protester.
Michael Colvin and Dalton Phillips, Esq., Department of Health and Human Services, for the agency.
John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee gained an unfair competitive advantage and should have been excluded from the competition because the agency used an evaluator employed by the awardee's subcontractor on a simultaneous procurement for similar services is denied where the record does not support the protester's contention that its proprietary information was improperly disclosed, or was not safeguarded by the evaluator, or that the evaluator participated in the preparation of the proposal for the awarded contract.

DECISION

Biomedical Research Incorporated (BRI) protests the award of a contract to Medical Equipment and Maintenance Company (MEMCO) under request for proposals (RFP) No. 263-91-F(39)-0387 (-0387), issued by the Department of Health and Human Services (HHS), for biological repository services for the National Institute of Allergy and Infectious Diseases and the National Institute of Neurological Disorders and Stroke.¹ BRI argues that MEMCO gained an unfair competitive advantage because the agency disclosed BRI's proprietary technical and cost information to an employee of MEMCO's subcontractor, ERC BioServices Corporation,² during a simultaneous procurement by the National Institute of

¹Biological repository services essentially entail the storage of biological specimens in cold storage.

²ERC, a large business, is now known as Ogden BioServices Corporation.

Child Health and Human Development (NICHD), HHS, for similar repository services.

We deny the protest.

The agency issued RFP-0387, as a small business set-aside, on December 31, 1992. This solicitation contemplated the award of a firm, fixed-price, indefinite quantity contract for a base period of 1 year with four 1-year options. The RFP provided that award would be made to the offeror whose offer, conforming to the solicitation, was determined most advantageous to the government.

Offers were received from BRI, the incumbent contractor, and MEMCO by the solicitation's closing date of February 7, 1992. The proposals were evaluated, discussions were conducted, and best and final offers were requested and received. The agency determined that the technical quality of the proposals was essentially equal, and made award to MEMCO based on its lower price. The agency notified BRI that award had been made to MEMCO on July 15, and shortly thereafter, in response to BRI's inquiry, informed the protester that ERC would be performing the contract with MEMCO as MEMCO's subcontractor. This protest followed.

BRI protests that MEMCO gained an unfair competitive advantage because during a simultaneous procurement for similar repository services the agency disclosed to MEMCO through MEMCO's proposed subcontractor--ERC--technical and cost information proprietary to BRI. The protester explains that on December 16, 1991, it submitted a proposal in response to RFP No. NIHD-PRP-92-02 (-02), issued by NICHD for biological repository services,³ and that a Vice President of ERC, Susan A. Stern, had served on a team of reviewers tasked with evaluating BRI's technical proposal. BRI contends that this disclosure harmed BRI with regard to RFP-0387 because its technical proposal contained proprietary and summary cost information from which the protester's pricing strategy for biological repository services allegedly could be ascertained.⁴ The protester notes that the awardee's proposed price under RFP-0387 was an average of only 8 percent lower than its proposed price under RFP-0387 for which it deduces that MEMCO may have gained access to its pricing strategy. BRI adds that its RFP-02 technical proposal was provided to Dr. Stern on January 28, 1992, for her review--10 days prior to the closing date for receipt of initial proposals under RFP-0387--and that Dr. Stern participated in a site visit

³BRI's proposal was the only one received on RFP-02.

⁴RFP-02 required that technical proposals submitted include this summary cost information.

to BRI's facilities. The protester also points out that Dr. Stern was proposed as a key technical person on RFP-0387. BRI concludes that because Dr. Stern had access to and reviewed technical and cost information proprietary to BRI, concerning BRI's approach to biological repository services, including pricing, at the same time that HHS was conducting the procurement for biological repository services under RFP-0387, MEMCO/ERC should have been precluded from competing for award under RFP-0387.⁵

An agency may exclude offerors from a procurement where it finds a conflict of interest or impropriety which could affect the award process. NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. A determination that an impropriety is likely to have occurred must be based on facts and not mere innuendo or suspicion, Laser Power Techns., Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267; a firm may not be excluded from participating in a procurement based on an alleged conflict of interest or impropriety where an investigation establishes that no wrongdoing actually

⁵BRI also contends that HHS' release of BRI's proposal submitted in response to RFP-02 to Dr. Stern for evaluation purposes constituted a violation of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423(a) (1988 and Supp. II 1990), as implemented by Federal Acquisition Regulation (FAR) § 3.104-3, and that the agency violated FAR § 9.505-4 in failing to obtain ERC's agreement with BRI to protect BRI's proprietary information and refrain from the unauthorized use or disclosure of such information. In sum, BRI's contentions concern the propriety of the initial release of BRI's technical proposal to Dr. Stern under RFP-02.

These contentions are untimely. Our Bid Protest Regulations require that protests not based on alleged improprieties in a solicitation be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1992). The agency informed BRI on February 10, 1992, that Dr. Stern would be performing as a reviewer for HHS with regard to RFP-02, and that Dr. Stern had been provided with BRI's technical proposal. However, while BRI verbally objected to Dr. Stern's participation, since ERC is a direct competitor of BRI, BRI elected not to pursue the matter and did not further object to Dr. Stern's on-site visit of BRI's facility. Thus, these protest contentions filed on July 23 more than 5 months after BRI knew of Dr. Stern's specific involvement in RFP-02--are untimely and will not be considered. See Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198.

occurred. See General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 96. Here, we find no basis for concluding that MEMCO should have been excluded from the procurement.

A hearing was held in connection with this protest at which testimony was elicited concerning the nature of Dr. Stern's position at ERC, and whether Dr. Stern had disclosed to ERC or MEMCO personnel any information proprietary to BRI to which Dr. Stern had access in her capacity as a reviewer for HHS in connection with RFP-02. Dr. Stern testified that in her position of Vice President at ERC she was responsible for the management of several biological repositories.⁶ Video Transcript (VT) at 14:04:00, 14:04:07, 14:53:15. She explained that she did not have any responsibilities with regard to the preparation of proposals in response to solicitations issued by the government, nor did she participate in proposal preparation. VT 13:57:11, 14:05:18, 14:08:40, 14:09:26, 14:50:10, 14:53:10. Dr. Stern noted in her testimony that the individuals in her firm responsible for preparing proposals in response to government solicitations work at ERC's corporate office in Gaithersburg, Maryland, and that her office was located in Rockville, Maryland. VT 14:07:33, 14:49:55, 15:03:11.

Dr. Stern stated that she was contacted by an official of the Division of Scientific Review, NICHD, in late 1991 or early 1992 and asked to serve on a technical review committee for a procurement of repository services for NICHD.⁷ VT 13:52:28, 14:22:19. Dr. Stern agreed to serve on the committee, and subsequently received a package containing a confidentiality agreement which she was required to complete, and a copy of BRI's technical proposal. VT 13:53:20, 14:23:24. This package was delivered by regular mail to Dr. Stern's business office in Rockville, and arrived in Dr. Stern's office in a sealed envelope. VT 13:53:34, 14:58:30. Although Dr. Stern was unable to recall whether she opened the package immediately on delivery, VT 14:58:20, the record reflects that the package was mailed to Dr. Stern on January 22, 1992, with Dr. Stern signing the confidentiality agreement on January 28.

⁶As of June 1, 1992, Dr. Stern holds the position of Director of Marketing for Ogden BioServices Corporation (formerly ERC).

⁷The HHS Acquisition Regulation, 48 C.F.R. § 315.608-71(f) (1991), consistent with FAR § 15.413-2(f), authorizes the use of non-government personnel as evaluators where the required expertise is not available within the government.

The confidentiality agreement provided in pertinent part that:

"I agree to use the information contained in the proposal(s) only for evaluation purposes. Neither the proposal(s) nor related material will be reproduced or disclosed to others not involved in the review process."

Nothing in this agreement precluded Dr. Stern or ERC from participating on future procurements.

Dr. Stern stated that she kept BRI's proposal locked in her office desk, and that only she had a key to that desk. VT 13:56:31, 14:59:50, 15:00:24. Dr. Stern testified that her office was located in a secured, locked facility. VT 14:59:55. Dr. Stern testified that she did not take any notes regarding the BRI proposal while reviewing it, VT 13:59:44, 14:24:45, 14:27:02, or make any copies of the materials, VT 15:01:26, and that she only discussed the proposal with other members of the technical review committee for RFP-02. VT 13:56:55, 14:02:26.

A site visit of BRI's facility was conducted on February 19, 1992. Dr. Stern stated that at the conclusion of the site visit, the technical review committee met, evaluated, and scored BRI's proposal. Dr. Stern testified that at the conclusion of this meeting, all materials provided by the agency, including BRI's technical proposal and the evaluation score sheets she completed as a member of the technical review team, were either handed directly to agency personnel, VT 14:45:15, or left to be collected by agency personnel, per the agency's instructions. VT 14:43:43, 14:45:15, 14:45:50.

Dr. Stern maintained throughout her testimony that she abided by the terms of the confidentiality agreement in that she did not and has not discussed the contents of BRI's proposal with any ERC or MEMCO personnel. VT 14:01:14, 14:02:26, 14:12:58, 14:25:50, 14:54:10, 14:55:50. Dr. Stern added that while in her capacity as a manager of the repository facilities she did have contact with certain ERC personnel concerning her managerial duties and performance, VT 14:05:54, 14:07:57, 14:13:48, she was not approached by anyone at ERC concerning BRI's proposal. VT 13:57:28.

Dr. Stern testified that she was not aware prior to the award of a contract under RFP-0387 that she had been proposed as a key person for that contract. VT 14:10:59, 14:18:30, 14:52:50. Dr. Stern explained that the decision as to which personnel would be proposed for a particular contract was made at the ERC corporate office in

Gaithersburg, and that those decisions were not discussed outside of the Gaithersburg office. VT 14:10:59, 14:12:00.

The Chief Financial Officer (CFO) of ERC, who prepared much of the business proposal submitted by MEMCO in response to RFP-0387, VT 15:19:20, 15:34:23, also testified at the hearing. The CFO confirmed that the business proposal had been prepared at ERC's Gaithersburg office, VT 15:32:52, 16:04:00. He testified as to what information was relied upon in preparing the business proposal, which did not include information about BRI or its proposal, VT 15:20:15, 15:20:32, 15:24:50, and explained that he did not find the requirements of RFP-0387 to be at all unique. VT 15:27:45, 15:28:30. This individual testified that he had not had any discussions with Dr. Stern concerning the preparation of MEMCO's proposal in response to RFP-0387, VT 15:20:15, 15:25:45, 15:26:15, 15:26:45, and stated that he had never discussed with Dr. Stern the fact that she was being proposed as a key person for RFP-0387. VT 15:46:16. The CFO stated that he has never heard or read or otherwise been made aware of any information regarding the protester's approach to the provision of biological repository services. VT 15:55:20, 15:56:15, 15:57:35, 15:58:10, 15:58:35.


Testimony was also taken from MEMCO's Vice President, who had worked with the CFO of ERC in preparing MEMCO's business proposal in response to RFP-0387. This individual confirmed that the business proposal had been prepared at ERC's Gaithersburg facility. VT 16:12:00. He testified that he had never discussed the requirements of RFP-0387 with Dr. Stern, VT 16:14:05, nor had he ever discussed with Dr. Stern her being proposed as a key person for RFP-0387. VT 16:16:50. This individual further testified that he has no knowledge of and has never seen any cost or technical information relating to BRI's proposed approach to the provision of repository services. VT 16:15:36, 16:17:48.

Based on our review of the record, including the testimony elicited at the hearing, we do not find that an improper disclosure of BRI's proprietary information to either ERC or MEMCO personnel that resulted in a competitive advantage for MEMCO/ERC under RFP-0387 occurred or likely occurred. No evidence has been presented, testimonial or otherwise, indicating that Dr. Stern disclosed any information proprietary to BRI which she had access to as a reviewer for NICHD in connection with RFP-02 to anyone other than those individuals who also served as reviewers for the NICHD procurement. Further, we believe it clear from the record that even though Dr. Stern was proposed as a key person for RFP-0387, she did not participate in, nor did her responsibilities at ERC include, the preparation of proposals in response to government solicitations. Similarly, because

"BEST COPY AVAILABLE"

the testimony showed that Dr. Stern kept BRI's proposal under lock and key in her Rockville office, and that MEMCO's proposal in response to RFP-0387 was prepared at ERC's Gaithersburg office, there is no basis on which we can conclude that BRI's proprietary information was inadvertently disclosed to any ERC or MEMCO personnel. Under the foregoing circumstances, we find that MEMCO did not have an improper competitive advantage on RFP-0387.

The protest is denied.


James F. Hinchman
General Counsel