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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: ITT Corporation-Electronic Systems

File: B-402808

Date: August 6, 2010

James P. Gallatin, Jr., Esq., Leigh T. Hansson, Esq., Gregory S. Jacobs, Esq., and Joelle E.K. Laszlo, Esq., Reed Smith LLP, for the protester.

Patricia H. Wittie, Esq., Karla J. Letsche, Esq., Kathryn E. Swisher, Esq., and Kyle D. Peddicord, Esq., Oldaker Belair & Wittie LLP, and Mark W. Reardon, Esq., and William J. Colwell, Esq., for The Boeing Company, an intervenor.

Scott E. Miller, Esq., and Sandra Castro Cain, Esq., Department of the Navy, Space and Naval Warfare Systems Center Pacific, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee had impermissible “unequal access to information”-type organizational conflict of interest is denied, where record shows that protester had access to the same information, and, in any case, the information was properly provided to the awardee by virtue of the agency’s contractual right to use the information.
 2. Protest alleging various evaluation errors in evaluation of protester’s proposal is denied, where record shows that, even if protester’s allegations were found to be meritorious, alleged errors were not prejudicial to protester due to its substantially higher cost.
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DECISION

ITT Corporation, Electronic Systems, of Clifton, New Jersey, protests the award of a contract to The Boeing Company, of Huntington, California, under Department of the Navy, Space and Naval Warfare Systems Center Pacific, request for proposals (RFP) No. N66001-09-R-0069, for joint tactical radio system (JTRS) software. ITT maintains that Boeing has an impermissible organizational conflict of interest (OCI) that should have resulted in its disqualification from the competition. ITT also asserts that the agency misevaluated its proposal.

We deny the protest.

BACKGROUND

This acquisition is part of a broader development effort for the JTRS, the objective of which is to develop, integrate and field a family of interoperable, digital, modular, software defined radios that operate as nodes in a network to ensure wireless communications and networking for both mobile and stationary military forces. The JTRS will have the ability to receive, transmit and relay voice, data and video information.

The radios comprising the JTRS may be broadly divided into two groups, depending upon the “waveform” that they utilize; the waveforms are defined by software developed by ITT and Boeing. ITT has developed a waveform known as the soldier radio waveform (SRW), while Boeing has developed a waveform known as the wide networking waveform (WNW). Each of these waveforms is utilized by certain of the radios comprising the JTRS (for example, ITT’s SRW is used by airborne, maritime fixed radios; Boeing’s WNW is used by vehicle-mounted ground mobile radios). In addition to developing software that defines the waveforms used by the JTRS radios, ITT and Boeing have developed software modules that provide network planning, management, and monitoring functionality for radios using their respective waveforms. ITT’s product is known as the soldier radio waveform network manager (SRWNM), and Boeing’s is known as the joint tactical radio system wide networking waveform network manager (JWNM). Finally, another software component, relevant here, is known as the JTRS enterprise network manager (JENM). The JENM provides network management functionality for JTRS radios across different waveforms.

The RFP here sought software in-service support, consisting of upgrades and enhancements to the baseline JENM software product. The contractor will integrate the two network management software components (Boeing’s JWNM and ITT’s SRWNM) into a single architecture, and add other features to the JENM, including support for a third waveform currently in development, the mobile user objective system.

The nature of the procurement–integration of ITT’s and Boeing’s network management software–necessitated providing offerors with certain information relating to the two network management software products. Agency Report (AR) exh. 5. Because the two products were in development, the information provided was limited, depending upon the point where the products were in their respective development cycles. Relevant here, ITT’s SWRNM is divided into two modules or components, SRWNM 1.0R and SWRNM 1.0+ (SRWNM 1.0R is a subset of SRWNM 1.0+). SRWNM 1.0R is adequately developed, so the agency was able to provide offerors with detailed information relating to that module. However, the agency provided only limited information regarding SWRNM 1.0+, since that module was

still in its development cycle (scheduled for final qualification testing in November, 2010), so further information was not yet available.¹

The RFP and Proposals

The solicitation, issued in June, 2009, contemplated the award of a cost-plus-fixed-fee/cost-plus-incentive-fee contract for a 2-year base period, with 3 option years. RFP at 37. Award was to be made to the offeror submitting the proposal deemed to offer the “best value” to the government considering cost and several non-cost factors. RFP at 101. The non-cost evaluation factors, listed in descending order of importance, were technical capability, management capability, past performance, and extent of small business participation. Technical capability was more important than all of the other factors combined, management capability was more important than past performance, and past performance was more important than extent of small business participation. RFP at 101-102. The non-cost factors combined were significantly more important than cost, with the importance of cost increasing with the relative equality of proposals under the non-cost factors. RFP at 101.

The non-cost factors included a number of subfactors. Under the technical capability factor there were three subfactors—enhancement task (JENM phase 2) (significantly more important than the second and third subfactors), technical data rights, and draft software development plan (equal in importance). RFP at 101-102. Under the management capability factor, there were three subfactors—key personnel (more important than the other two subfactors), management plan, and management plan enhancement task (JENM phase 2) (equal in importance). *Id.* Under the extent of small business participation factor, there were two subfactors of equal importance—extent of participation of specific small businesses, and extent of participation of specific small disadvantaged businesses. *Id.* Proposals were rated on an adjectival scale of outstanding, good, satisfactory, marginal, or unsatisfactory. RFP at 106-109; RFP Amend. No. 4 at 15-17.

The agency received three proposals—ITT’s, Boeing’s, and a third offeror’s (Offeror A). The agency evaluated the proposals and determined that discussions were necessary. Following several rounds of discussions, final proposal revisions (FPRs) were submitted, which the agency evaluated as follows:

¹ The agency provided offerors a single document relating to SWRNM 1.0+, a software development plan. AR, exh. 5, at 10-11.

<i>Factor/Subfactor/Description</i>	<i>Offeror A</i>	<i>ITT</i>	<i>Boeing</i>
Technical Capability	Satisfactory+	Good-	Good+
Enhancement Task	Satisfactory	Satisfactory+	Good+
Technical Data Rights	Good	Good	Outstanding
Software Development Plan	Good	Good	Good
Management Capability	Satisfactory+	Good	Satisfactory+
Key Personnel	Good	Good+	Good
Subfactor Mgmt. Plan	Satisfactory	Satisfactory+	Satisfactory+
Mgmt. Plan JENM phase 2	Satisfactory	Satisfactory+	Satisfactory
Past Performance	Good-	Good	Good
Small Business Participation	Good+	Good	Outstanding
Small Businesses	Good	Good	Outstanding
S/D Businesses	Outstanding	Good	Outstanding
Overall Technical Rating	Satisfactory+	Good-	Good
Cost			
Proposed	\$86.3M	\$88.2M	\$54.9M
Evaluated	\$86.3M	\$90.6M	\$59.1M

Agency Report, June 3, 2010, at 13. Based on these evaluation results, the agency determined that Boeing's proposal represented the best value, and thus made award to that firm.

Industry Day Effort

Another aspect of the JTRS development effort, separate from the procurement here, was the identifying of viable vendors interested in the development, testing and integration of their radios with ITT's SWRNM 1.0+ software to produce SRW-capable radios. Toward this end, the agency held an "industry day" public meeting on May 29, 2009 to identify interested commercial radio manufacturers. Several companies attended, including all three offerors here. After evaluating vendors' radios and engaging in several teleconferences, the agency determined that three radios, including Boeing's, potentially could meet the agency's needs. The agency therefore scheduled one-on-one technical interchange meetings between the vendors and ITT, during which the vendors were to present information relating to their radios and ITT was to provide further information relating to its SWRNM 1.0+ software. In this latter regard, ITT was directed by the agency, pursuant to its SRWNM software contract, to participate in the technical interchange meetings. ITT Letter of Protest, May 3, 2010, attach. F. Boeing, ITT and the agency participated in a meeting on October 22, 2009, during which Boeing presented information relating to a radio it believed could support the agency's requirements, and ITT presented information relating to its SWRNM 1.0+ software. AR, exh. 51. After the meeting, the agency ultimately decided that the Boeing radio would not be suitable for its requirements, and no further information was exchanged among the parties.

PROTEST

Organizational Conflict of Interest

The protester maintains that Boeing had an impermissible “unequal access to information”-type OCI by virtue of the information provided to it by ITT at the October 22 meeting regarding the SRWNM 1.0+ software product. It notes, in this regard, that not all offerors had access to the information, and that Boeing had an opportunity to amend its proposal after the meeting. As a result, ITT concludes that Boeing should be excluded from the competition because of its OCI.

We find no impermissible OCI. Contracting officials must avoid, neutralize or mitigate potential significant OCIs so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. Federal Acquisition Regulation (FAR) §§ 9.504(a), 9.505. The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, fall under three broad categories: unequal access to information, biased ground rules, and impaired objectivity. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 11-12.

As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR §§ 9.505(b), 9.505-4; Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 at 8; see also McCarthy/Hunt, JV, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 at 5. As the FAR makes clear, the concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of “[p]roprietary information that was obtained from a Government official without proper authorization,” or “[s]ource selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.” FAR § 9.505(b).

At the heart of ITT’s allegation is the notion that, because the SRWNM 1.0+ software is ITT’s product, ITT should have enjoyed exclusive use of information relating to the software when preparing its proposal. In other words, ITT is complaining, not that Boeing had unequal access to information, but that ITT lost an informational advantage to which it believes it was entitled. This situation does not establish the elements of an unequal access OCI. First, an unequal access to information OCI can only be established where a protester shows that the awardee had information that it did not possess. Where the protester has the information in question and the awardee also has the same information, the awardee cannot be said to have “unequal access to information,” and, correspondingly, the protester cannot be said to have been prejudiced, since both it and the awardee had access to the same information.

More fundamentally, all of the software to be integrated under the RFP--ITT's SRWNM 1.0R and SRWNM 1.0+, as well as Boeing's JWNM software product--was developed and provided to the government with a government purpose rights (GPR) license. Agency Supp. Report, Second Decl. of Agency's Deputy Project Manager, attach.; Intervenor's Supp. Comments, July 2, 2010, attach. D. Accordingly, and as conclusively demonstrated by the fact that ITT was contractually required to provide the information to Boeing at the TIM, the record establishes that the agency had a legal right to use the information by virtue of its GPR license.² It follows that the implicit, underlying premise of ITT's argument--that it was entitled to the unequal advantage afforded by possession of the information because it had an exclusive, proprietary right to the information--is unsupported by the record. We therefore conclude that the fact that Boeing was provided with the information did not create an "unequal access" OCI vis-a-vis ITT, and also does not support the finding of any other procurement impropriety.

Evaluation of ITT's Proposal--Technical Capability Factor

ITT asserts that the agency misevaluated its technical proposal under the enhancement task subfactor of the technical capability (most important) factor; it takes issue with essentially every weakness identified by the agency. In this regard, the agency assigned ITT's proposal a major weakness and a significant risk rating under the subfactor for failing to provide adequate information concerning calculation of the equivalent source lines of code--and, correspondingly, the proposed level of effort--necessary to perform the requirement. AR, exh. 18, at 37-39. The agency also assigned a minor weakness for failing to request a certain spectrum management application as government furnished information. Id. at 39-40. Based on these evaluation findings, the agency rated ITT's proposal satisfactory+ and medium risk under the enhancement task subfactor. Id. at 46-47.³ ITT asserts that,

² The record shows that the contractor is to be provided with information relating to both ITT's and Boeing's network manager software. In this connection, the RFP included questions and answers from the offerors. One question provided as follows:

Q28. [The potential offeror] assumes that SRWNM 1.0+ and JWNM artifacts will be provided as Government Furnished Equipment (GFE) to the winning bidder? If this is correct, will the SRWNM and JWNM contractors be firewalled from this competition?

A28. (a) Correct. (b) No.

RFP, amend. No. 2, at 21.

³ ITT also maintains that a minor strength assigned its proposal for offering an accelerated schedule should have been deemed a major strength. However, Boeing
(continued...)

but for the evaluation errors, its proposal could have been ranked superior to Boeing's (good+) under this subfactor.

We need not address ITT's assertions relating to the evaluation in detail because, even if ITT were correct with respect to all of its assertions, the alleged errors would not have affected its standing in the competition or the source selection decision. In this regard, competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. TMM Investments, Ltd., B-402016, Dec. 23, 2009, 2009 CPD ¶ 263 at 4; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996).

The record shows that, in assigning Boeing's proposal a good+ rating for the enhancement task subfactor, the agency reached the following conclusion:

The three previously identified major strengths, addressing each SOW and RAL requirement, a common database engine hosting two databases, and the use of a test driven development methodology, remain, as do the seven minor strengths. Based on the input from the FPR, the six previously identified minor weaknesses are mitigated, two minor weaknesses remain, and one new minor weakness was introduced.

As a final result, three minor weaknesses remain, which are offset by the three major and seven minor strengths, and the risk for this subfactor remains Low. The rating is raised to GOOD (G+) as the Offeror's response shows a complete understanding of the Government's requirement.

AR, exh. 18, at 69-70. In comparison, the agency concluded with respect to ITT's proposal as follows:

The two previously identified major strengths, the development of JENM-2.0 as a modular system and a common database engine, remain, as do the five minor strengths. Based on the input from the FPR, three major weaknesses are mitigated, however, one new major weakness

(...continued)

also proposed an accelerated schedule (both firms proposed to perform in 20 rather than 24 months) and its proposal also was assigned only a minor strength. AR, exh. 16, at 42, 68; exh. 18, at 46, 69. There was nothing unreasonable in the agency's assigning ITT's proposal the same minor strength as Boeing's for essentially an identical feature.

was introduced. All six minor weaknesses are mitigated, however, one new minor weakness was introduced. One error was corrected and none remain.

As a final result, one major weakness and one minor weakness remain, which are generally offset by the two major and five minor strengths, and the risk for this subfactor remains Medium. The rating remains SATISFACTORY (S+) as the Offeror's response shows an adequate understanding of the Government's requirement.

AR, exh. 18, at 46-47.

Although eliminating ITT's evaluated weaknesses would result in its proposal's having no weaknesses versus Boeing's three minor weaknesses, Boeing's proposal had one more major strength and two more minor strengths than ITT's. Given this array of comparative strengths and weaknesses that would result from ITT's prevailing on all of its challenges, there simply is no reason to believe that ITT's proposal would have been rated superior to Boeing's under the enhancement task subfactor.⁴ The most that can be concluded is that the proposals may have been found technically equal. In that event, given that ITT's evaluated cost was substantially higher than Boeing's--\$90.6 million versus \$59.1 million--and in light of the terms of the RFP, which provided that the importance of cost would increase as proposals were found to be more technically equal, Boeing would remain in line for the award.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁴ ITT also challenges the agency's assignment of a good rather than an outstanding rating to its proposal under the technical data rights subfactor (of the technical capability factor). However, because Boeing's proposal received an outstanding (the highest available) rating under this subfactor, ITT's proposal could not have been found technically superior to Boeing's under this subfactor.