



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: B3H Corporation

File: B-280374

Date: September 23, 1998

Ira E. Hoffman, Esq., and Alan M. Grayson, Esq., Grayson and Associates, P.C., for the protester.

Donal R. Myrick, Spectrum Sciences & Software, Inc., an intervenor.

Clarence D. Long III, Esq., and Lt. Col. Gregory B. Porter, Department of the Air Force, for the agency.

Katherine I. Riback, Esq. and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's speculation that a competing firm has an incentive to falsely conclude that certain items being acquired by agency are not compatible with firm's software used to process the items, thereby improving its chances for subsequent awards for the items, does not provide a basis to require that the firm be prohibited from competing.
2. Agency is not required to structure solicitation requirements to eliminate competitive advantages allegedly possessed by a contractor by virtue of its particular circumstances, where advantages did not result from any unfair government action.
3. Protest that agency engaged in allegedly improper communications with the prospective awardee is denied where the record does not support allegations.

DECISION

B3H Corporation protests the issuance of a purchase order to Spectrum Sciences & Software, Inc., under request for quotations (RFQ) No. F44650-98-T0130, issued by the Department of the Air Force for certain weapon safety descriptors, also known as "footprints." The protester principally argues that Spectrum should have been found ineligible for consideration due to an alleged conflict of interest.

We deny the protest.

BACKGROUND

The footprints being acquired consist of graphical representations of weapon impact probability predictions. Each footprint describes a weapon delivery by a particular type of aircraft, using a particular weapon, within a specific range of delivery parameters such as airspeed and dive angle. The footprints are based on statistical evaluations of historical "bomb-drop" data, the professional judgment of evaluators regarding the sufficiency of that data, and complex computer modeling of impact effects, such as ricochet. These footprints are used to determine what types of missions may be conducted at various size ranges. A software program entitled "Hazard" is used by the Air Force to process the footprint data into a usable format so that the footprints can be manipulated on digitized range maps in order to make a decision as to whether it is safe to conduct a given mission on a particular range. Spectrum independently developed the Hazard software program and owns proprietary rights to the source code.

Previous acquisitions of these footprints were accomplished by the agency under a contract for advisory and assistance services (CAAS) on which B3H was a prime contractor and Spectrum was its subcontractor, under which B3H's proposal received an award based on its inclusion of Spectrum's Hazard methodology.¹ Agency Report, Tab 6.

In April 1997, the agency issued a Commerce Business Daily notice that it intended to purchase additional footprints, software and site licenses from Spectrum on a sole source basis. B3H then filed an agency level protest on May 9, in which it asserted that a sole source award for the entire requirement was not valid, because only the software and related licenses were truly proprietary to Spectrum, and that development of the footprints and related items could be accomplished by any other firm, working in conjunction with Spectrum. Agency Report, Tab 8. On August 6, the Command Competition Advocate denied the activity request to procure additional footprints, software, and site licenses from Spectrum on a sole source basis, stating that there were at least four possible sources for this procurement, including Spectrum. Agency Report, Tab 9. As a result, on September 29, the agency determined to purchase only the rights to use the Hazard software program from Spectrum.

¹The CAAS solicitation did not specify any particular software to enable the Air Force to process the footprint data.

On April 20, 1998 the agency issued the present RFQ as a small business set-aside for the development of 80 footprints. The RFQ, which required that quotations be submitted by May 8, contemplated the issuance of a fixed-price purchase order to the vendor whose quotation represented the best value to the government. RFQ § 52.212-2 at 9.

The solicitation included the requirement for all footprints developed under this contract to be "certified" by the contractor.² RFQ § 4.1.4 at 3. In addition, the RFQ required that the contractor ensure that the footprints are "completely compatible" with the Hazard program. RFQ § 4.3.1 at 6. To this end, section 4.3.2 of the RFQ contained the following requirement:

Footprints shall be independently verified and validated by software contractor, Spectrum Sciences and Software, Inc., to ensure they are properly integrated into Hazard software. Contractor shall obtain written certification from Spectrum that they have certified each Footprint and provide copy of certification to [the Air Force] along with each Footprint delivery.

On April 23, the Chief Executive Officer of B3H discussed with a Spectrum representative the possibility of the firms teaming together to submit a quotation in response to the RFQ. On May 4, the Spectrum representative declined B3H's offer to team with it and indicated that it would compete for the contract as a prime contractor.³

The Air Force received quotations from B3H and Spectrum in response to the RFQ. The Air Force determined not to include B3H's quotation in the competitive range because its deficiencies were such that correction would have been tantamount to the submission of an entirely new proposal, and the price quoted by B3H was [deleted] higher than the price quoted by Spectrum. Spectrum's proposal was rated "exceptional" in 7 out of 13 technical criteria. The agency conducted negotiations with Spectrum, issued a purchase order to that firm on June 5, and this protest followed.

²The agency believed that this certification was necessary to preclude liability issues on the part of the government should the data later prove to be incorrect. Contracting Officer's Statement at 1.

³The exact particulars of this conversation between representatives of B3H and Spectrum are in dispute, as discussed below.

ANALYSIS

Organizational Conflict of Interest

B3H argues that selection of Spectrum is improper because it presents an organizational conflict of interest to have Spectrum both develop footprints and provide independent verification and validation (IV&V) of the footprints, as required by section 4.3.2 of the RFQ, to ensure Hazard compatibility.⁴ B3H misconstrues the nature of Spectrum's involvement. Spectrum's only role in the verification and validation process is to ensure that the already-developed footprints are in a format that is compatible with Spectrum's proprietary Hazard software program. Hearing Transcript (Tr.) at 192-93. We do not believe that an organizational conflict of interest can arise here because Spectrum, as the IV&V contractor for Hazard compatibility, is not verifying any element of the accuracy of the footprint; rather, it is simply ensuring that the footprint is in a format which is compatible with Spectrum's Hazard software.

B3H also asserts that if a firm other than Spectrum is selected for footprint development, then Spectrum would have an incentive to falsely conclude that the footprints are not compatible with the Hazard software, thereby improving Spectrum's chances for subsequent awards.

The protester's argument regarding a conflict of interest on the part of Spectrum is entirely speculative. While an agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, such a determination must be based on facts and not mere innuendo or suspicion. Greenwich Air Servs., Inc., B-277656, Nov. 5, 1997, 97-2 CPD ¶ 159 at 4. Here there is simply no basis to anticipate that Spectrum would provide false incompatibility determinations.

B3H also argues that Spectrum should be precluded from receiving an award for footprint development because of the RFQ requirement that the contractor that develops the footprints provide a copy of a "current, signed agreement with Spectrum Sciences and Software, Inc. to provide independent validation and verification of footprints and maps to ensure Hazard compatibility on this effort." RFQ at 10. B3H takes the position that Spectrum does not have, and cannot properly enter into, such an agreement with itself.

⁴An organizational conflict of interest exists when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. See Federal Acquisition Regulation § 9.501.

This argument is without merit. The clear purpose of the requirement is to ensure that, regardless of which firm develops the footprints, the assurance of Hazard compatibility will be provided by Spectrum. Clearly, if Spectrum develops the footprints, this provides appropriate assurance that the footprints are compatible with its own Hazard software.

Competitive Advantage

B3H also argues that it was competitively harmed by the fact that its quote included the fee that it would have to pay Spectrum to provide the IV&V services for Hazard compatibility, and that Spectrum had a competitive advantage by virtue of the fact that its quote did not include this cost. In other words, B3H argues that it would have submitted a more competitively priced quote, but for the fact that it was required to pay Spectrum a fee of \$2,500, per footprint, to perform the IV&V services to ensure Hazard compatibility. Tr. at 26-28.

B3H's objection is without merit, since a firm properly may enjoy a competitive advantage by virtue of its particular circumstances, and the government is not required to equalize such an advantage. Consolidated Duct Sys., Inc., B-241402, B-241402.3, Feb. 6, 1991, 91-1 CPD ¶ 125 at 5. Additionally, B3H's argument that it would have submitted a competitive quote but for the fee that it had to pay Spectrum is contradicted by the record. B3H's quote was [deleted] higher than Spectrum's, and the \$2,500 fee, per footprint, that B3H paid to Spectrum to perform IV&V services to ensure Hazard compatibility accounts for less than [deleted] the price difference between B3H's and Spectrum's quotes. Tr. at 128-31; Agency Report, Tab 22.⁵

Alleged Improper Communications Between Agency and Spectrum Before Award

The protester points to two instances of alleged improper communications between the Air Force and Spectrum that it contends "irreparably tainted" the award to Spectrum. Protester's Comments at 17. The first is based on a May 4 telephone conversation between B3H's Chief Executive Officer and a Spectrum representative in which Spectrum declined B3H's offer to team with it, and during which B3H alleges that Spectrum said that the Air Force had given Spectrum assurances that if it (Spectrum) bid as a prime contractor it would win.

⁵In addition, we note that this argument, in large measure, constitutes an untimely protest of an alleged solicitation impropriety since B3H failed to protest the RFQ requirement for Spectrum IV&V services for Hazard compatibility prior to the due date for quotations. 4 C.F.R. § 21.2(a)(1) (1998). B3H has also raised a number of other issues, some of which are, in fact, untimely objections to alleged solicitation improprieties. We have considered these issues but, to the extent that any of them are timely and cognizable, we find that they provide no basis to sustain the protest.

At a hearing conducted in connection with this protest, testimony was elicited from the parties involved in this conversation. The Air Force personnel involved in this procurement all explicitly deny making the statement that Spectrum would win if it bid as the prime contractor. Tr. at 96, 142, 185. Further, at the hearing, the Spectrum representative stated that he told B3H simply that he had received assurances from the agency that Spectrum would be allowed to submit a quote as a prime contractor. Tr. at 30-31. On the record before us, Spectrum's version of this conversation is the more plausible, in view of the explicit denials by Air Force personnel.

The second communication is based on B3H's debriefing during which, a B3H representative alleges, the contracting officer stated that the agency knew how much Spectrum would charge B3H, per footprint, to provide IV&V for Hazard compatibility. At the hearing, the contracting officer stated that in reply to a question from the B3H representative concerning price, she stated that the price evaluation involved price analysis, such as comparing the prices with previous buys. Tr. at 97-98.⁶ The other Air Force personnel present at the debriefing confirm that the contracting officer never said that she knew what amount Spectrum would charge B3H for IV&V services to ensure Hazard compatibility. Tr. at 141, 186. This version of the conversation is further confirmed by the testimony of the Spectrum representative that Spectrum never communicated the price that it would charge B3H for IV&V services for Hazard compatibility to any agency officials. Tr. at 46-47.

On balance, the record supports the agency's position that the contracting officer did not state during the debriefing that she knew what amount that Spectrum would charge B3H for IV&V services for Hazard compatibility. In short, there is no plausible evidence that the agency engaged in any improper communications with Spectrum.

B3H also alleges that Spectrum helped the Air Force draft the RFQ. B3H's belief appears to be primarily based on the fact that the RFQ specifically lists Spectrum as the IV&V contractor for Hazard compatibility. B3H seems to assume that there must have been some inappropriate communication between Spectrum and the agency before Spectrum was listed in the RFQ as the IV&V contractor for Hazard compatibility. There is no support for this belief in the record, and it is contradicted by the agency. Tr. at 155, 214-15. The acquisition officer, who drafted the RFQ, stated that he listed Spectrum as the IV&V contractor for Hazard compatibility based on communications that took place during B3H's agency-level protest of the proposed sole source procurement which caused him to believe that Spectrum would agree to provide IV&V services for Hazard compatibility for any

⁶The contracting officer also stated at the hearing that at the time of the debriefing she did not know the price that Spectrum had agreed to charge B3H for the IV&V services for Hazard verification. Tr. at 97-98.

firm that wanted to submit a quote in response to the RFQ. The acquisition officer also testified that he did not contact Spectrum before listing that firm in the RFQ as the IV&V contractor for Hazard compatibility. Tr. at 155. This statement was further confirmed by a Spectrum representative who testified that the firm first learned that it was listed in the RFQ as supplying IV&V services for Hazard compatibility when Spectrum received and read a copy of the RFQ. Tr. at 43-44.

The agency official responsible for drafting the RFQ stated that the RFQ evolved from previous contracts, such as the CAAS contract, and lessons learned from those contracts. For example, B3H wrote a trip report while it was working for the Air Force under the CAAS contract, where it, for the first time, categorized footprints. The acquisition officer, who drafted the RFQ, reasoned from this that if there were certain different types of footprints, then there had to be some footprints that were easier and harder to develop and that this level of effort should be reflected in the price the government was being charged. Tr. at 226-27. Therefore the present RFQ requires that a firm classify/price each footprint according to the methodology that it will use. RFQ § 4.1.1.1 at 2. The Air Force acknowledged that there were communications between it and Spectrum during the RFQ formation process when the agency was conducting market research for the purpose of determining whether this procurement could be conducted as a commercial buy. Tr. at 91-92. The record before us does not, however, support the protester's contention that Spectrum helped to write the RFQ, or that the RFQ was written around Spectrum's capabilities to develop footprints.

Bias

Finally, the protester argues that this procurement was a "sham" and a "contrived effort" to sole source this award to Spectrum. Protest Letter at 5. Since this complaint is based on the same allegations that were considered above and found to be without merit, it is without basis.

The protest is denied.

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