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J. V. ...
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DECISION



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

FILE: B-190864 **DATE:** May 11, 1978
MATTER OF: Sensor Technology, Inc.

DIGEST:

1. Contention that proposal was unfairly and improperly determined to be technically unacceptable because of numerous deficiencies cited by grantee's consultant is found to be without merit upon review of record.
2. Where alleged potential competitor for other grants or contracts is technical evaluator for grantee, such matter does not constitute violation of organizational conflict of interest regulation in OMB Circular 110, Attachment "O," or ERDA Federal Assistance Manual.

Sensor Technology, Inc. (Sensor), has filed a complaint concerning the award of a contract to Solarex Corporation (Solarex) by the Mississippi County Community College (MCCC) pursuant to a grant from the Department of Energy (DOE).

The contract is for supplying silicon concentrator cells and modules which will be incorporated in a terrestrial linear focus photovoltaic concentrator system located at MCCC.

Five proposals were received in response to a request for proposals issued by MCCC on October 17, 1977. The proposals were evaluated by TEAM, Inc., a consultant to MCCC, and following discussions, award of the contract to Solarex was recommended by TEAM on November 9, 1977, to the Board of Trustees of MCCC, which concurred in the recommendation.

Sensor's complaint is based on what it contends are numerous irregularities in the valuation and awarding of the contract. Sensor argues that it

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submitted the lowest cost proposal but that its proposal was not presented to the Board of Trustees because it was erroneously found to be technically unacceptable.

Initially, Sensor states that, while "availability of experienced personnel, equipment, and facilities to perform the work as proposed" was an evaluation criteria; there was no comparison of offerors under the criteria in TEAM's presentation to the Board of Trustees. Sensor believes that its experience in solar cell production is greater or equal to any of the other offerors, however, information regarding its 12-years experience in producing all kinds of cells was not provided nor requested.

TEAM, in responding to Sensor's complaint, states that the experience of all offerors was evaluated. While Sensor did possess experience in producing one sun (nonconcentrated illumination) solar cells, it did not have adequate experience in producing large size concentrator cells as needed for this procurement. Sensor argues that it advised TEAM that it had designed and produced a 5 cm x 5 cm concentrator cell but, according to the information contained in TEAM's report to our Office, Sensor had made only one cell of the above size but it had not yet been tested.

Contrary to Sensor's contention that the evaluation factor listed in the RFP made no mention of concentrator cell production experience, we believe the phrase "to perform the work as proposed," should have placed offerors on notice that TEAM was looking for experienced firms in the concentrator cell field. Accordingly, we have no objection to the manner in which the experience of Sensor was evaluated.

Secondly, Sensor states it was unfairly downgraded because it had performance problems and late deliveries under a prior contract, which TEAM failed to advise the Board of Trustees had been assumed by Sensor after the initial contractor went into bankruptcy. We find nothing improper in the

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evaluation of Sensor's past performance. Sensor listed the above contract in its proposal and gave the name of the project manager as the individual to be contacted for information. TEAM spoke with this individual concerning Sensor's performance. We do not view the fact that Sensor assumed the contract as requiring TEAM to ignore Sensor's performance under it.

Thirdly, Sensor argues it was not advised that TEAM desired a performance warranty on the items being procured which Solarex and another offeror offered in their proposals and was listed by TEAM as one of the factors for recommending award to Solarex. Sensor initially offered a 1-year limited warranty on materials and workmanship and in its best and final offer extended the warranty to 3 years with a 5-year warranty available for an additional \$19,200. Solarex offered a 5-year warranty and a 2-year performance warranty. The RFP stated one of the selection criteria would be "Nature and extent of warranty offered and the assessed ability of Seller to fulfill terms of that warranty."

We believe the RFP gave offerors the opportunity to propose the type and length of any warranty they desired and believed they could fulfill. Where two of five offerors propose performance warranties, we do not find it incumbent upon the evaluators to advise the other three offerors that another offeror has proposed a performance warranty.

Sensor also argues that TEAM advised the Board of Trustees that Sensor had provided no proposal concerning the problem of "shadowing." Shadowing refers to a method to protect a cell when it is shadowed but the remaining cells in the string are illuminated. When this shadowing occurs, the cell so shadowed acts as a direct load with the current from the remaining cells going through one part of the shadowed cell, thereby destroying the cell. The RFP required offerors to propose an interconnection design that would "provide optimum performance/cost in cell protection against variable illumination across the module."

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TEAM states that Sensor's proposal contained a comment regarding individual cell shadowing protection rather than across the module composed of numerous cells. TEAM contacted Sensor on November 7, 1977, about this discrepancy, but the individual contacted did not indicate any other portion of the proposal which dealt with the problem. Sensor's proposal did contain a section on zero cell performance which TEAM states is the same thing as shadowing, but this portion of the proposal noted that the method to be employed was proprietary to Sensor and details regarding it would be furnished "at special request on award of the contract."

When Sensor chose not to reveal its propriety method of dealing with cell shadowing, it did so at its own risk. Evaluators are entitled to know how the offeror intends to solve a technical problem before the award of the contract.

There is also a dispute as to some thermal calculations which were made by TEAM concerning the proposal of Sensor. Sensor's calculations are based on using a copper wire mesh which TEAM argues was not proposed by Sensor. Sensor states that its proposal noted that an insulated mesh screen would be used and that it did not specifically state copper because this was considered proprietary and a patent had been applied for the process. As above, we do not believe an evaluator can be expected to evaluate something not contained in a proposal and our Office has no objection to TEAM's thermal calculations.

Sensor also has raised the question as to whether there is an organizational conflict of interest in having TEAM conduct the evaluation of proposals. Sensor alleges that TEAM is an actual or potential competitor for other DOE grant or contract awards. Sensor contends that such conflict of interest is prohibited by Office of Management and Budget Circular 110, Attachment "0," paragraph "b," and the Energy Research and Development Administration (ERDA) Federal Assistance Manual (FAM) § 815(c)(1) and (2). Both of these documents contain

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the same wording and the ERDA FAM reads, in part, as follows:

"c. Procurement system standards.

Recipients may use their own procurement policies and procedures. However, all recipients shall adhere to the standards set forth in paragraphs c. and d.

- "1. The recipient shall maintain a code or standards of conduct that shall govern the performance of its officers, employees or agents engaged in the awarding and administration of contracts using ERDA funds. No employee, officer or agent shall participate in the selection, award or administration of a contract in which ERDA funds are used, where, to his knowledge, he or his immediate family, partners, or organization in which he or his immediate family or partner has a financial interest or with whom he is negotiating or has any arrangement concerning prospective employment. The recipients' officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors or potential contractors. Such standards shall provide for disciplinary actions to be applied for violations of such standards by the recipients' officers, employees or agents.
- "2. All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient should be alert to organizational conflicts of interest or noncompetitive

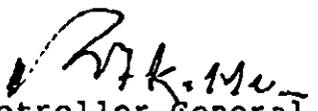
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practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements statements of work, invitations for bids and/or requests for proposals should be excluded from competing for such procurements. * * *

DOE has advised our Office that TEAM is not a hardware producer but a consultant which is involved in other DOE projects as Technical Manager. Even if Sensor's allegations were true there is nothing in the above regulations that prohibits the situation as Sensor depicts it. Moreover, our review of the entire record does not reveal anything improper in the conduct of the evaluation of proposals or award of the contract.

Finally, Sensor states that neither DOE nor MCCC fulfilled their duty by investigating the allegations raised by Sensor in its complaint but merely accepted the position taken in TEAM's response. As we have found no impropriety in the conduct of the procurement, we find it unnecessary to discuss this matter further.

Complaint is denied.


Deputy Comptroller General
of the United States