Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Knights' Piping, Inc.; World Wide Marine & Industrial Services

File: B-280398.2; B-280398.3

Date: October 9, 1998

Brian K. Knight for Knights' Piping, Inc., and A.J. Hammond for World Wide Marine & Industrial Services, the protesters.
Sharon Hershkowitz, Esq., Frank A. Putzu, Esq., and Paul W. Tyler, Esq., Department of the Navy, for the agency.
Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's inadvertent inclusion of emerging small business set-aside notice in solicitation does not prohibit award to large business where solicitation otherwise indicated that no set-aside was intended, there is no legal requirement that the contract be set aside for emerging small business concerns, and no bidder was prejudiced as a result.

2. Contracting agency properly awarded contract to firm possessing both a Master Ship Repair Agreement and an Agreement for Boat Repair (ABR) where solicitation was restricted to ABR holders.

3. Protest that a conflict of interest exists where agency awarded a contract for the planned availability of the USS THOMAS S. GATES to the contractor who is the planning yard for this class of ship and who prepared the availability analysis is denied where agency reasonably determined that adequate safeguards were in place to mitigate or neutralize any conflict and also properly executed a waiver of the possible organizational conflict of interest as being in the best interest of the government.

4. Protest that submission of an allegedly below-cost offer constitutes a "buy-in" does not provide a valid basis to challenge an award.

DECISION

Knights' Piping, Inc. and World Wide Marine & Industrial Services protest the award of a contract to Ingalls Shipbuilding, Inc. under request for proposals (RFP) No. N62795-98-R-0023, issued by the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy, Pascagoula, Mississippi (SUPSHIP) for the performance of certain repairs and alterations to a guided missile cruiser, USS

THOMAS S. GATES. Both protesters argue that the award to Ingalls, a large business, was improper because the RFP was set aside for emerging small businesses (ESB); that the RFP was restricted to firms holding a current Agreement for Boat Repair (ABR) and Ingalls was ineligible because it holds both an ABR and a Master Ship Repair Agreement (MSRA); and that Ingalls had an unfair competitive advantage because, as the planning yard for guided missile CG-47 class ships, it had information regarding the RFP in advance of other offerors.

We deny the protests.

The RFP, issued April 15, 1998, stated that it was restricted to those firms having a current ABR and also stated that in "accordance with Department of Navy policy competition is restricted to ABR/MSRA holders within a 75 mile radius of vessel's homeport. Firms which do not possess a MSRA/ABR (as applicable) are ineligible for award unless adequate time exists to permit the Navy to perform an assessment of their MSRA/ABR application and to execute the applicable MSRA/ABR without impacting the vessel's availability dates." RFP § A-6. The RFP also contained Federal Acquisition Regulation (FAR) § 52.219-20, Notice of Emerging Small Business Set-Aside which provides that the procurement was restricted to ESB concerns. RFP § L-2-7. The RFP provided for award of a firm, fixed-price contract using a best value determination based upon the evaluation factors of past performance and price. RFP § M-6. The past performance evaluation factor consisted of the following subfactors: technical (quality of product); schedule; and management. Past performance was to be rated as exceptional, very good, satisfactory, marginal or unsatisfactory. Offerors without a record of relevant past performance or for whom information on past performance was not available were to receive a neutral rating. The RFP stated that "Past Performance is approximately equal to Price, with Past Performance being more important than Price." RFP § M-6(c)(1).

The agency received four offers by the May 15 closing date. The past performance evaluation team (PPET) rated each offeror's past performance using existing relevant past performance information. Ingalls was rated neutral because no relevant past performance data was available at this SUPSHIP and Knights' Piping was rated satisfactory based on available relevant past performance data. World Wide Marine was rated unsatisfactory based on relevant past performance data. A best value advisory committee (BVAC) performed a best value analysis using pricing

information and the PPET analysis of relevant past performance data. The BVAC ranked the offers as follows:

CONTRACTOR	OVERALL RATING	PRICE PROPOSED
Ingalls	Neutral	$2,914,857
Knights' Piping	Satisfactory	$4,311,252
Offeror A	Unsatisfactory	$2,933,780
World Wide Marine	Unsatisfactory	$4,444,537

The contracting officer determined that although Knights' Piping had a higher past performance rating, Ingalls represented the best value because of its lower proposed price, and Ingalls was awarded the contract on June 12. Neither Knights' Piping nor World Wide Marine requested a debriefing, and on June 16, both filed agency-level protests that were denied on June 26. On July 2, Knights' Piping filed its protest with our Office and World Wide Marine filed its protest on July 6, both raising essentially the same issues.

First, the protesters argue that the Navy improperly awarded the contract to Ingalls because, as a large business, Ingalls is ineligible for award under an ESB set-aside. The Navy maintains that the FAR § 52-219-20 set-aside provision was inadvertently included in the solicitation, and argues that there is no provision for setting aside a procurement of this dollar value for an ESB. The Navy also points out that neither Knights' Piping nor World Wide Marine indicated that its proposed prices would have changed had it known that large businesses were going to be allowed to compete.

The record supports the agency's position that inclusion of the notice of ESB set-aside was inadvertent. The RFP cover sheet at block 5 is explicitly and appropriately marked in the space which designates that the procurement is unrestricted, while the space providing for a set-aside is not marked. This unrestricted designation is consistent with other RFP provisions suggesting that the procurement is unrestricted (e.g., the inclusion of both small and large business progress payment rates), except for the inclusion of FAR § 52-219-20 at paragraph L-2-7. FAR § 19.1007(b) calls for the inclusion of FAR § 52.219-20 in solicitations in accordance with FAR § 19.1006(c). FAR § 19.1006(c) provides that acquisitions in the four industry groups identified in FAR § 19.1005(a)(4), which includes nonnuclear ship repair, with an estimated value equal to or less than the ESB reserve amount established by the Office of Federal Procurement Policy (OFPP) shall be set aside for ESBs: "provided that the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible ESB's that will be competitive in terms of market price, quality, and delivery."

If no such reasonable expectation exists and the acquisition value is over $25,000 then, in accordance with FAR § 19.1006(b), the requirement shall not be considered

for small business set-asides. The standard industrial classification (SIC) code for this procurement is 3731, RFP § K-17, for which OFPP has established $25,000 as the reserve amount. 58 Fed. Reg. 19,849, 19,852 (1997). Here, the government estimate for this acquisition was in excess of $2.4 million and both protesters' offers were over $4 million, substantially in excess of the applicable ESB reserve amount of $25,000. Under the circumstances, it is clear that the inclusion of FAR § 52.219-20 was inadvertent and as a result there was no prohibition on making award to a large business bidder like Ingalls. See Northwest Piping, Inc., B-239404, Aug. 16, 1990, 90-2 CPD ¶ 133 at 2-4.

Both protesters maintain that regardless of whether its inclusion was inadvertent, because the ESB set-aside provision was included, it must be enforced. As explained above, the FAR does not provide for an ESB set-aside here and prohibits the use of small business set-asides for procurements of this nature. Under these circumstances, particularly since the solicitation also provided clear notice in other sections that the procurement was not set aside, the protesters' contention is without merit. Knights' Piping also maintains that had it known that the FAR § 52.219-20 ESB set-aside notice was not going to be enforced it would not have participated in this procurement. However, since Knights' Piping certified in its offer that it is not an ESB, Knights' Piping is not an appropriate party to raise this issue on behalf of ESBs, a class to which it apparently does not belong. Priscidon Enters., Inc., B-238370, Mar. 30, 1990, 90-1 CPD ¶ 345 at 4.

Second, the protesters argue that because Ingalls has both an MSRA and ABR, it should have been excluded from the competition because this places offerors with ABRs only at a competitive disadvantage. The agency reports that in order to perform repair work of any kind on Navy ships a prospective contractor must enter into an advance agreement with the Navy, called a master agreement for repair and alteration of vessels (MARAV). The MSRA and ABR are the two types of MARAVs and they differ according to the nature of the work the contractor is qualified to perform. A contractor holding an MSRA is eligible to perform extensive and complex work on ships of 500 tons or larger. An ABR allows a contractor which lacks the capability to perform the more extensive work on larger vessels to compete for repair work on smaller vessels and, where designated by the Navy, for work of limited scope on the larger vessels. MSRA holders are automatically issued an ABR since they can perform the less complex work.

Here, the contracting officer determined that the minimum qualification for eligibility to compete for the contract was possession of an ABR. The competition was then opened to any firm with an ABR and since Ingalls met this minimum qualification requirement, Ingalls properly was allowed to participate in this acquisition. As previously stated, the RFP specifically stated that it was restricted to ABR holders or, if adequate time existed to perform an assessment of MSRA/ABR application and to execute the applicable MSRA/ABR without affecting the vessels' availability dates, to firms that did not possess an MSRA/ABR. Thus, it was the

agency's stated intent to allow all ABR holders to participate, and Ingalls as an ABR holder was properly allowed to participate. We see no merit in the protester's position that possession of an MSRA as well as an ABR somehow renders a firm ineligible to compete for procurements for which only an ABR was required. Clearly, Ingalls' possession of both simply means that it met and exceeded the stated eligibility requirement.

Next, the protesters argue that Ingalls had an unfair competitive advantage because as the planning yard for guided missile CG-47 class ships, it had information regarding the solicitation prior to other offerors. Knights' Piping also contends that the solicitation was partially prepared by Ingalls.

An organizational conflict of interest occurs where, 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 otherwise be impaired, or a person has an unfair competitive advantage. FAR § 9.501. Contracting officials are 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 § 9.504(a)(2); CH2M Hill, Ltd., B-259511 et al., Apr. 6, 1995, 95-1 CPD ¶ 203 at 14. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. We will not overturn the agency's determination in this regard except where it is shown to be unreasonable. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9.

The Navy reports that Ingalls developed the detail design and was the lead shipbuilder for the CG-47 class ships and as a result the Navy contracts with Ingalls to accomplish Planning Yard services to support the integrated maintenance and modernization process for the CG-47 class ships. Initially the Planning Yard contract required Ingalls to provide input into bid specifications by developing work items to support alteration installation and repair efforts. The Navy included a special organizational conflict of interest clause in the Planning Yard contract identifying this effort as creating an organizational conflict of interest. However, 6 months after contract award, Ingalls was instructed to stop work associated with this portion of the statement of work and SUPSHIP assumed the task of preparing bid specifications and, according to the agency, Ingalls has not developed work items or specifications to support alteration installation or repair efforts regarding CG-47 class availabilities for which Ingalls may compete.

Additionally, under the Planning Yard contract, Ingalls develops Ship Alteration Records, which provide definition of a Navy proposed military improvement or change for the ship class, and Ship Alteration Installation Drawings, which contain the detailed design for the change. When Ingalls expressed an interest in competing for CG-47 class ship repair availabilities, the Navy established a process to

neutralize or mitigate any organizational conflict of interest associated with these efforts. First, in order to preclude the introduction of any "yard specific" characteristics into Planning Yard products, drawing packages are developed by the Planning Yard in accordance with strict standard formats prescribed by the Navy's Fleet Modernization Program Manual. All drawing packages are then submitted to the Navy for review and approval. After approval by the Navy, drawing packages are available upon request to any interested party wishing to bid on the package and notice of availability of these drawing packages is posted on the Internet.

Further, the Navy reports that notwithstanding its mitigation efforts, since it could still be perceived that Ingalls had an organizational conflict of interest, in accordance with FAR § 9.503, the head of the contracting activity determined that it was in the best interest of the Navy to grant a waiver to the organizational conflict of interest provisions. On December 24, 1997, a waiver was granted with respect to Ingalls to allow Ingalls to continue providing Planning Yard services for CG-47 and other ship classes, and to compete on upcoming availabilities for those classes of ships.

The record does not support the protester's contention that Ingalls should have been excluded from competing because of an organizational conflict of interest. While the potential for such a conflict exists, numerous safeguards were built into the process by the agency to ensure that Ingalls' assistance when it develops installation drawings and ship alteration records or prepares feasibility studies does not result in undue prejudice to potential competitors when it competes for the CG-47 class ship availabilities. SUPSHIP, not Ingalls, developed the specifications and the specifications are provided to all potential offerors. Moreover, in any case, because the agency concluded that the potential for a conflict still existed notwithstanding its mitigation efforts, in accordance with FAR § 9.503, the agency properly executed a waiver to the organizational conflict of interest provisions of FAR § 9.505. Where a procurement decision such as the waiver in this case is committed by statute or regulation to the discretion of agency officials, our Office will not make an independent determination of the matter. Rather, we will review the agency's explanation to ensure that it is reasonable and consistent with applicable statutes and regulations. See Lawlor Corp.--Recon., B-241945.2, Mar. 28, 1991, 91-1 CPD ¶ 335 at 3. In our view, the agency acted reasonably in determining that it was in the best interest of the Navy that, notwithstanding a potential organizational conflict of interest, Ingalls, the only source for the planning yard efforts, be allowed to perform planning yard functions and compete for CG-47 class ship availabilities. Accordingly, the agency's determination to award to Ingalls notwithstanding its Planning Yard services work is unobjectionable.

Finally, the protesters' contention that Ingalls submitted a below-cost or "buy-In" bid provides no basis for protest. The allegation that a below-cost offer has been submitted does not in itself provide a basis to challenge the validity of a contract award. This is so because below-cost pricing is not prohibited and the government

cannot withhold an award from a responsible offeror merely because its low offer is below cost. Norden Sys., Inc., B-227106.9, Aug. 11, 1988, 88-2 CPD ¶ 131 at 5. Further, as to whether Ingalls is a responsible offeror, our Office will not review a contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith or that definitive responsibility criteria have not been met, neither of which are alleged here. Trak Eng'g, Inc., B-231791, Oct. 28, 1988, 88-2 CPD ¶ 402 at 6.

The protests are denied.

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of the United States