



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: CDR Enterprises, Inc.

File: B-293557

Date: March 26, 2004

Cynthia Malyszek, Esq., Malyszek & Malyszek, for the protester.
Kay Bushman, Esq., Defense Energy Support Center, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly concluded that there was no organizational conflict of interest on the part of the firm in line for award where the firm was not involved in creation of the solicitation's statement of work (SOW); SOW was not essentially derived from materials furnished by the firm; and the firm did not play a role in the source selection process.

DECISION

CDR Enterprises, Inc. protests the award of a contract to Air Liquide America L. P. under request for proposals (RFP) No. SPO600-03-R-0336, issued by the Defense Logistics Agency, Defense Energy Support Center (DESC), for repair of the cathodic protection system for the gaseous nitrogen pipeline at Vandenberg Air Force Base (AFB), California. CDR contends that Air Liquide should have been excluded from the competition because it was involved in creating, and authored a report required to be read in conjunction with, the RFP's statement of work and because it had a direct oversight relationship to the protester during the selection process.

We deny the protest.

BACKGROUND

Air Liquide holds a contract for the supply of gaseous nitrogen (GN2) through a government-owned pipeline to end users on Vandenberg AFB. The pipeline extends from a nitrogen plant to space launch complex 3 (the SLC-3 branch), space launch complex 4 (the SLC-4 branch), and space launch complex 6 (the SLC-6 branch). Pursuant to its contract, Air Liquide is required to perform semi-annual inspections of the pipeline cathodic protection system and to notify the contracting officer of

any malfunctions capable of jeopardizing system operability. The notification is to describe the malfunction, the consequences of not correcting it, the contractor's proposed method of correcting it, and the estimated cost of implementing the corrective action. The contracting officer is to review the notification and negotiate the scope and cost of the corrective action that he or she deems appropriate.

In May 1999, Air Liquide reported that its inspections of the pipeline cathodic protection system showed that the SLC-6 branch was unprotected as a result of depletion of the protective anode beds and that several of the anode beds along the SLC-3 and the SLC-4 branches were also depleted. Pursuant to the above contract, the government negotiated with Air Liquide for replacement of the anode beds along the SLC-6 branch, which work was accomplished in June 2000. In September 2000, Air Liquide reported that the integrity of the cathodic protection for the SLC-6 branch had been restored, but that readings along the SLC-3/4 branch indicated anode depletion on the SLC-4 portion. Over the course of the next 2-1/2 years, Air Liquide reiterated its finding that the anode beds along the SLC-4 branch had been consumed and recommended their replacement; beginning in November 2002, it also reported that the SLC-3 anode beds were substantially depleted and recommended their replacement.

According to the contracting officer, initially it was assumed that Air Liquide would perform the repairs on the SLC-3/4 branch under its existing contract; pursuant to this assumption, Air Liquide submitted to the contracting office both a Statement of Objectives (SOO) (dated September 21, 2001) and, after agency feedback, a revised SOO (dated March 10, 2003). Rather than proceeding with award of the work to Air Liquide under its current contract, however, the Director of Missile Fuels at DESC determined that the agency should compete the work to obtain better prices for the government. Accordingly, she directed Vandenberg AFB personnel to draft their own statement of work (SOW) and to exclude Air Liquide from any discussions regarding the SOW. The contracting office contacted the project manager for the GN2 pipeline at Vandenberg AFB, who worked with an agency electrical engineer and a mechanical engineer employed by an agency contractor to draft an SOW.

RFP No. SPO600-03-R-0336, requesting offers for inspection and repair of the GN2 pipeline's existing cathodic protection system, was issued on September 25, 2003, with a closing date of October 7. The RFP contemplated the award of a fixed-price contract to the acceptable offeror with the lowest evaluated price. Acceptability of a proposal was to be determined on the basis of two factors: technical capability and past performance.

Three offerors submitted timely proposals. The agency's technical evaluators determined all three proposals technically acceptable and conducted price

negotiations with each of the three offerors. Offerors' final prices were as follows:

Air Liquide	\$136,310
CDR	\$139,137
Offeror A	\$153,669

On November 18, the agency awarded a contract to Air Liquide as the lowest-priced, technically acceptable offeror and notified CDR of its action.

By letter dated November 24, 2003, CDR filed an agency-level protest of the award. The contracting officer denied the protest on December 29, and on January 8, 2004, CDR protested to our Office.

Timeliness

As a preliminary matter, the agency argues that CDR's protest should be dismissed as untimely because the protester knew, or should have known, prior to the closing time set for receipt of proposals that Air Liquide would be permitted to compete for the work; thus, to be timely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003), its protest of the agency's failure to exclude Air Liquide would have had to have been filed prior to the closing time. The agency asserts that the protester should have known that Air Liquide would be permitted to compete because the cover page of the solicitation (Form 1449) indicated that the acquisition was "unrestricted" and there were no restrictions elsewhere in the RFP or in the presolicitation notice.

A protester's allegation that another firm has an impermissible conflict of interest, and thus must be precluded from competing under the solicitation, is generally premature when filed before an award has been made. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. This conclusion reflects the underlying principle that a protester is charged with knowledge of the basis for protest only at the point where the agency conveys to the protester the agency's intent to follow a course of action adverse to the protester's interests. Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198 at 2, aff'd, Kimmins Thermal Corp.--Recon., B-238646.4, Jan. 31, 1991, 91-1 CPD ¶ 106. In the context of an alleged organizational conflict of interest, that point typically is when the protester is notified of the agency's selection decision.¹ Contrary to the agency's view, the fact

¹ A variation on the general rule applies in cases where the agency specifically advises the protester before award is made that it will consider the firm allegedly having the conflict of interest to be eligible for award. See, e.g., International Sci. and Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16; Booz-Allen & Hamilton Inc., B-246919, Apr. 14, 1992, 92-1 CPD ¶ 368; Central Texas College, B-245233.4,

(continued...)

that the RFP was issued on an unrestricted basis was not sufficient to charge CDR with knowledge that the agency planned to take what CDR considers to be improper action--treating Air Liquide as eligible for award despite its alleged conflict of interest. See REEP, Inc., supra.

Because CDR filed an agency-level protest within 10 days after receiving notification that Air Liquide had been selected for award under the solicitation and filed its protest to our Office within 10 days after receipt of the agency's denial of the agency-level protest, we find its protest to be timely.

Analysis

CDR argues that Air Liquide should have been excluded from the competition because it had an unfair advantage over other competitors based on an organizational conflict of interest. In this connection, the protester alleges that Air Liquide was directly involved in creating the SOW and that it authored a report required to be read in conjunction with the SOW. CDR further alleges that Air Liquide "had a direct oversight relationship" during the selection process in that the contracting officer "needed to get an approval from Air Liquide directly" to shut down the pipeline for performance of the repairs. Protest at 4-5.

The Federal Acquisition Regulation (FAR) sets forth both general and specific instructions on organizational conflicts of interest in subpart 9.5. The FAR generally requires contracting officials to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, 9.505. Specifically, the 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 may not supply the system or services, except in certain limited situations. 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, see FAR § 9.505(a), or (2) avoid the possibility that the contractor, by virtue of its special knowledge of the agency's future

(...continued)

Jan. 29, 1992, 92-1 CPD ¶ 121. In those cases, timeliness of the protest is measured from the date when the protester receives explicit notice from the agency that the firm with the alleged conflict of interest is considered eligible for award. The rule in those cases does not apply here because there was no explicit indication from the agency, in the solicitation or otherwise, that Air Liquide was considered eligible for award.

requirements, would have an unfair advantage in the competition for those requirements. FAR § 9.505(b); GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263 at 6. The responsibility for identifying and resolving conflicts of interest is that of the contracting officer, who in doing so is admonished to exercise “common sense, good judgment and sound discretion.” FAR §§ 9.504, 9.505. We will not sustain a protest challenging a contracting officer’s determination regarding a conflict of interest unless it is shown to be unreasonable. Daniel Eke and Assocs., P.C., B-271962, July 9, 1996, 96-2 CPD ¶ 9 at 4-5.

The agency denies that Air Liquide participated in creation of the agency SOW and has submitted sworn statements from the three individuals involved in its drafting in support of its position. The pipeline project director and the two participating engineers all attest that in drafting the SOW, they disregarded the previously drafted Air Liquide SOO, and instead consulted the previous pipeline surveys, the existing pipeline maintenance records, and the original records from the construction of the pipeline. All three further attest that they had no conversations with Air Liquide regarding the SOW while drafting it.

Moreover, a comparison of the agency’s SOW to Air Liquide’s March 10, 2003 SOO shows that the SOW contains a number of requirements that differ from or are significantly more detailed than the requirements of the SOO. Specifically, the SOO calls upon the contractor simply to install replacement anode beds along the pipeline route, while the SOW requires the contractor to design a cathodic protection system using sacrificial anodes with a life of 20 years or more. Further, the SOW requires the reestablishment of electrical isolation between the meter station and the SLC-6 branch, whereas the SOO does not; the SOO requires a post-repair cathodic protection survey and report while the SOW requires a close-interval survey (the distinction being that in a close-interval survey, the contractor is required to test the pipeline every 3 feet, where in a routine survey, the pipeline is tested at designated test stations only); the SOW requires that any deficiencies noted during the post-repair survey be corrected at no additional cost to the government, whereas the SOO does not contain such a requirement; and the SOW, but not the SOO, requires the contractor to provide 4 hours of training to government and contractor engineering/maintenance personnel on how to maintain and operate the renovated system.

In sum, the record does not support the protester’s allegation that Air Liquide was involved in drafting the SOW or that the SOW was essentially derived from materials furnished by Air Liquide.

Regarding the protester’s allegation that Air Liquide authored a report required to be read in conjunction with the SOW, the SOW requires the contractor to refer to “survey reports” to determine where pipe-to-soil potential readings show voltage below National Association of Corrosion Engineers (NACE) standards, but does not indicate that the survey reports to be referred to are those previously prepared by

Air Liquide. Since the contractor is to perform its own survey as a first step in its design of a new cathodic protective system, we think that the above reference to “survey reports” is most reasonably interpreted as a reference to that survey, rather than to a prior Air Liquide survey. Our interpretation is supported by the declaration of one of the SOW drafters, who states that the drafters “wrote the SOW to include a new survey and evaluation report from the contractor, which would become the basis of the repairs, not the previous surveys.” Decl. of Mechanical Engineer, Feb. 6, 2004, at 3.

To the extent that the protester further argues that Air Liquide’s knowledge of the existing pipeline cathodic protection system gave it an unfair competitive advantage over other competitors, there is no evidence—nor has the protester even alleged—that this knowledge was garnered through exposure to proprietary or source selection information, see FAR § 9.505(b);² instead, the knowledge was the product of Air Liquide’s work under its GN2 supply contract. The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an organizational conflict of interest, and an agency is not required to compensate for every competitive advantage gleaned from a potential offeror’s prior performance of a particular requirement. Daniel Eke and Assocs., P.C., supra, at 6. Moreover, DESC took steps to mitigate any advantage that Air Liquide might have had by virtue of its related pipeline work by furnishing CDR with the pipeline survey results and an extensive site visit. Regarding CDR’s argument that Air Liquide’s non-attendance at the site visit indicates that it already had access to information that CDR learned during the site visit, the protester concedes that it learned the information that Air Liquide already allegedly knew during the site visit; thus, we see no basis for an argument that it was prejudiced by Air Liquide’s prior knowledge.

Finally, regarding the protester’s assertion that Air Liquide “had a direct oversight relationship” during the selection process in that the contracting officer “needed to get an approval from Air Liquide directly” to shut down the pipeline for performance of the repairs, Protest at 4-5, the Director of Missile Fuels at DESC states as follows:

² FAR § 9.505(b) provides that:

In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

- (1) Proprietary information that was obtained from a Government official without proper authorization; or
- (2) Source selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

The decision of when and for how long to shut down the pipeline in order to perform cathodic or any type of repair is controlled by the customers at [Vandenberg] AFB and the needs of the users along the pipeline. This is largely dependent on the launch schedule. This decision is coordinated with Air Liquide in order to ensure that the customers continue to obtain their needed GN2. However, under no circumstance would the contracting office need to get approval from Air Liquide to shut down the pipeline for repairs. On the contrary, Air Liquide would need approval from the contracting office to shut down the pipeline.

Decl. of Director of Missile Fuels Commodity Business Unit, Feb. 3, 2004, at 3. We fail to see how the coordination the agency describes in any way demonstrates a conflict of interest on Air Liquide's part.

The protest is denied.

Anthony H. Gamboa
General Counsel