Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: DZS/Baker LLC; Morrison Knudsen Corporation

File: B-281224; B-281224.2; B-281224.3; B-281224.4; B-281224.5; B-281224.6

Date: January 12, 1999

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Gregory H. Petkoff, Esq., and William D. Cavanaugh, Esq., Department of the Air Force, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a cost comparison study pursuant to Office of Management and Budget Circular No. A-76, where 14 of 16 agency evaluators held positions under the study and thus subject to being contracted out, a conflict of interest that could not be mitigated was created, and protests challenging the evaluators' conclusion that all private-sector offers were unacceptable are therefore sustained.

DECISION

DZS/Baker LLC and Morrison Knudsen Corporation protest the decision of the Department of the Air Force to cancel solicitation No. F33601-98-B-9002 and to retain performance of civil operations and maintenance services in-house (rather than contracting out) at Wright-Patterson Air Force Base (AFB), Ohio. The agency canceled the solicitation, a two-step sealed bid procurement issued as part of a cost comparison study pursuant to Office of Management and Budget (OMB) Circular No. A-76, after finding all step-one technical proposals unacceptable. DZS/Baker and Morrison Knudsen challenge both the conduct of the competition and the evaluation of proposals.

We sustain the protests.

The solicitation, issued on May 29, 1998, requested the submission of initial technical proposals to perform maintenance, operation, repair, and minor construction services with respect to facilities, utility systems, grounds, and

infrastructure at Wright-Patterson AFB and specified off-base sites. Offerors submitting acceptable technical proposals then would be furnished an invitation for bids. The solicitation provided that compliance with, and demonstration of a "complete understanding" of, the performance work statement requirements would be evaluated in five areas--technical plan, organization and management plan, quality control plan, transition plan, and past performance--and that "[a]ny factor or sub-factor judged to be unacceptable will render the entire area unacceptable." Solicitation Attachment 2, Technical Proposal Evaluation Criteria, § 1.4.

Two technical proposals, DZS/Baker's and Morrison Knudsen's (in a joint venture teaming arrangement with Parsons Brinckerhoff), were received by the closing time on July 14. After advising each offeror of the initial evaluation results, the Air Force requested revised technical proposals. Based upon its evaluation of the revised technical proposals, the agency determined that both were severely deficient and thus technically unacceptable. Accordingly, the contracting officer advised offerors on September 25 that "[s]ince no offerors have exhibited sufficient expertise to perform the required services, the ASC Executive Steering Group and I, after considering the options outlined in [Air Force Pamphlet 26-12, Guidelines for Implementing the Air Force Commercial Activities Program (AFP), September 25, 1992], have determined that the solicitation will be canceled and the Government's Most Efficient Organization (MEO) will be implemented." Air Force Letters, Sept. 25, 1998; Contracting Officer Statement (B-281224), Oct. 27, 1998, at 3-4. Following a debriefing by the agency, DZS/Baker and Morrison Knudsen filed these protests with our Office.[1]

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[1]Where there is an established appeals process available for review of an A-76 cost comparison, our Office will consider a protest alleging deficiencies in the cost comparison only where the protester has exhausted the agency's appeals process, and we will not review any objections to a cost comparison not specifically appealed to the agency. Madison Servs., Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136 at 9; Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 at 3. Here, however, the Air Force has determined that its actions with respect to the cost comparison study are not subject to review under the agency appeals procedure. In this regard, the Air Force notes that OMB Circular No. A-76, Revised Supplemental Handbook, Mar. 1996, provides that "[f]ollowing a tentative waiver or A-76 cost comparison decision, the A-76 Administrative Appeals process is invoked," Part I, Ch. 3, § K.1; according to the agency there was no waiver, and the agency was unable to perform a cost comparison due to the lack of any acceptable technical proposals from commercial offerors. Air Force Administrative Appeals Decisions, Nov. 2, 1998; Contracting Officer Statement (B-281224), Oct. 27, 1998, at 3; see Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 at 4 (A-76 administrative appeal procedures do not apply to questions concerning the selection of a private-sector offer for comparison with the government's cost estimate).

DZS/Baker and Morrison Knudsen argue that the determination that their proposals were technically unacceptable--that is, the determination on which cancellation of the solicitation was based--resulted from a failure to conduct meaningful discussions, and an unreasonable evaluation of technical proposals by evaluators with an improper conflict of interest. In this latter regard, the protesters note that 14 of 16 evaluators--4 of 6 core evaluators (5 designated core evaluators and 1 evaluator considered by the evaluation team to be a core evaluator) responsible for evaluating the entire proposals, plus all 10 technical advisers responsible for evaluating specific portions of the proposals--held positions that were under study as part of the A-76 study. Air Force Statements, Nov. 24, Nov. 30 and Dec. 2, 1998.

We agree with the protesters that the evaluation process was fundamentally flawed as a result of a conflict of interest.[2]

OMB Circular No. A-76 describes the executive branch policy on the operation of commercial activities that are incidental to performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private companies or in-house using government facilities and personnel. While our Office does not review internal agency decisions regarding matters not the subject of a solicitation, where, as here, an agency has conducted an A-76 competition, thus using the procurement system to determine whether to contract out or perform work in-house, we will consider a protest alleging that the agency has not complied with the applicable procedures or has conducted an evaluation that is inconsistent with the solicitation criteria or otherwise unreasonable. See NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 5-6; Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335 at 3-4.

In setting out the standards of conduct that apply to government business, Federal Acquisition Regulation (FAR) § 3.101-1 states:

> Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

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[2]In light of our conclusion, we need not address the arguments concerning the conduct of discussions or the evaluation of proposals.

The standards contained in FAR subpart 3.1 are explicitly applicable to the actions of government personnel.[3] Id.

FAR subpart 3.1 does not provide specific guidance regarding situations in which government employees, because of their job positions or relationships with particular government organizations, may be unable to render impartial advice to the government. However, as we noted in our decision in Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 6-7, and as discussed below, FAR subpart 9.5 addresses analogous situations involving contractor organizations. Accordingly, although FAR subpart 9.5, by its terms, does not apply to government agencies or employees, we believe that in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR § 3.101-1, FAR subpart 9.5 is instructive in that it establishes whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation. Id.

FAR § 9.501(d) provides that a conflict of interest exists when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired." Likewise, FAR § 9.505-3 generally prohibits a contractor from evaluating its own products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the government's interests.

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[3]We note as well that, when "Source Selection or negotiated procurement techniques" are used for an A-76 cost comparison, the OMB Circular A-76, Revised Supplemental Handbook provides the following guidance:

> As required by the FAR, the Government should establish a Source Selection Authority, including assurances that there are no potential conflicts of interest in the membership of the Authority.

Part I, Ch. 3, § H.3.b.

In addition, FAR § 9.504 provides general direction to contracting officers, stating:

> (a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to--
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> > (1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
> >
> > (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.[4]

Where, as here, a private-sector offeror submits a technical proposal as part of an A-76 cost comparison study for work currently performed in-house by an agency, and agency personnel holding positions under the study and thus subject to being contracted out are involved in evaluating the commercial offeror's proposal, it seems self-evident that, as addressed in FAR § 9.501(d), the agency evaluators are potentially unable to render impartial assistance or advice to the contracting officer--their objectivity in performing the evaluation may be impaired. Indeed, as addressed analogously in FAR § 9.505-3, in this situation agency evaluators are in effect evaluating a competitor's proposal. Accordingly, a conflict of interest exists which calls for the agency to take appropriate remedial action. Our conclusion in this regard appears to be consistent with that of the contracting officer, who reports that "[i]n my opinion, the potential for an inherent conflict of interest by the technical evaluation team performing the evaluation required extra surveillance of

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[4]FAR § 9.505 further provides that:

> Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

the process on my part." Contracting Officer's Statement (B-281224), Oct. 27, 1998, at 10; see Contracting Officer's Statement (B-281224.2), Oct. 27, 1998 at 3.

We note that, according to the contracting officer, although "I could not help but be aware of the potential for a conflict of interest from the Technical Evaluation Team," nevertheless, "due to the requirement for expertise in the performance requirements, there was no one else available and qualified to perform as part of the technical evaluation team." Contracting Officer's Statement (B-281224.2), Oct. 27, 1998 at 3. Notwithstanding the contracting officer's statement, for which no support was offered, it seems implausible that there were no other personnel available in the Department of the Air Force who were qualified to evaluate proposals for installation civil operations and maintenance services.

The Air Force argues that it took reasonable precautions to ensure the integrity of the evaluation process in light of this conflict, including the appointment of a procurement analyst whose position was not subject to the A-76 study as the technical evaluation team chief; physical segregation of the evaluators; and increased training and surveillance by the contracting officer. Contracting Officer's Statement (B-281224), Oct. 27, 1998 at 10-11; Contracting Officer's Statement (B-281224.2), Oct. 27, 1998, at 3-5; Memorandum of Law (B-281224.2), Oct. 27, 1998, at 6. We do not agree that these steps were adequate to eliminate or mitigate the conflict. Notwithstanding these actions, 14 of 16 agency evaluators, including 4 of 6 core evaluators, continued to hold positions that were under study and at risk of being contracted out in the event that a private-sector contractor's proposal was determined acceptable. This represented a substantial conflict for all but two of the evaluators, and draws into question the objectivity of their individual and collective evaluation findings.

In our view, given the breadth and severity of the conflict of interest here, the conflict could not be mitigated by any action short of reconstituting the evaluation team. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 17. So long as contracting officials relied on the evaluators for their expertise and input, we fail to see how, in this situation, mere additional oversight of the evaluation process would be adequate to mitigate a conflict of interest. Accordingly, in this context, assigning an individual without a conflict to be the evaluation team chief, while a step in the right direction, is insufficient to mitigate the conflict. Finally, while segregation may resolve a conflict of interest relating to an offeror's unfair access to information, it is virtually irrelevant to a conflict of interest involving potentially impaired objectivity. Id. at 16.[5]

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[5]In this regard, we note that in January 1996 Air Force commercial activities program managers were furnished with a background paper advising them that "[t]o ensure a clean and pure technical evaluation is conducted in negotiated

The Air Force contends that there is no evidence that evaluators holding positions under the A-76 study were more inclined to find the proposals unacceptable than those not under it. This argument is unpersuasive. As an initial matter, we note that there is a presumption of prejudice to competing offerors--here, the private-sector offerors--where a conflict of interest, other than a de minimis or insignificant matter, is not resolved. Id. at 19. Moreover, while it may well be that the ratings of the two evaluators suggest that a team of impartial evaluators would arrive at the same evaluation judgments as the team here, this can only be confirmed by actually having an evaluation performed by an impartial team. In light of the potential adverse impact on the integrity of the process, we think all offerors are entitled to such an evaluation instead of mere speculation that the evaluation may have been objective.[6]

We conclude that, in light of this significant conflict of interest on the part of the evaluators, the evaluation was invalid and did not furnish a proper basis for cancellation of the solicitation.[7] We therefore sustain the protests. We recommend that the agency rescind the cancellation of the solicitation, constitute a new technical evaluation team, the composition of which is consistent with this decision, and reevaluate the step-one technical proposals. We also recommend that DZS/Baker and Morrison Knudsen be reimbursed their costs of filing and pursuing

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acquisitions, have individuals from outside the function (from [Headquarters] and possibly other bases) sit on the evaluation team." Supplemental Guidance for AFI [Air Force Instruction] 38-203, Commercial Activities Program, and AFP 26-12, Guidelines for Implementing the Air Force Commercial Activities Program, and Miscellaneous Background Information, Jan. 3 1996, Attachment 12, at 2.

[6]Indeed, given the fact that, according to the agency, "both the initial evaluation rating and the final evaluation rating were by consensus," Supplemental (Legal) Memorandum (B-281224.2), Nov. 10, 1998, at 4, it is not apparent how the effects on the agency's overall evaluation judgments of the conflict of interest on the part of 14 of 16 evaluators could be reliably determined.

[7]DZS/Baker protests the Air Force's refusal to disclose, outside of the protective order issued by our Office, the agency's management plan, MEO and all supporting documentation. However, the failure to release documents does not state a basis for protest.

the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). DZS/Baker and Morrison Knudsen should submit their certified claims for costs, detailing and certifying the time expended and costs incurred, to the Air Force within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Comptroller General
of the United States