

Matter of: Energy Compression Research Corporation
File: B-243650.2
Date: November 18, 1991

King Golden, Esq., for the protester.
 James M. Thompson, for Kaman Sciences Corporation, an interested party.
 Gregory B. Petkoff, Esq., Department of the Air Force, for the agency.
 Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

Protest is sustained where awardee's use of a Federally Funded Research and Development Center (FFRDC) as a significant partner was contrary to Federal Acquisition Regulation prohibition against FFRDCs competing with private firms under government solicitations.

DECISION

Energy Compression Research Corporation (ECR) protests the award of a contract to Kaman Sciences Corporation under Program Research and Development Announcement (PRDA)¹ No. 91-05, issued by the Air Force for the design and development of an Ultra Wide Band Microwave Source, a testing device that radiates high energy microwaves. ECR alleges, among other things, that Kaman was improperly permitted to team with Sandia National Laboratories--a Federally Funded Research and Development Center (FFRDC) sponsored by the Department of Energy (DOE)--in contravention of Federal Acquisition Regulation (FAR) § 35.017-1(c)(4). That regulation requires that the sponsor

¹A PRDA is a special type of solicitation authorized by Air Force Systems Command (AFSC) Federal Acquisition Regulation (FAR) Supplement § 35.90 at FAR. It is used to obtain proposals for certain types of exploratory research. AFSC FAR Supp. § 35.2001. A PRDA is issued in the form of an announcement in the Commerce Business Daily. Id.

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agency's prohibition of FRAC from competing with private firms for government contracts. ECR also alleges that Kanan's proposal does not conform to material requirements of the PRDA, and that its own proposal was misvaluated as a result of agency bias.

We sustain the protest because we agree with the protester that the participation of Sandia under the circumstances here was contrary to the applicable regulation.

The PRDA was published in the Commerce Business Daily on January 3, 1991, soliciting proposals for an 18-month effort to develop the required microwave device, with a stated cost estimate of "approximately" \$6 million. Technical proposals were to be evaluated with respect to three overall factors, listed in descending order of importance: (1) technical and engineering soundness; (2) scientific merit; and (3) the offeror's capability to achieve the agency's principal objective in advancing "linear switching mod silicon technology." Within the factor relating to technical and engineering soundness 14 evaluation subfactors were listed in descending order of importance. The two most important technical subfactors were specific high-energy pulse power requirements for the microwave device, and the desirability of using a number of laser-triggered silicon-based semiconductor switches as part of the design. Cost was identified as secondary to technical considerations.

Three proposals from the following firms were received on February 5: TRW; Kanan, at a proposed cost of \$4.7 million; and ECR, at a proposed cost of \$4.7 million. (TRW's offer was determined unacceptable because the microwave generating system it proposed did not meet the requirements set forth in the PRDA relating to required wave burst frequency, and because its proposed switch design was considered risky).

Kanan's proposal was found acceptable. That firm proposed to "team" with Sandia in order to use the laboratory's recognized expertise in "repetitive high energy laser pulse power development and high energy laser activated switching

A sponsor is the executive agency which manages, administers, monitors, funds and is responsible for the overall use of the FRAC. FAR § 35.017(b).

Kanan's proposal lists Sandia as a teaming partner and a subcontractor. According to FAR § 9.601, a teaming arrangement exists when a prime contractor agrees with one or more companies to have them act as subcontractors under a specified government contract or acquisition program.

technology." Sandia's effort was expected to account for \$1.9 million of the \$4.7 million total cost proposed by Kaman. The record shows that the evaluators specifically noted that Sandia was a teaming partner with Kaman and recognized the partnership for its expertise. The evaluators were particularly impressed with the solution to switching problems posed by the PRDA--a solution using only one switch instead of multiple switches. The Air Force states such an innovative idea had not been considered by its technical staff prior to the issuance of the PRDA, which described a multiple switch arrangement as a suggested solution. The evaluators found the simplicity of a single-switch system to be of special benefit in ensuring lower maintenance costs during field testing outside a laboratory.

ECR's proposal was found to be unacceptable principally because of the complexity of its design involving the simultaneous coordination of 216 switches. The evaluators did not find that ECR lacked corporate expertise in requisite switching technology, or that its design could not meet the required power outputs. Rather, they questioned whether ECR had demonstrated specific experience in building as complex a set of switches as it proposed, and they found that the complex design was, simply put, too risky for successful operation as a field testing device--the ultimate goal of the PRDA. The evaluators also noted that, given ECR's proposed costs of \$6.7 million and the agency's "budget" of approximately \$6 million, the Air Force would not have been able to award a contract to ECR without changes in the firm's proposal.

An award was made to Kaman on the basis of its initial proposal on March 27. This protest followed on April 15, within 10 working days of ECR's telephonic notification of award, but outside of the 10 working day time to effect a stay of performance under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (1988). Thus, the agency reports that performance has continued.

ECR's position is that award to the Kaman/Sandia "team" was improper because it is contrary to FAR § 35.017-1(c)(4), which prohibits Sandia, as an FFRDC, from competing with the private sector for government contracts. ECR also argues that Kaman's one-switch design was not "responsive" to the PRDA, and that its own proposal was misvaluated as a result of long-standing Air Force bias against the firm.

We agree with ECR that, under the circumstances of this procurement, the Air Force's decision to accept Kaman's proposal to team with Sandia was inconsistent with the prohibition contained in FAR § 35.017-1(c)(4) and we sustain the protest on this basis.

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The record shows that Kaman's use of Sandia was a significant factor used by the agency in distinguishing among the three competing offers. Kaman's proposal was highly regarded because of proven expertise in high energy pulse power and switching design technology it offered--the very areas upon which Kaman chose to rely on Sandia's resources. On the other hand, TRW's and ECR's proposals were faulted in these areas. In addition, the cost of Sandia's efforts, which apparently do not include any amount for profit, came to 40 percent of Kaman's overall proposed costs and Kaman's use of the simplified switching technology contributed to Kaman's ability to propose the lowest costs. ECR's multiple switching approach was significantly more costly.

Had Kaman proposed to team with a private subcontractor to obtain the expertise there would be no question concerning the propriety of the arrangement. Sandia is not, however, a private firm. Sandia is an FFRDC. See FAR § 35.017-1(a). According to DOE, in this role, Sandia functions on the agency's behalf on a contractual basis as a government-controlled, government-supported research establishment. The policy regulating FFRDCs explicitly recognizes their special relationship to the government (see FAR § 35.017(a)(2)), and it requires their exclusion from competing for government contracts with the private sector. FAR § 35.017-1(c)(4).

The Air Force argues that the regulatory ban on an FFRDC competing with commercial firms under a government solicitation extends only to instances where the FFRDC is a prime contractor. The agency also points to FAR § 35.017-1(e)(5) which permits the FFRDC's sponsor to allow it to perform work for private profit organizations as authority for Sandia to perform this work under the Kaman proposal. In this regard, the agency notes that Sandia's sponsor here, DOE, did in fact approve Sandia's participation with Kaman as not constituting direct competition with private sector organizations.

While DOE has authority under FAR § 35.017-1(c)(5) to permit Sandia to work for private entities under appropriate circumstances, such work must be compatible with the regulatory prohibition contained in FAR § 35.017-1(c)(4) which, in essence, states that such work must not result in participation in a competition for a government contract against private concerns. KAMAN sought DOE's approval for Sandia to construct an impulse transmitter for Kaman after the firm had submitted its proposal at issue here. Its request to DOE made no mention of the Air Force procurement. DOE's approval was apparently based solely on Sandia's and

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Kaman's general statements that direct competition with the private sector would not result from Kaman "acquir[ing] the services of Sandia National Laboratories to participate in its impulse radar program." The record does not establish that either the Air Force nor DOE ever considered the extent of Sandia's participation in Kaman's proposal or whether the FFRDC's participation as a teaming partner placed the firm in the competition with non-FFRDC concerns under the PRDA.

FAR § 35.017-1(c) (4) does not make a distinction between an FFRDC's role as a prime contractor or subcontractor. We think that the determination whether an FFRDC is in fact competing with a private firm in violation of the regulation depends not upon whether the FFRDC has submitted a proposal in its own name but upon the impact of its participation, both from a technical and a cost standpoint, upon the procurement. Here, Sandia was a major teaming partner with Kaman in that the FFRDC was to supply important pulse power and switching technology which constituted 40 percent of the cost of the team's effort. Further, the record shows that Sandia's contribution to Kaman's proposal was critical both from a technical and cost standpoint to its being selected for award. Under the circumstances here, we believe that Sandia's participation with Kaman constituted competition for a government contract and thus ran afoul of the ban contained in FAR § 35.017-1(c) (4).

We have examined BCR's other allegations concerning the acceptability of Kaman's proposal and the alleged bias of the agency in its evaluation of the protester's own proposal and find them to be without merit. In view of our conclusion with regard to the principal issue, however, it would serve no useful purpose to discuss these allegations any further.

We believe that given the extent and significance of Sandia's participation in the Kaman proposal and the technical impact upon its requirements of Sandia's unique approach to switching, the agency should have either rejected Kaman's proposal as violative of FAR § 35.017-1(c) (4) or given Kaman the opportunity through discussions to submit an approach that was not dependent upon Sandia's participation. If the agency determined that the statutory and regulatory requirements for negotiating only with the Kaman/Sandia team were met, it could also have conducted a sole-source negotiation pursuant to those authorities.

Since performance is approximately one-half complete, we find it impractical to recommend that Kaman's contract be terminated. We do, however, find that ECR is entitled to recover its proposal preparation costs and its reasonable costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1) and (2) (1991).

The protest is sustained.

for 
Comptroller General
of the United States

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