

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

Protest of Proposal Rejection For Organizational 10,115

FILE: B-193497

DATE: May 10, 1979

MATTER OF

Institute of Gas Technology

*Conflict of Interest
DLG 01559*

DIGEST:

Where offeror has individual and corporate ties with gas and oil industry, agency rejection of proposal for services to assist agency review of gas curtailment because of organizational conflict of interest is sustained. Offeror's status as not-for-profit, tax-exempt organization does not preclude agency determination that conflict of interest does or might exist.

DLG 00912

The Institute of Gas Technology (IGT) protests the refusal by the Department of Energy (DOE) to consider its proposal for award under request for proposals (RFP) No. EB-78-C-01-6363 for technical consulting and management support services to assist the Economic Regulatory Administration review the present natural gas curtailment approach, and, if necessary, the establishment of a modified curtailment priority system for interstate pipelines. DOE disqualified IGT and awarded the contract to another firm because it determined that conflicts of interest existed for IGT and its proposed subcontractor.

The RFP set forth as qualification criteria requirements relating to organizational conflicts of interest. DOE states that it attempted to fully implement the special statutory conflict of interest disclosure requirements applicable to the Department (See 15 U.S.C. § 789 (Supp. 1979); 42 U.S.C. § 5918 (Supp. 1979)). To this end, DOE considers that portion of Energy Research and Development Administration (ERDA) (one of DOE's predecessor agencies) Procurement Regulations relating to the avoidance of organizational conflicts of interests to have been applicable to

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this procurement. Under the above authority, the Department is prohibited from entering into technical and management support service contracts unless it finds, after evaluating all information disclosed by the offeror, that (1) it is unlikely that a conflict of interest would exist, (2) such conflict has been avoided, or (3) it is in the best interest of the United States to do so. See, e.g., 15 U.S.C. § 789(b).

The RFP required the submission of a disclosure statement regarding organizational conflicts of interest, a necessary prerequisite for consideration of the offeror's proposal. According to DOE, due to the sensitivity of the work to be done, the following paragraph was added:

"(5) Special Disclosure Regarding Performance of Related Studies For Public or Private Organizations. Offerors are advised that the Department considers the question of natural gas curtailment priorities to be a most sensitive matter requiring the utmost in care to avoid either the possibility of bias or the appearance of bias. It is, therefore, the Government's intent by separate disclosure to ascertain in the fullest extent possible whether offerors have performed any studies for organizations which could be construed in any manner as affecting the offeror's ability to render impartial, technical, sound, and objective assistance or advice. The offer shall, therefore, provide a separate statement which discloses all relevant facts concerning any studies, to include analysis, data collection, and other similar work, dealing either in whole or in part, with natural gas curtailment, energy user priorities, natural gas supplies, natural gas substitution, or related matters, performed during the three years prior to the issuance of this solicitation, presently being performed, or presently being considered for performance in any manner. All

such studies are to be disclosed by providing a brief description of the study, whether performed for public or private organizations, together with the identity of the client organization. Offerors are advised to interpret this requirement in the broadest reasonable manner possible should there be any question of applicability of this disclosure requirement to a given situation. In addition, offerors are to briefly describe any corporate financial or other special affiliation of continuous relationship with oil, gas, or energy industry firm or associates thereof."

The Department believes that an actual or potential conflict of interest existed because of IGT's close corporate ties with the natural gas industry. The recommendation to disqualify IGT states that many members of IGT's board of trustees, which governs the organization, and a majority of its executive committee include officials of gas and oil companies. In addition, some gas industry members sponsor research projects through IGT by contributions which totalled \$710,000 in 1977 from 184 corporate members. In this connection, DOE states:

"It was and is DOE's belief that IGT's membership of its board of trustees which governs the organization could subtly influence the study on natural gas curtailment priorities. The fact that the board of trustees includes a large number of gas industry officials as well as the gas industry's sponsoring of research through IGT creates the appearance of a conflict of interest and also opens the possibility for gas industry officials to influence the outcome of planned projects in the statement of work in order to gain a more favorable gas allocation. In

addition, the relationship of the gas industry and IGT would give rise to the questioning of the validity of the study by those most affected by its outcome. The public perception of this relationship could render the study worthless."

IGT argues that its disqualification is an improper and arbitrary action based upon DOE's faulty interpretation of IGT's purpose and operational constraints. IGT alleges that it is a not-for-profit organization under state law and is required to operate for public rather than private benefit by its charter, state law and the Internal Revenue Service, citing ~~26 U.S.C. § 501(c)(3)~~. Therefore, it cannot have a conflict of interest in matters pertaining to the public interest. The protester argues further that DOE did not consider fully these constraints or IGT's record of complete freedom of scientific inquiry without improper outside influence on gas matters.

We have recognized that procuring activities have a legitimate interest in protecting the Government from the bias that might result from awarding a contract to a firm having an organizational conflict of interest. See Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 91 (1976), 76-1 CPD 202. At the same time, because it is a general policy of the Federal Government to allow all interested qualified parties an opportunity to participate in its procurement in order to maximize competition unless there is a clearly supportable reason for excluding a firm, we recognize that a firm should not be excluded from competition simply on the basis of a theoretical conflict of interest. PRC Computer Center Inc.; On-Line Systems, Inc.; Remote Computing Corporation; Optimum Systems, Inc., 55 Comp. Gen. (1975), 75-2 CPD 35.

Furthermore, the determination as to whether a sufficient possibility exists that an award to a particular firm would result in an organizational conflict of interest must be made by the procuring activity, with which lies the responsibility

for balancing the Government's competing interest in (1) preventing bias in the performance of certain contracts which would result from a conflict of interest and (2) awarding a contract that will best serve the Government's needs to the most qualified firm. See Planning Research Corporation Inc., supra.

The regulation applied by the agency stated that "The ultimate test should always be; is the contractor placed in a position where its judgment may be biased, or where it has an unfair competitive advantage?" ERDA Procurement Regulations § 9-1.5406(a). We believe the agency's affirmative answer to this question has not been shown to have been an unreasonable abuse of discretion in the circumstances. We do not find unreasonable DOE's determination that the individual and corporate composition of the protester could "subtly influence" the gas curtailment study.

DOE's conclusion does not require, as the protester suggests, that DOE presume that IGT's trustees or executive committee would willfully violate the various fiduciary duties imposed upon them. That the composition of the board of trustees would harm the public perception of the study, rendering it worthless, is viewed as a valid major concern of the agency. In addition, IGT's brochure which IGT offered to us as evidence of the nature of the protester, states that the organization's work is done "in the best interest of the industry and the general public." (Emphasis added). The brochure also states that, for nonsponsored activities, IGT depends on the support of its members, more than half of which are utility companies. We believe that the combination of these factors could call into question IGT's objectivity in performing a contract that could significantly affect the gas industry.

Furthermore, the regulations applied by DOE were designed to avoid placing a contractor in a position where its judgment might be biased, or where there would be an unfair competitive advantage. ERDA PR § 9-1.5402(b) exempts some not-for-profit organizations and educational institutions from those parts of the rules which pertain to unfair competitive advantage

except in unusual or specific situations identified by contracting officers. Such organizations are not excepted, however, from the conflict of interest regulations which relate to bias. Thus, the regulations recognize that a not-for-profit organization can have a conflict of interest. In this regard DOE's recent issuance of permanent procedures to avoid organizational conflicts of interest specifically eliminated any further exclusion for firms similar to that in the predecessor ERDA PR. This was explained as follows:

"(1) Exclusion of Independent Contract Research Organizations (ICRO) and Universities. It was recommended by some commenters that ICRO's and universities be specifically excluded from OCI coverage. One commenter stated that such organizations should not be excluded from OCI coverage. The Department has adopted the latter position because it believes that ICROs and universities are not immune from being in the position of serving two masters or from gaining an unfair competitive advantage. Neither Pub. L. 95-39 (42 U.S.C. § 5918) nor Pub. L. 95-70 (15 U.S.C. § 789) provides for the exclusion of such organizations and the Department does not believe that such exclusion was the intent of Congress. Additionally, OFPP's (Office of Federal Procurement Policy) revised proposed rule does not exclude such organizations from coverage."
44 Fed. Reg. 2556 (1979.)

In addition, we agree with DOE's statement that the fact that IGT is organized under 26 U.S.C. § 501(c)(3) does not prevent application by DOE of its organizational conflict of interest statutes and regulations here.

IGT's allegation that DOE failed to consider fully the statutory and regulatory constraints on IGT to act in the public interest is not supported

by the record. The protester submits no evidence for this statement, and we cannot assume that DOE ignored the disclosure statement in IGT's proposal. Moreover, DOE states that the decision to disqualify IGT "was made with a good deal of thought and effort pursuant to the information submitted by IGT."

IGT seeks to avoid future summary rulings by Government procuring agencies that the business affiliations of its trustees or sources of funds are by and of themselves a sufficient basis for its disqualification without complete consideration of all circumstances in specific procurements. We observe that DOE is required to make independent evaluations based on disclosure statements provided for each procurement and to consider the specific circumstances based on all relevant information.

In view of the foregoing, we find it unnecessary to address IGT's protest against disqualification of its subcontractor for failure to comply with the conflict of interest provisions in the RFP.

Protest denied.



Deputy Comptroller General
of the United States