

97-1 CPD ★ COMP. GEN.'S PROCUREMENT DECISIONS

Comptroller General
of the United States

Washington, D.C. 20548

Decision

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Matter of: Logicon RDA

File: B-276240; B-276240.2; B-276240.3

Date: May 23, 1997

Michael A. Gordon, Esq., and Fran Baskin, Esq., Holmes, Schwartz & Gordon, for the protester.

Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for Hughes Associates, Inc., an Intervenor.

Elaine A. Eder, Esq., and Timothy A. Chenault, Esq., Department of Transportation, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against termination of protester's contract is denied where agency reasonably determined, after award, that protester's use of a federally funded research and development center (FFRDC) as a subcontractor was contrary to Federal Acquisition Regulation prohibition against FFRDCs competing with private firms under federal government solicitations.

DECISION

Logicon RDA protests the Department of Transportation, United States Coast Guard's terminating for the convenience of the government the contract awarded to Logicon under request for proposals No. DTCC39-96-R-E00093, for research and development services in the areas of fire science and fire protection engineering. The Coast Guard terminated Logicon's contract after concluding that Logicon's proposal of Sandia National Laboratories—a federally funded research and development center (FFRDC) sponsored by the Department of Energy (DOE)—as a subcontractor was inconsistent with the regulations prohibiting FFRDCs from competing with private concerns.

We deny the protest.

The RFP contemplated the award of an indefinite delivery/indefinite quantity, task order, cost-plus-fixed-fee contract for research in the areas of fire science, fire protection engineering, toxicity, human factors, reliability, and risk assessment. The solicitation set forth an estimated level of effort of 70,500 hours (over 5 years).

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which were allocated among 15 labor categories (5 key and 10 non-key). Offerors were required to propose a specific individual for each key labor category. In addition, offerors were required to certify their ability to perform both "nonstandard" and various types of standard testing either in-house, through subcontractors, or by procuring testing. The solicitation provided for award to be made to the offeror whose proposal offered the greatest value to the government under two evaluation categories: (1) technical (including subfactors for past performance, personnel and facilities), and (2) cost, which was significantly less important than technical.

Proposals were received from three offerors, including Hughes and Logicon. Following discussions, the Coast Guard requested best and final offers (BAFO) and, based on its evaluation, found Logicon's offer to be the best value. In this regard, although Hughes's and Logicon's proposals received the same ratings in the facilities subcategory, the agency determined that Logicon's proposed facilities were slightly more advantageous. In addition, Logicon was evaluated as possessing a significant advantage with respect to past performance. The agency concluded that Logicon's advantage in these areas offset Hughes's evaluated advantage with respect to proposed personnel. Further, Logicon's proposal had the lowest proposed and evaluated cost. Upon learning of the resulting award to Logicon, Hughes wrote to the agency to complain that Logicon's proposal of Sandia as a subcontractor was improper. After reviewing the matter, the Coast Guard agreed that applicable regulations prohibited the use of Sandia; it then withdrew the award to Logicon and made award to Hughes. Logicon then filed this protest, maintaining that its contract was properly awarded and therefore should be reinstated.

Our Office generally will not review an agency's decision to terminate a contract for the convenience of the government; such decisions are a matter of contract administration which is not within our bid protest function. However, we will review such a termination where, as here, it is based upon an agency determination that the initial contract award was improper. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667 at 2.

The dispute here turns on whether the Coast Guard reasonably determined that Logicon's proposal of Sandia as a subcontractor was inconsistent with the provisions of part 35 of the Federal Acquisition Regulation (FAR), which governs the use of FFRDCs. Recognizing that FFRDCs enjoy a "special relationship with the Government," part 35 generally provides that:

"[i]t is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, when the work is not otherwise available from the private sector."

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FAR § 35.017(a)(2) (FAC 90-4). The FAR requires that the sponsor agency for the FFRDC include in the sponsoring agreement or its policies and procedures "[a] prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other than the operation of an FFRDC." FAR § 35.017-1(c)(4).¹ Although Sandia was proposed as a subcontractor, not as a prime contractor, the prohibition in FAR § 35.017-1(c)(4) does not make a distinction between an FFRDC's role as a prime contractor or subcontractor. Rather, the determination whether an FFRDC is competing with a private firm in violation of the regulation depends upon the impact of its participation on the procurement, from both a technical and cost standpoint. Energy Compression Research Corp., B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466 at 5.

The Coast Guard reasonably determined that Sandia's participation was significant. The record indicates that Sandia had not been used for the work performed under the previous 5-year fire safety research contract, and the Coast Guard determined that, while Sandia may possess certain unique capabilities, neither the statement of work nor the tasks projected for the new 5-year contract required expertise or facilities unique to Sandia. Further, although only 11.8 percent of the overall proposed hours were to be performed by Sandia personnel (a point emphasized by Logicon in arguing that Sandia's involvement is not significant), the agency noted that this accounted for approximately 29 percent of the cost; it also noted that 6 of the 11 proposed key personnel were to be Sandia personnel (who would perform 54.2 percent of the contemplated 15,500 key personnel hours). Finally, the agency determined that, without Sandia's key personnel, Logicon's proposal would have failed to meet the minimum solicitation requirements. The Coast Guard concluded that these considerations indicated that Sandia's participation would be substantial, such that Logicon's proposal placed Sandia in competition with non-FFRDCs, in contravention of the FAR. We find no basis to question the Coast Guard's conclusion.

While Logicon urges that Sandia's involvement be measured as a percentage of the total contract hours (11.8 percent), we think the agency's focus on the extent of Sandia's involvement in the central work under the contract--that is, the work of the key personnel--together with the cost attributable to Sandia (29 percent), presents a more realistic picture of Sandia's impact under the contract. These considerations, and the fact that Logicon's proposal would have been unacceptable without Sandia's

¹The sponsor agency is the executive agency which manages, administers, monitors, funds, and is responsible for the overall use of an FFRDC. FAR § 35.017(b) (FAC 90-4).

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key personnel, reasonably warrant terming Sandia's impact substantial as to both performance and cost.²

The record also does not establish that the Coast Guard's fire research needs could be met only by Sandia, that is, that "the work is not otherwise available from the private sector."³ Although, as noted by Logicon, the Coast Guard concedes that "Sandia's credentials are impressive and may well represent unique capability for particular purposes or situations"--the agency noted that its technical personnel were "very impressed" with Sandia's experience in pooled fires--the Coast Guard nevertheless maintains that there is nothing in the statement of work, or in any of the future work currently anticipated by the agency, that could be performed only by Sandia. Logicon has not shown that the agency's position is unreasonable.⁴

²Logicon claims that it could have replaced the Sandia personnel with its own personnel or personnel from academic or other institutions and that, in any event, it would only use the more expensive Sandia personnel when Sandia's unique experience is required. However, the fact remains that Logicon's proposal as submitted would have been unacceptable without the use of Sandia personnel. To the extent that Logicon is questioning the Coast Guard's failure to raise this issue during discussions, its argument is untimely and will not be considered. Logicon's claim that it could have replaced Sandia was not made until it filed its comments on the agency report on March 27, 1997, approximately 6 weeks after it filed its initial protest with our Office against the withdrawal of its award. Under our Bid Protest Regulations, however, protests based on other than solicitation improprieties generally must be filed within 10 days of when the protester knew or should have known their bases (whichever is earlier). 4 C.F.R. § 21.2(a)(2) (1997).

³Logicon argues that the fact that DOE approved Sandia's participation--on a non-exclusive basis--in Logicon's proposal indicates that DOE has determined that the work to be furnished under the subject contract encompassed Sandia's unique capabilities since the record indicates that DOE's policy governing the participation of FFRDCs with nonfederal entities requires that such participation "include unique capabilities." However, it is the responsibility of the procuring, nonsponsoring federal agency to determine that the work requested of the FFRDC would not place it in competition with private industry, see generally FAR § 17.504(e) (FAC 90-40), and the fact that the sponsoring agency approves of the participation is not

dispositive. Energy Compression Research Corp., supra.

"In any case, the solicitation did not require the use of Sandia, and if Logicon believed that the agency should have provided for procurement of services from Sandia on a sole source basis due to its unique capabilities, it was required to protest on this basis prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

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We conclude that the Coast Guard properly determined that the award to Logicon was improper. Accordingly, the termination of Logicon's contract is not objectionable. The protest is denied.

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