



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Washington Utility Group

File: B-266333

Date: January 29, 1996

Thomas E. Strait for the protester.

Gena E. Cadieux, Esq., Department of Energy, for the agency.

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DIGEST

Agency properly excluded protester from competition for support services where contracting officer reasonably determined that professional or business relationships disclosed by the protester and a proposed subcontractor had the potential for impairing the protester's ability to provide objective and impartial advice to the agency.

DECISION

The Washington Utility Group (WUG) protests the rejection of its proposal under request for proposals (RFP) No. DE-RP01-95EE16102, issued by the Department of Energy (DOE) for support services. The contracting officer excluded WUG from further participation in the procurement based on her conclusion that WUG had an unavoidable organizational conflict of interest (OCI).¹

We deny the protest.

¹The contracting officer also excluded the protester's proposal from further consideration on the basis that WUG had gained an unfair competitive advantage in the procurement. Since we conclude that the agency properly excluded the protester's proposal due to the unavoidable OCI, we need not address the protester's contention that it did not have access to any information in this procurement that was not publicly available.

BACKGROUND

The Energy Policy Act of 1992 and the Renewable Energy and Energy Efficiency Technology Competitiveness Act of 1989 require DOE to implement the "Commercialization Ventures Program." Under that program, DOE provides financial assistance to firms developing a broad range of renewable energy technologies, such as solar energy and biowaste conversion.

The RFP, issued May 19, 1995, contemplated the award of a cost-plus-fixed-fee, level-of-effort contract for a base year and up to two 1-year option periods. The successful offeror is to provide approximately 8,835 direct labor hours per year in support of DOE's Commercialization Ventures Program. The contractor will provide DOE with investment advice and managerial services in support of the program. Contractor responsibilities include assisting DOE in various capacities, including performing acquisition support functions, evaluating proposals, brokering, and monitoring of renewable energy projects. In performing the acquisition support functions contemplated under the contract, for example, the awardee will draft and issue solicitations seeking proposals for renewable energy projects to be funded by DOE. The awardee will conduct discussions with firms seeking financial assistance regarding their applications; evaluate both the pre-proposal applications and proposals; and ultimately recommend to DOE which projects should be funded.

The contracting officer's cover letter to the RFP notified offerors as follows:

"Award of the contract will be subject to the [OCI] clearance of the selected offeror in accordance with Department of Energy Acquisition Regulation (DEAR) § 909.570-5. The applicable clause, DEAR § 952.209-72, can be found in [s]ection I, [p]rovision I.1. All offerors are required to submit the OCI information using the questionnaire provided [as an attachment to the RFP]. Each proposer must disclose all potential conflicts of interest with respect to: (1) being able to render impartial, technically sound, and objective assistance and advice; and (2) being given, or having, an unfair competitive advantage."

Six firms, including WUG, responded to the RFP by the June 19 closing date for receipt of initial proposals. A technical evaluation committee evaluated proposals in accordance with the evaluation criteria and provided its report to the contracting officer on August 24. Based on those initial results, the contracting officer decided to include WUG's proposal within the competitive range and conduct written discussions with WUG. The discussion items DOE issued to WUG included extensive questions raised by WUG's OCI disclosure statement.

The contracting officer reviewed WUG's responses to the OCI questionnaire included in the RFP and the answers to DOE's OCI discussion items. Based on her review of that information, the contracting officer determined that WUG's proposal presented an unavoidable OCI. Specifically, the contracting officer found that either WUG, its employees, or its proposed subcontractor had relationships with organizations and individuals directly involved in various aspects of different types of renewable energy technologies, which could prejudice WUG's advice to DOE. Accordingly, she eliminated WUG's proposal from further consideration and awarded the contract to KPMG Peat Marwick on September 27. This protest followed.

DISCUSSION

DOE contracting officials are required to avoid or mitigate OCIs on the part of prospective contractors so as to prevent the existence of conflicting roles that might impair a contractor's capacity to provide objective assistance and advice, or to prevent an unfair competitive advantage. See DEAR §§ 909.570-2; 909.570-3; 909.570(a); Meridian Corp., B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129. The responsibility for determining whether possible OCIs exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist, and to what extent the firm should be excluded from the competition, rests with the contracting agency. DEAR § 909.570-9(a). Our Office will not overturn the agency's determination in this regard except where it is shown to be unreasonable. See D.K. Shifflet and Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419. Based on our review of the record, we conclude that DOE reasonably found that WUG's proposal presented an unavoidable OCI, and that the contracting officer's decision to exclude WUG from further participation in the procurement was reasonable.

WUG proposed to use three of its own employees to provide 3,100 (out of 8,835) annual direct hours. As relevant to the contracting officer's OCI determination, WUG also proposed a subcontractor, the "U.S. Association for Renewable Energy and Energy Efficiency Development," referred to in the record as USAFREED, which would provide 3,850 direct labor hours annually, or about 44 percent of the total effort.

WUG disclosed that its principals "participated as financial and economic advisors to USAFREED. . . ." Those principals were the same three employees proposed to perform WUG's portion of the work under the RFP. WUG further disclosed that Joel B. Stronberg is the Executive Director of USAFREED and is a principal of the JBS Group. Mr. Stronberg executed USAFREED's OCI disclosure statement, identifying himself as "Senior Investment Manager." In response to one of the OCI questions, Mr. Stronberg stated that "[t]he JBS Group manages USAFREED as a subcontractor. When USAFREED receives task orders the JBS Group is involved in

carrying out the task orders." Mr. Stronberg disclosed that all of his income resulted from his involvement with the JBS Group.

The contracting officer concluded that as a chief executive of the JBS Group and as the Executive Director of USAFREED, Mr. Stronberg has a vested interest in, and control over, both organizations. Given this overlap of responsibilities and control, DOE found that USAFREED and the JBS Group are virtually one and the same for OCI purposes.

Based on her review of WUG's disclosure, the contracting officer concluded that she could not make the required finding that WUG's proposal presented "little or no likelihood" of an OCI. As explained in greater detail below, the contracting officer specifically concluded that the protester, through USAFREED and the JBS group, had relationships with organizations that could potentially bias its advice to DOE.

The information provided by WUG and its team members in response to DOE's OCI discussion items revealed several circumstances presenting clear potential for biased advice. For example, USAFREED disclosed that it "is currently working with Power Generating Inc. (PGI) in bringing to market a biowaste converter technology the corporation has developed." DOE states that biowaste conversion is a type of technology specifically included for consideration for financial assistance under the Program. USAFREED admitted in its OCI disclosure that it would benefit financially from future sales of the technology. Given USAFREED's relationship with PGI, and in light of USAFREED's proposed significant contribution to this effort (44 percent), we think that the contracting officer's conclusion that a potential for biased advice existed was reasonable, and that USAFREED's participation presented an unavoidable OCI.

In addition, Mr. Stronberg disclosed a relationship with the American Solar Energy Society that provided the JBS Group with a substantial portion of its income. The agency states that solar energy is a type of technology for which DOE is likely to solicit projects to be funded. Given Mr. Stronberg's relationship with both the JBS Group and American Solar, it was not unreasonable for the contracting officer to conclude that Mr. Stronberg could have preconceived opinions regarding certain technologies which could result in biased advice and recommendations provided DOE under the contract. In these circumstances, we think that the contracting officer was reasonably concerned with WUG's ability to provide impartial, objective advice concerning projects that should be funded.

Further, USAFREED disclosed that it was conducting discussions with two utility companies for the purpose of negotiating an agreement by which USAFREED would assist them to identify commercial renewable energy opportunities. The contracting officer concluded that these relationships have a "great potential" to influence the advice provided by the WUG-USAFREED team to DOE. The contracting officer also

found that USAFREED's relationship with the utility companies could present the potential for USAFREED's clientele to benefit from inadvertently obtaining information about the types of projects that DOE would fund. For example, USAFREED's clientele could benefit from learning--albeit inadvertently--that only a few firms in a certain technology area have indicated interest in applying for financial assistance, or which geographic regions DOE is considering for funding allocations. Under these circumstances, we think that the contracting officer reasonably concluded that the risk of inadvertent disclosure of this type of sensitive information was too great to allow WUG to participate in the competition.

The contracting officer considered whether appropriate conditions could be included in the contract to avoid the conflict and concluded that the OCI was unavoidable without significant changes to WUG's proposal, particularly with respect to USAFREED. The agency was particularly concerned that WUG did not propose a meaningful conflict avoidance plan and apparently did not recognize that several of the relationships it had disclosed in response to the OCI questionnaire presented a potential OCI. For instance, USAFREED stated that any potential conflicts that may occur as a result of PGI's seeking assistance through the program would be avoided by recusing USAFREED and its consultants from reviewing proposals; however, the record is devoid of any mitigating plan explaining how WUG could review such proposals without involving USAFREED. Nor did USAFREED state that it would recuse itself from reviewing proposals from competitors of PGI. More importantly, the contracting officer concluded that there was no realistic means to avoid the conflicts identified in the protester's submissions. Given that the contractor will be providing advice on several technologies, the contracting officer concluded that "[r]ecusal cannot assure that those technologies in which USAFREED has an interest, whether directly or indirectly, or technologies in which it may develop an interest due to its commercial activities under the above agreements, will be evaluated in an unbiased manner."

The contracting officer concluded that since USAFREED was to provide a significant portion of the work, it was imperative that WUG propose a different team member if it were to remain in the competition. The record shows that during the competition WUG did not offer to replace USAFREED, and the protester did not suggest that it could maintain a viable proposal without USAFREED. Even after being notified of its exclusion for OCI reasons, and after discussing those reasons extensively with DOE, WUG did not identify any acceptable solutions in its responses to the OCI discussion items that it would have implemented to address the agency's OCI concerns.

In sum, WUG's proposal presented numerous and substantial potentials for providing biased advice to DOE. WUG did not identify any OCI and did not propose a conflict avoidance plan to address the agency's concerns to its satisfaction. Further, recusal of USAFREED was neither proposed by WUG nor

realistic. In our view, the contracting officer reasonably determined that WUG had several past, present, or currently planned interests that are inextricably related to the work to be performed under the contemplated contract, and that such interests could impair the firm's capacity to provide DOE with impartial advice. Accordingly, we find that the contracting officer's decision to exclude WUG from further participation in this competition was reasonable. See ICF, Inc., B-241372, Feb. 6, 1991, 91-1 CPD 124.

The protester also argues that given the limited number of firms involved in renewable energy technologies, and given the nature of the services sought, the RFP itself created the potential for OCIs.² Our Bid Protest Regulations specifically require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. If WUG believed that DOE could have written the RFP differently so as to avoid or mitigate potential OCIs, WUG should have raised its objections and suggestions prior to the closing time for receipt of initial proposals. Since the firm failed to do so, this allegation is untimely and will not be considered.

The protest is denied.

Comptroller General
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²In its comments on the agency report, WUG asserts that DOE provided the awardee with a greater opportunity to propose an OCI mitigating or avoidance plan. Offerors were clearly informed of the requirement to identify all potential OCIs and to propose mitigating or avoidance plans where appropriate. WUG's contention that offerors were treated differently in this regard is simply not supported by the record.