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DECISION

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

FILE: B-188703

DATE: October 5, 1977

MATTER OF: John J. McMullen Associates, Inc.

DIGEST:

1. Protest based on contention that proposed awardee should be excluded from award consideration under RFP's organizational conflict of interest clause is timely under GAO Bid Protest Procedures where filed 6 days after protester first heard rumors of agency's intent to make award to allegedly ineligible firm. Even though protester may have known previously that such firm was competing, no basis for protest existed until protester had actual or constructive notice of agency's intent not to disqualify firm.
2. Determination as to whether award to particular firm would be contrary to terms of RFP because organizational conflict of interest would result in matter for procuring activity, and such determination is not subject to objection unless contrary to statute or regulation or clearly unreasonable.
3. Allegation of wide variation in technical scores of competing proposals determined by agency to be substantially equal technically is not supported by record which indicates that technical scores were very close.

John J. McMullen Associates, Inc. (McMullen) protests the proposed award of a contract to Litton Systems, Inc., Mellonics Systems Development Division (Melonics) under request for proposals (RFP) No. N00123-77-R-0222, issued by the Naval Regional Procurement Office (NRPO), Long Beach, California. The RFP solicited offers to provide engineering support for computer programming, engineering analysis and studies, test and evaluation, and systems integration of the

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HARPOON (surface-to-surface missile system), ASMD (anti-ship missile defense system) and AEGIS (complete ship combat system) systems. Mellonics has submitted comments as an interested party to the protest.

McMullen contends that the proposed award to Mellonics violates the organizational conflict of interest provision in the RFP. McMullen also contends that its proposal was rated technically superior to Mellonics' and that NRPO improperly determined that the competing proposals were technically equal, thereby leading NRPO to select Mellonics on the basis of its lower price.

The organizational conflict of interest provision of the solicitation reads as follows:

"To avoid a possible organizational conflict of interest, the successful contractor must not be a major supplier of major combat system elements for Naval Surface Warfare Systems in the areas of ASMD, AEGIS, or HARPOON. A major combat system element is defined as a missile, launcher, gun, radar, command and control computer, ECM device, ESM device, or operational program."

At the outset, Mellonics urges that the protest was not timely filed and should not be considered on the merits. Mellonics argues the real basis of the protest does not involve its eligibility under the RFP provision, but rather is that the "clause should have been worded otherwise" to exclude Mellonics or that "the language of the RFP clause is ambiguous." In this connection, Mellonics contends that McMullen knew or should have known long before the protest was filed that NRPO would not exclude Mellonics from the competition since in 1974 Mellonics was awarded a contract under a solicitation with a similar restriction. Mellonics' points out that its former employee who conducted the prior procurement has been working for McMullen since 1976 where he is directly involved in this competition. Thus, it is Mellonics' position that this protest involves an

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alleged solicitation defect and is untimely under our Bid Protest Procedures because it was not filed until after the closing date for receipt of initial proposals. See 4 C.F.R. § 20.2(b)(1) (1977).

We do not agree with the Mellonics characterization of the protest. McMullen's complaint is not based on an ambiguity in the solicitation; neither does McMullen argue that the solicitation language should be changed. On the contrary, McMullen's protest is that under the express terms of the solicitation, Mellonics is precluded from award of a contract. McMullen filed its protest on March 29, 1977, some 6 days after it heard "rumors" that NRPO would award a contract to Mellonics. Even if McMullen had earlier noticed that Litton had submitted an offer, as Mellonics has alleged, we do not believe McMullen properly may be charged with notice that the Navy would consider Mellonics eligible for award consideration. See VAST, Inc., B-182844, January 31, 1975, 75-1 CPD 71. Certainly, Mellonics' eligibility status under the 1974 solicitation would not necessarily indicate the firm's current eligibility. Accordingly, we conclude that McMullen's protest was timely filed.

McMullen asserts that Mellonics is disqualified for award by the organizational conflict of interest provision because Litton Systems, Inc. (Litton), the parent corporation of Mellonics, through its various divisions and affiliates, is a major supplier of both hardware and operations programs involved in the procurement. First, McMullen states that Litton is the supplier of the DD-963 and LHA classes of vessels which will carry the systems identified by the conflict of interest provision. Second, McMullen states that Litton is the supplier of the operational program that integrates and controls the HARPOON and other weapons systems on the DD-963 vessels. McMullen's third allegation is that Litton is the supplier of the AN/UPX-24, a radar and electronic support measure (ESM) device, which it maintains is a vital component of the AEGIS system and a candidate for inclusion in the ASDM system. Lastly,

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McMullen maintains that Litton supplies the computer, displays and operational program for the E-2C aircraft which is a "candidate" program in the ASMD area.

In response, NRPO states:

"The [first] allegation is that Litton manufactures vessel types which will carry elements of the system, restricted by the provisions of the solicitation. While such an allegation is broadly true, it is also wholly immaterial; the terms of the solicitation do not prohibit vessel manufacturers from receiving award. * * *

"The second substantive allegation * * * states that Litton supplies operational programs for the HARPOON and ASMD elements. Litton is providing operational programs, but only for the DD-963 and LHA class vessels. This objection, then, is without merit for the same reason as the prior element, that it is grounded on a type of involvement not excluded by the solicitation provisions.

"The third allegation * * * is based upon the fact that Litton supplies the AN/UPX-24 IFF processor. The processor, very simply stated, is a minimal element in any system in which it is incorporated. It is not an ESM device, nor a radar. * * * The significant fact remains that this component is not within the ambit of the solicitation prohibitions. Thus, here too, the protester's concern is groundless.

"The final element of the protest is that Litton provides elements of equipment to the E-2C Airborne Early Warning Aircraft. Even were the allegations of the protester in this area true, they do not cause any objection to Litton as an awardee. The protest itself * * * refers to the E-2C as a 'candidate' program. It is not, however,

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even that; it is a related effort, cognizance for which would not fall within the intended contractual scope. The effort by the protester to include the E-2C within the scope of the solicitation's restrictions is wholly without merit."

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 and that they may utilize appropriate solicitation provisions restricting award to firms not having a particular organizational conflict of interest. See Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 91 (1976), 76-1 CPD 202; Gould, Inc., Advanced Technology Group, B-181446, October 15, 1974, 74-2 CPD 205. At the same time, because it is a general policy of the Federal Government to allow all interested qualified firms an opportunity to participate in its procurements in order to maximize competition unless there is a clearly supportable reason for excluding a firm, and we have also stated that a firm should not be excluded from competition simply on the basis of a theoretical or potential conflict of interest. See PRC Computer Center, Inc; On-Line Systems, Inc.; Remote Computing Corporation; Optimum Systems, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 635 and cases cited therein.

The determination as to whether a sufficient possibility exists that award to a particular firm would result in an organizational conflict of interest necessarily must be made by the procuring activity, with which lies the responsibility for balancing the Government's competing interests 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 Public Management Services, Inc., supra at 923. We think such determinations are subject to objection only where they are contrary to statute or regulation or are clearly unreasonable.

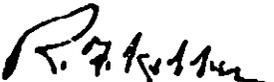
After carefully considering the various submissions of the parties, including the protester's rebuttal statements to the Navy's expressed position, we are

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unable to conclude that NRPO's determination regarding Mellonics is unreasonable. The most that can be said with respect to the showing made by McMullen on this record is that Litton, through its divisions and affiliates, has or may have some interest in the ASMD, AEGIS, and HARPOON systems. There has been no showing that Litton is a major supplier of "major combat system elements" for any of the systems. Absent that showing, it cannot be said that the Navy's willingness to award to Mellonics is contrary to the RFP provision or is otherwise improper or unreasonable.

McMullen's other contention is that its technical evaluation score was 88.8 of a possible total technical score of 90 and that the agency improperly determined Mellonics' proposal, with a score of 66.6, to be technically equal. However, the record indicates that the actual scores of the offerors are far different from those that McMullen has alleged. McMullen's score, as indicated by the work sheets of the technical evaluation committee, is 69.6 as compared to Mellonics' score of 71.1. The record affords us no basis for disputing the Navy's determination that the proposals were technically equal.

The protest is denied.


Deputy Comptroller General
of the United States