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Decision

Matter of: Ktech Corporation

File: B-285330; B-285330.2

Date: August 17, 2000

Robert S. Gardner, Esq., for the protester.
Thomas F. Burke, Esq., McKenna & Cuneo, for Maxwell Technologies, an intervenor.
David C. Rickard, Esq., Defense Threat Reduction Agency, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee's subcontractor has impermissible conflict of interest is sustained where record shows that agency did not consider possibility that subcontractor may have improperly obtained, through performance of earlier government contract, information confidential to protester and used it to enhance capabilities made available to awardee, and agency did not analyze possible conflicting roles that subcontractor may be required to perform under protested contract and subcontractor's other government work.

DECISION

Ktech Corporation protests the award of a contract to Maxwell Technologies under request for proposals (RFP) No. DTRA01-00-R-0009, issued by the Defense Threat Reduction Agency (DTRA) for the operation of a magnetic flyer plate facility, and the performance of certain tests within the facility. Ktech asserts that the awardee has an impermissible organizational conflict of interest, that the agency made its award decision on a basis other than that announced during the acquisition, and that the agency failed to conduct meaningful discussions with it.

We sustain the protest.

BACKGROUND

The solicitation contemplated the award of a cost-reimbursement contract to perform various services in connection with the operation of the agency's magnetic flyer plate (mag flyer) facility in Albuquerque, New Mexico. This facility is used for

testing reentry bodies (RBs)¹ to ensure that they are sufficiently 'hardened' against forces and effects that might occur in a hostile environment. RFP Statement of Work (SOW) at 1. The work to be performed under the RFP is divided into three phases. Under phase 1, the agency's mag flyer facility is to be brought up to full operational status (the facility had been previously 'mothballed'). Included under phase 1 are the design, manufacture, integration testing and evaluation of all equipment necessary to conduct the tests. Id. Under phase 2 (an option under the contract), the contractor is required to conduct calibration of the equipment, and to execute full scale testing on two RBs. Id. The agency contemplated that the phase 1 work would take approximately 12 months and that the phase 2 work would take approximately 6 months (4 months for testing and 2 months for reporting the data). Commerce Business Daily, Nov. 23, 1999. Testimony at the hearing that our Office conducted in this matter shows that the agency originally intended to obtain the test data by July 1, 2001. Hearing Transcript (Tr.) at 75. Under phase 3 (also optional), the contractor is required to provide support that will keep the facility safe and secure for a period of 1 year, and to provide the government with cost estimates for performing any additional tests approved by the agency. SOW at 6.

Technical considerations were more important than price, price was more important than past performance considerations, and technical and past performance considerations, when combined, were significantly more important than price. RFP at 46-47. Award was to be made on a best value basis. Id.

The agency received three initial proposals, two of which (Maxwell's and Ktech's) were included in the competitive range. The agency engaged in discussions with both firms and obtained final proposal revisions (FPR). [deleted]. Memorandum from the Source Selection Evaluation Board (SSEB) to the Contracting Officer, Source Selection Recommendation at 1-2 (Mar. 10, 2000). [deleted]. Id. at 4.

Subsequent to the March 10 recommendation, members of the source selection evaluation board (SSEB) met with other agency officials [deleted]. Tr. at 76-77, 172, 181-84, 302-08. On the basis of these meetings, the SSEB members prepared a second memorandum dated March 30 [deleted]. The agency proceeded with the award and, after a debriefing, this protest followed.

ORGANIZATIONAL CONFLICT OF INTEREST (OCI)

Ktech asserts that award to Maxwell was improper due to an OCI arising out of the activities of one of its subcontractors, ITT Industries. A potential OCI exists where, because of a contractor's other activities, there is the possibility either that the contractor enjoys an unfair competitive advantage, or that award of the subject contract creates the possibility that the contractor will be faced with performing

¹ [deleted].

conflicting roles that might bias the contractor's judgment. Federal Acquisition Regulation (FAR) §§ 9.501, 9.505. OCI situations can be grouped into three general categories, depending on the impact of the OCI: (1) unequal access to information; (2) impaired objectivity; and (3) biased ground rules. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13. As explained below, Ktech's protest involves allegations that fit into all three categories.

The OCI regulations require that, where an actual or apparent conflict of interest arises, the agency is required to carefully analyze the situation and either take action to avoid, neutralize or mitigate any possible advantage that might accrue from the circumstances, or make a specific determination to waive the application of the OCI requirements where the head of the contracting agency determines that it is in the best interests of the government to do so. FAR §§ 9.503, 9.504(a).

Unequal Access to Information

In an unequal access to information OCI, the contractor has had an opportunity in connection with the performance of a government contract to access nonpublic information, and the concern relates to the risk that the firm may gain a competitive advantage in a later competition for a government contract. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 12. Ktech maintains that, as a past and present Navy contractor,² and in its role as a member of the Joint Test Program (JTP) Committee,³ ITT had an opportunity to observe and monitor Ktech's performance on a predecessor contract and that, in the course of those activities, ITT obtained Ktech's proprietary data that subsequently was made available to Maxwell for the current requirement.

In response to the allegation, DTRA asserts that, regardless of what may have occurred during Ktech's prior contract, ITT never made Ktech's proprietary information available to Maxwell for use in preparing its proposal. In this regard, the agency directs our attention to the fact that ITT never entered into a subcontracting agreement with Maxwell prior to award of the contract, but instead agreed only to

² While the procurement here is being conducted by DTRA, the RBs are being tested in response to a Navy Strategic Systems Programs (SSP) requirement, and all of the test data generated during performance of this contract will be provided to SSP for analysis and evaluation. Tr. at 375.

³ The JTP Committee is comprised of representatives from various organizations, including the Navy, Sandia National Laboratory, Los Alamos National Laboratory, the Department of Energy, ITT and Lockheed Aerospace Corporation. Tr. 218, 224. Among other activities, the JTP Committee drafts and approves testing and evaluation requirements for the mag flyer program.

enter into a relationship with the firm after it had successfully been awarded the contract. DTRA therefore maintains that, since ITT never provided Maxwell substantive information in connection with the preparation of its proposal, it could not have provided the firm with information that afforded Maxwell a competitive advantage for purposes of this competition.

The record supports Ktech's assertion that ITT, as a government contractor member of the JTP Committee, had an opportunity to obtain information confidential to Ktech during its observation of the firm's performance on the predecessor contract. In this regard, the record shows that ITT, as a member of the committee, functioned in an oversight role during Ktech's performance of the predecessor contract, participating in coordination meetings and observing Ktech's performance of various tests and experiments. Tr. at 229-37. When asked what sorts of things ITT was able to observe of Ktech's that were proprietary or competition sensitive, one of Ktech's senior officials testified as follows:

They had access to complete technical details on all elements of the program. In particular, they had access to the calculational tools that we had to predict the electromagnetic mechanical response, how the current from the capacitor bank drove the flyer plate, and then the codes that took the magnetic force acting on the flyer plate, took account of the air cushion effects to define what the impact conditions were.

Those techniques, those numerical techniques that were developed on this program were beyond the state of the art of what had existed in previous programs.

Tr. at 229-30. This same individual also testified as follows:

Ktech . . . [deleted]. I know I'm getting very technical now, and I'm sorry. [deleted]. And we developed [deleted] that could use these formulations that had been generated primarily by Los Alamos.

Q. Do you consider that proprietary to Ktech?

A. [deleted] that is proprietary to Ktech. We also developed [deleted]. So we developed [deleted].

Q. Is that proprietary to Ktech?

A. To my knowledge, nobody else has that capability in the country. The techniques on how we did those things w[ere] all detailed in these coordination meetings and w[ere] provided to ITT

Tr. at 231-32. The record also shows that ITT also had an opportunity to make detailed observations of virtually every aspect of Ktech's work in connection with the prior program, including seeing how the hardware and instrumentation system were being assembled and how the grounding and shielding system was being fabricated.⁴ Tr. at 235. The record thus clearly shows that ITT, through its prior work as a government contractor, had an opportunity to obtain Ktech's proprietary information during the performance of Ktech's prior contract.

The record also supports Ktech's assertion that ITT may have used its proprietary information to improve its technical capabilities. According to this same witness, ITT lacked certain capabilities prior to having access to Ktech's confidential information. The witness stated:

We know from personal experience that the codes that ITT had in the past were unable to predict with accuracy the performance of the flyer plate.

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The calculation . . . where the importance of the air cushion on the shape that is generated, the shape of the shock wave that's generated with the RB, that calculation, the original ITT codes used an ideal gassy equation of state, which is unstable, did not give you the correct answer.

Tr. at 230-31.

The witness further testified that the information presented at the meetings was sufficient to advance ITT's capabilities. The witness stated:

Q: So someone who sat at the meeting would have an idea of the physics principles, perhaps, that you applied?

A: The physics principles and the--specifically [deleted].

Tr. at 283. Finally, the witness presented testimony that, in his view, the information was in fact used by ITT to improve its capabilities. The witness stated:

Q: To your knowledge, has anybody generated that code?

⁴ This same individual testified that Ktech personnel had OCI concerns at the time but were assured that all members of the JTP Committee had appropriate OCI restrictions in place. Tr. at 234.

A: Like I previously stated, in October of '98, [a senior ITT official] claimed he did not have the capability to do those calculations. [deleted].

So from that I can presume that they took the knowledge that was gained in the coordination meetings and revised their capabilities

Tr. at 283-84.

The record also contains evidence showing that ITT advised Maxwell [deleted]. Maxwell Initial Technical Proposal at 27. [deleted] (Ktech's senior official obviously was not privy to the contents of the Maxwell proposal). Tr. at 428-32. Thus, despite the agency's position, the record in fact shows that, while ITT may not actually have provided Maxwell information to include in its proposal, it nonetheless advised it that it would make its [deleted]. The agency's evaluation of FPRs specifically states that [deleted]. Memorandum from the SSEB to the Contracting Officer, Source Selection Recommendation at 2 (Mar. 10, 2000).

We conclude that ITT had access to information that was confidential to Ktech and that related directly to any firm's ability to successfully perform the current contract; that, on the basis of the record before our Office, ITT may have used that information to enhance its capabilities; [deleted]. It is significant that, despite the seriousness of this allegation and the weight of this testimony, neither the agency nor the intervenor has presented any evidence, either during the hearing or in connection with their post-hearing submissions, refuting this testimony; indeed, the intervenor (the party in the best position to come forward with evidence bearing on this question) did not even mention the issue in its post-hearing comments. We note particularly that in the course of the hearing, counsel for the agency expressed surprise at the assertion of Ktech's witnesses that confidential information had been obtained and used by ITT to enhance its capabilities (Tr. at 433); GAO's hearing examiner specifically advised that our Office expected that both the agency and the intervenor would respond to the assertion and explicitly solicited the submission of evidence relating to the issue. Tr. at 434-35. Notwithstanding this specific request, neither party has come forward with argument or evidence to contradict the protester's position.

Impaired Objectivity

Ktech also contends that, by virtue of its other ongoing responsibilities as a government contractor for the Navy, ITT has an "impaired objectivity" OCI. This type of OCI arises where a firm has conflicting obligations under different government contracts. In these situations, concern exists that the firm's ability to render impartial judgments is compromised because of its conflicting roles. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., *supra*, at 13.

The agency responds that, to the extent that there may be a conflict between ITT's roles and responsibilities under its Navy contract and its roles and responsibilities as a subcontractor to Maxwell, adequate measures are available to alleviate this potential problem, and those measures essentially are matters of contract administration under ITT's Navy contract.

As noted above, ITT is a JTP Committee member. The JTP Committee is responsible for establishing the parameters for, among other things, the tests to be performed for this contract, and also has authority to grant relief from the stringency of the test requirements against which Maxwell will be required to perform. While there is no indication that Maxwell's proposal sought a deviation from or relaxation of the applicable test requirements, the record shows that such changes to the parameters of the test requirements are possible, and do occur. By way of example, the record contains an October 8, 1999 letter from the JTP Committee to DTRA granting DTRA's request for relief from certain testing tolerances. Letter from Director, Strategic Systems Program to Director, Counterproliferation Operations and Support, DTRA (Oct. 8, 1999). In addition, as discussed earlier, ITT, in its role as a JTP Committee member, had responsibilities as an observer and monitor of Ktech's performance under the prior contract. Nothing in the record suggests that ITT will be relieved of its responsibilities as a JTP Committee member. There appears to be an inherent conflict between ITT's role as a subcontractor responsible for conducting these tests, and its role as a member of the Committee tasked with the responsibility for making decisions regarding the stringency of the testing requirements and monitoring the performance of the tests.

Further, the record shows that the terms of ITT's Navy contract encompass responsibility for analyzing the data generated by Maxwell and ITT in performing the contract here. (The contractor for this effort is responsible for conducting the tests and providing the test data to the appropriate military activities; the raw data must then be analyzed for purposes of arriving at a useful end product.) The SOW in ITT's Navy contract includes the following:

The Contractor shall perform calculations of both natural . . . and hostile environments, and shall assess the vulnerability of SLBM reentry systems to these environments. . . . The Contractor shall participate in planning, pre-test predictions, and post-test analysis of vulnerability testing.

ITT Contract N00030-96-C-0021 at 5. Testimony by the agency's program director suggests that ITT may in fact be called upon to analyze the data:

I believe [the Navy] would like to use ITT [to interpret the data]. The question is does ITT have the necessary programs of analysis tools available to do it properly, or will they review what is being produced

out of Lockheed, out of Livermore, out of Los Alamos, and out of Sandia.

Tr. at 375-76. While we do not have enough information in the record to dispositively conclude that generating the data on the one hand and analyzing it on the other will place ITT in the position of having conflicting responsibilities under different government contracts that would impair its objectivity, we note that the agency agrees that, “[i]f appropriate steps are not taken, ITT may find itself in the awkward position of being asked to pass judgment on the work performed by its prime contract.” Agency’s Post-Hearing Comments at 4. The record does show that ITT, too, recognized this problem, which it proposed to resolve by “separating” its principal investigator for the current contract from that group within ITT that will be responsible for analyzing the data. *Id.*; Tr. at 372-73. (ITT’s principal investigator had been assigned to the group responsible for analyzing the test data.) To the extent that ITT is faced with conflicting responsibilities, an OCI arises that must be addressed. FAR § 9.505; *J&E Assocs.*, B-278771, Mar. 12, 1998, 98-1 CPD ¶ 77 at 3.

While the agency is correct that there may be measures available to mitigate or neutralize these “impaired objectivity” OCI concerns, the record before us fails to show that the agency adequately analyzed the circumstances surrounding ITT’s apparently conflicting roles and responsibilities, and failed to ensure that adequate safeguards were in place to prevent the potential bias that might result from ITT performing conflicting roles. In this connection, Maxwell’s proposal does not even discuss the possibility of an OCI on ITT’s part, nor does it present information that would serve to clarify the assignment of responsibilities within ITT to mitigate the potential conflict. As for DTRA, the agency apparently failed to analyze the issue in any meaningful way prior to award and, to the extent that it made inquiry after the award had been made, there is nothing in the record showing that the agency either resolved the issue satisfactorily (that is, analyzed information presented by ITT and arrived at a reasoned conclusion that the firm had made arrangements that would mitigate or eliminate the potential conflict among ITT’s apparently inconsistent responsibilities) or made a determination to waive the OCI requirements of the FAR. (In fact, to the extent that DTRA had some informal information gathering and deliberation on the subject, there is nothing to show that the measures that ITT apparently had taken—separating its principal investigator from the group that might be responsible for analyzing the data—were adequate to meet the concern.) In this connection, the FAR requires agencies to document their conclusions regarding OCI situations where there is a substantive issue concerning a potential OCI. FAR § 9.504(d).

In summary, the un rebutted testimony of the protester indicates that ITT may have obtained and used information that provided it an unfair competitive advantage by virtue of its role as an oversight entity during Ktech’s predecessor contract. The

agency failed to address this problem.⁵ We also find that there are apparent conflicts between ITT's ongoing responsibilities as a Navy contractor and member of the JTP Committee on the one hand, and its responsibilities as a subcontractor to Maxwell on the other hand. The record shows that, beyond several informal and largely inconclusive telephonic inquiries made by the agency's contracting officer and program manager, and certain informal in-house discussions, the agency did nothing to satisfy itself that ITT's apparent OCI had been satisfactorily addressed. Tr. at 370-73, 410.

ADEQUATE DISCUSSIONS AND THE AGENCY'S AWARD DECISION

Before discussing our recommendation, we find it necessary to address the protester's contentions relating to the adequacy of discussions and the propriety of the source selection decision. The record shows that the agency improperly failed to engage in adequate discussions with Ktech and improperly made award on a basis different from the basis articulated to the offerors during the procurement. We briefly discuss these issues.

Agencies are required to conduct meaningful discussions with all offerors, and discussions cannot be meaningful where the agency has failed to apprise an offeror of a material deficiency that would prevent it from receiving award. Biospherics, Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161 at 8. [deleted]. Memorandum from the SSEB to the Contracting Officer, Source Selection Recommendation at 4 (March 10, 2000). [deleted], Agency's Post-Hearing Comments at 4, [deleted].

⁵ Ktech also argues that ITT has an impermissible "biased ground rules" type of OCI because it authored two documents relating to the requirements for this procurement entitled "JT4-4 Exoatmospheric Impulse Test Plan" and "Trial 2035/1 Exoatmospheric Impulse Test Plan." In this connection, an OCI also may be found where a firm has, as a government contractor, written specifications or a statement of work; the primary concern in these situations is that the firm could skew the competition in favor of itself. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra. We have reviewed Ktech's allegation in this respect and find no basis to conclude that its role in the preparation of the test documents creates an OCI for ITT because, as maintained by the agency, the information in the test documents is largely derivative of another document prepared by Navy personnel, the documents themselves reflect only broad parameters but do not impose detailed requirements for how to conduct the tests, and review of the background information in connection with preparing the documents does not appear to have provided any material advantage to ITT.

[deleted]. This change in the SSEB's recommendation resulted from a series of meetings conducted during the time between the two recommendations. Testimony presented at the hearing shows that the basis for this change was that the SSEB was advised that what had been viewed as a firm July 1, 2001 deadline for providing the test data was not in fact a firm date.⁶ [deleted]. See, e.g., Tr. at 113. In response to this information, the agency's director advised that a 4- to 6-month delay would be acceptable. Tr. at 114. On the basis of that advice, the agency made award to Maxwell without ever informing Ktech of its revised requirements. Agencies, however, may not properly conduct an acquisition on the basis of one set of needs and then relax those needs without affording all offerors an opportunity to respond to the agency's revised requirements. International Data Sys., Inc., B-277385, Oct. 8, 1997, 97-2 CPD ¶96 at 4. Because the agency had apparently led both offerors to believe that the July 1, 2001 deadline was a firm deadline, the agency should, in implementing the recommendation set out below, ensure that both offerors have an equal understanding of the agency's needs in this regard.

RECOMMENDATION

We recommend that the agency reopen discussions with both offerors in order to clarify its position with respect to price and scheduling. In the course of its discussions with Maxwell, the agency should solicit any and all information that it deems relevant to evaluating ITT's apparent OCI, and the agency should then address the OCI in accordance with FAR subpart 9.5. After resolution of the OCI, and review of final proposal revisions, the agency should proceed with determining which firm offers the best overall value to the government. Should DTRA determine that Ktech's proposal represents the best value to the government, we recommend that the agency terminate Maxwell's contract for the convenience of the government and make award to Ktech.⁷ Finally, we recommend that the agency reimburse Ktech the reasonable costs associated with filing and pursuing its bid protest, including reasonable attorneys fees. 4 C.F.R. § 21.8(d)(1) (2000). Ktech's certified claim for

⁶ The July 1, 2001 date is not expressly stated in the RFP because the performance periods are described as being for a particular duration from the date of award. Nonetheless, the agency's Source Selection Plan states "Phase I and Phase II efforts are structured to meet a 1 July 2001, . . . RB Test in Phase II (Option I)." Source Selection Plan at 6. There is no dispute that all parties understood July 1, 2001 to be the deadline for performing the test.

⁷ We note that the agency overrode the suspension of this contract's performance on the basis that to do so was in the best interests of the United States. Under such circumstances, our Office is required to fashion our recommendation without regard to any cost or disruption from terminating, recompeting or reawarding the contract. 31 U.S.C. § 3554(b)(2) (Supp. IV 1998).

costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Robert P. Murphy
General Counsel