



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Science and Technology
Institute, Inc.

File: B-259648

Date: January 12, 1995

Stanley R. Soya, Esq., and James J. Gildea, Esq., Wiley,
Rein & Fielding, for the protester.

David R. Johnson, Esq., and James C. Dougherty, Esq.,
Gibson, Dunn & Crutcher, for Price Waterhouse LLP, an
interested party.

Christopher Randolph, Esq., Agency for International
Development, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest contention alleging organizational conflict of interest on the part of the awardee is dismissed as untimely where the solicitation identified three companies that assisted the agency in developing the project, advised that the solicitation had been reviewed and approved pursuant to the organizational conflict provisions set forth in the Federal Acquisition Regulation, and provided potential offerors with copies of the background papers prepared for the agency; and where the record clearly shows that the protester was aware of the awardee's participation throughout the procurement.

DECISION

International Science and Technology Institute, Inc. (ISTI) protests the award of a contract to Price Waterhouse by the Agency for International Development (AID) pursuant to request for proposals (RFP) No. 94-003, issued to procure technical assistance to India for the Financial Institutions Reform and Expansion (FIRE) program. The protest challenges several facets of the evaluation and award decision. It also alleges that Price Waterhouse is ineligible for award because of an organizational conflict of interest arising from its prior involvement in assisting AID with the design of this procurement, and because Price Waterhouse evaluated ISTI's performance under a similar contract in Sri Lanka.

We dismiss as untimely the protester's argument that AID's decision to permit ISTI to participate in this procurement violates organizational conflict of interest (OCI) rules. The file remains open, however, for development of the record to consider the protester's other claims.

On May 9, 1994, AID issued the RFP for the FIRE procurement. Since AID had used three contractors to assist the agency in the design of this project, the RFP included unique language advising offerors of this fact. Specifically, the RFP stated in section L, clause 22:

"USAID used the services of three contractors to assist USAID in the preparation of documentation related to the design of the FIRE Project. The contractors were Price Waterhouse, Center for Financial Engineering in Development and Planning and Development Collaborative Inc.

* * * * *

"USAID reviewed this activity pursuant to [Federal Acquisition Regulation] FAR Subpart 9.5 "Organizational and Consultant Conflicts of Interest" for potential conflict of interest related to the procurement under this RFP and approved this solicitation."

In addition, section L, clause CCC of the RFP, identified the background documents related to the design of the project, and provided those documents with the RFP to all prospective offerors in order "to level the playing field."

After submission of initial proposals on July 1, and best and final offers (BAFO) on September 6, ISTI was notified on November 28 that award had been made to Price Waterhouse at a total cost of \$12,259,741. While we will not set forth here the details about ISTI's activities, the record includes ample evidence that ISTI actively monitored the procurement, was aware that Price Waterhouse was a participant, and knew that Price Waterhouse had been asked to extend the acceptance date included in Price Waterhouse's BAFO.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals, must be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1994). Similarly, protests not based on solicitation improprieties must be filed within 10 days after the basis of protest is known or should have been

known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). For the reasons below, we conclude that ISTI's information about the procurement, together with the RFP provisions described above, was sufficient to put ISTI on notice that AID was considering Price Waterhouse for award despite its prior role as a contractor for the agency, and should have triggered a challenge from ISTI prior to the selection of Price Waterhouse for award.

As stated above, the RFP here identified Price Waterhouse, and two other companies, as having played a role in AID's development of this project. In addition, the above-quoted section of the RFP specifically advised that the agency approved this solicitation after reviewing the rules set forth in the FAR regarding organizational conflicts of interest. Since the solicitation was issued for full and open competition--and hence none of the three companies was excluded from participation--this clause should have been sufficient to put potential offerors on notice that AID would consider proposals from these companies if they participated. Accordingly, we conclude that ISTI should have filed a protest on this issue prior to the time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

Despite the protester's arguments to the contrary, we view our decision here as consistent with our earlier decision in Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198. In Kimmins, we dismissed as untimely a protest alleging an organizational conflict of interest filed after the protester received notice of award where an agency permitted a contractor to compete after previously concluding that the contractor would be ineligible for award. When the agency reversed its position on this issue, however, it expressly communicated the decision to the protester, who nonetheless failed to challenge the decision until the other company was selected for award.

Although ISTI correctly argues that we state in Kimmins that we will not charge a protester with knowledge that another firm was considered eligible for award simply because the protester knew that the other firm had submitted an offer, ISTI's argument overlooks the outcome in that case. The result there, and here, is that when an agency expressly advises offerors that it has considered and resolved concerns about an organizational conflict of interest on behalf of another potential offeror, a protester cannot wait to see if it wins the competition before challenging the eligibility of the other offeror.

We have also looked for guidance to our prior decision in GIC Agricultural Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263, where our Office rejected AID's contention that a protest alleging an organizational conflict of interest

should be dismissed as untimely because there was no evidence in the record that GIC was aware that; (1) the awardee had prepared AID's initial project paper; (2) the company in question had submitted a proposal; or (3) the company in question had been included in the competitive range for award. Here, unlike in GIC, each of these indicia of notice is present: the RFP clearly advised of Price Waterhouse's prior involvement, and there is no doubt that ISTI was aware of Price Waterhouse's participation in the current competition. In addition, in sustaining GIC's protest, we recommended that AID release the project paper prepared for that procurement in order to mitigate any conflict; in this procurement, AID provided the background papers with the RFP, several of which were clearly identified as having been prepared by Price Waterhouse.

We recognize that the clause used in the RFP here was an effort by AID to put potential offerors on notice prior to the time of award that a potential offeror who participated in developing the project would be permitted to participate in an unrestricted procurement. Since this information was included in the solicitation, offerors were required to file a challenge to the decision prior to the time for submitting offers, not at the time of award. In our view, the timeliness rule applied here is analogous to the requirement to challenge the listing of a potential offeror as an approved source prior to the time for submitting offers, not after award. See Teledyne CME, B-223609, Sept. 23, 1986, 86-2 CPD ¶ 338.

We also dismiss as untimely ISTI's conflict allegation regarding a prior audit by Price Waterhouse of ISTI's performance under a similar contract. As shown by the record, ISTI was well aware that Price Waterhouse was participating in this procurement, and was on notice from the terms of the RFP that Price Waterhouse would be permitted to participate in the procurement if it elected to do so. If ISTI had additional information--such as the alleged audit--that would have disqualified Price Waterhouse, it should have made this information available prior to award given the agency's attempt to signal in advance that Price Waterhouse, and the other two companies that participated in the development of the project, would be eligible for award.

Finally, although not argued by ISTI, we note for the record that this protest issue does not meet the "significant issue exception" to our timeliness rules. See 4 C.F.R. § 21.2(c). The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community and that have not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. ISTI's complaint is

particular to this procurement, and does not present a significant issue of widespread interest to the procurement community.

The protest is dismissed.

Christine S. Melody
Assistant General Counsel