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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: Ellwood National Forge Company

File: B-402089.3

Date: October 22, 2010

Thomas L. McGovern III, Esq., Michael D. McGill, Esq., and Edward C. Eich, Esq., Hogan Lovells US, LLP, for the protester.

Craig A. Holman, Esq., and Kara L. Daniels, Esq., Arnold & Porter LLP, for McConway and Torley, LLC, an intervenor.

Marvin K. Gibbs, Esq., and James B. Howarth, Esq., Department of the Air Force, 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

Protest that competitor has an unfair access to information organizational conflict of interest is denied where record shows that the information at issue was obtained by a former employee and consultant of protester; alleged dissemination of such information is a dispute among private parties that Government Accountability Office will not consider, notwithstanding that the former employee may also have had subsequent opportunity to obtain the same information through performance of government contract.

DECISION

Ellwood National Forge Company, of Ellwood City, Pennsylvania, protests the decision by the Department of the Air Force to allow McConway and Torley, LLC (M&T), of Pittsburgh, Pennsylvania, to compete for a contract to manufacture bomb live unit-113 (BLU-113) case assemblies and pallets under request for proposals (RFP) No. FA8213-09-R-77150. Ellwood maintains that M&T has an impermissible organizational conflict of interest (OCI).

We deny the protest.

The BLU-113 case assemblies are steel warhead casings fabricated from high-strength alloy steel and are designed to penetrate either the ground or reinforced/hardened structures before detonating. The specific steel alloy used for these casings is referred to as HP 9-4-20M steel, and in order to be eligible to

compete for the requirement, firms must be qualified to manufacture this alloy and to fabricate the casings.

This protest centers around an individual who was a long-term employee of, and later a consultant to, Ellwood. From 1964 to 2002, the individual was an employee of The National Forge Company, a concern that Ellwood states was its predecessor in interest. Thereafter, from 2002 to 2007, the individual served as a consultant to Ellwood through his firm Cherokee Technical Specialists, LLC (CTS). Throughout the period from approximately 1993 to 2007, the individual was closely involved in the development and production of BLU-113 warhead casings, and in the fabrication and formulation of HP 9-4-20M steel by Ellwood (or its predecessor).

In addition, Ellwood states that it has been a subcontractor on another project--the massive ordnance penetrator (MOP) program--since 2005. The protester states that the ordnance fabricated for the MOP program is essentially a larger version of the BLU-113 warhead, and uses the same HP 9-4-20M steel that is employed in the fabrication of the BLU-113 warheads; Ellwood manufactures the steel that is used to fabricate the MOP ordnance. In connection with the MOP program, another concern, Applied Research Associates (ARA), performs system engineering and technical assistance (SETA) services for the Defense Threat Reduction Agency (DTRA). ARA, in turn, employs CTS and, therefore, the individual in question, as a subcontractor. Agency Report (AR), exh. 7-P. In performing SETA-related activities, the individual has evaluated Ellwood's performance in connection with the MOP contract and has had access to Ellwood's facilities and information.

The record shows that CTS also entered into a consulting relationship with M&T to assist that firm in qualifying to manufacture the BLU-113 casings for the requirement here. AR, exh. 7-X. M&T achieved qualified status in June of 2010. AR, exh. 6. When the protester became aware of the consulting relationship between CTS and M&T, it wrote to the contracting officer, advising her of its concern that the relationship between the two concerns created a potential unfair access to information OCI on the part of M&T. AR, exh. 7-E. The protester expressed concern that the individual in question could have shared Ellwood's non-public, competitively useful information relating to the fabrication of HP-9-4-20M steel with M&T. Id.

After receiving Ellwood's letter (as well as being alerted to a possible OCI by Air Force personnel at Elgin Air Force Base), the contracting officer investigated Ellwood's concerns. She reviewed various non-disclosure and professional services agreements between Ellwood and the individual in question, as well as the agreement between M&T and the individual. She also reviewed the contractual arrangement between CTS and ARA, as well as a proprietary information agreement among the parties to the SETA contract and the various contractors whose work was the subject of the SETA contract review. Contracting Officer's Statement at 8-10; AR, exh. 7-O. The contracting officer also requested affidavits from M&T, Ellwood personnel, and the individual in question, addressing the assertion that Ellwood

information had been provided to M&T. Contracting Officer's Statement at 11. The contracting officer reviewed the affidavits, AR, exhs. 7-A, 7-B, 7-C, and concluded that the various non-disclosure agreements in force had been effective in preventing the transmission of Ellwood information to M&T. Contracting Officer's Statement at 11.

In addition to the above efforts, the contracting officer contacted the cognizant Air Force engineering team for the BLU-113 requirement to determine whether the team could discern any similarities between the M&T-produced steel and the Ellwood-produced steel that could have resulted from Ellwood's information being provided to M&T. The engineers advised the contracting officer that there were significant differences between the two firms' manufacturing processes, such that there was no basis to conclude that the individual in question had provided Ellwood's information to M&T. AR, exh. 7-W.

Based on her investigative efforts, the contracting officer prepared a determination and finding, which concluded that there was no evidence that Ellwood's proprietary information had been provided to M&T; that the cognizant Air Force engineering team had found that each of the two companies used different processes to achieve the final product; and that the various non-disclosure and proprietary information agreements among the various parties had effectively prevented the transmission of Ellwood's information to M&T. AR, exh. 7-R. She therefore concluded that there was no reason to preclude M&T from competing for the current requirement. After receiving the contracting officer's determination and finding, Ellwood filed this protest with our Office.

Ellwood asserts that, at a minimum, M&T has a potential unfair access to information OCI by virtue of its relationship with CTS and, more specifically, with Ellwood's former employee. Ellwood reiterates its position that this individual had access to its non-public information relating to the fabrication of HP-9-4-20M steel, and that the information would be competitively useful in the qualification process for the BLU-113 casings. Ellwood concludes that, because the individual assisted M&T both in the qualification process and in preparing its proposal, this establishes a prima facie case that M&T suffers from a potential OCI.

Ellwood's assertions are without merit. While Ellwood's argument is based principally on the fact that Ellwood's proprietary information was available to its former employee in his role as a subcontractor under a SETA contract relating to the MOP program (during which time he observed Ellwood's manufacturing activities and was privy to Ellwood's non-public information), Ellwood has not explained what information was gained during that activity that was in any way new or different from the information the individual already possessed through his employment and consultant relationships with Ellwood. In this regard, where information is obtained by one firm directly from another firm--by, for example, dissemination of information by former employees--this essentially amounts to a dispute between

private parties that we will not consider absent evidence of government involvement. LLH & Assocs., LLC, B-297804, Mar. 6, 2006, 2006 CPD ¶ 52 at 5.

Ellwood's protest supports the proposition that its former employee already possessed the information in question, stating as follows:

Massive Ordnance Penetrator is a technology demonstration program funded by DTRA to develop a large conventional penetrating weapon that will defeat hard and deeply buried targets using high-strength alloy steel casings nearly identical to those ENF [Ellwood] produces for the BLU-113 program. See FedBizOps Website, www.fbo.gov (search "Solicitation No. 678ARSS8JUN09"). The fundamental difference between the casings is their respective sizes. The MOP is a 30,000-pound weapon designed to be carried onboard B-2 and B-52 bombers while the BLU-113 is a 5,000-pound weapon carried on most strike aircraft.

* * * * *

The [MOP] casing is comprised of the same HP-9-4-20M alloy steel used to construct the BLU-113 casings. Proprietary information and know-how regarding manufacture of the MOP, therefore, is directly applicable to manufacture of the BLU-113 and to any other penetrators made of HP-9-4-20M material.

* * * * *

[The individual], in all three of his prior capacities: (1) as a senior manager for ENF's [Ellwood's] predecessor, NFC [National Forge Company]; (2) as a consultant to ENF; and (3) as a SETA contractor to DTRA under the MOP program, [has] had access to and observed ENF's confidential and proprietary techniques used in the production of HP-9-4-20M material and the associated weapons casings.

Ellwood Letter of Protest, July 19, 2010, at 5-6. Ellwood has neither alleged nor demonstrated that information necessary to manufacture HP-9-4-20M steel for the MOP is in any way different from information necessary to manufacture HP-9-4-20M steel for the BLU-113; in fact, it alleges that the information is the same. This being the case, Ellwood's allegation amounts to no more than an assertion that information the individual acquired as an Ellwood employee and consultant was improperly shared with M&T. This is not an OCI scenario; rather, it amounts to an alleged violation of an agreement between private parties that we will not consider. LLH & Assocs., LLC, *supra*. Stated differently, where an individual obtains non-public, competitively useful information in connection with a private employment or consulting agreement, an allegation that the information subsequently was shared with a competitor is a dispute between private parties, and does not give rise to an OCI, notwithstanding that the individual also subsequently may have had access to the same information through performance of a government contract.

In any case, as outlined above, the contracting officer conducted an extensive investigation into any potential OCI. This effort was sufficient to provide the agency with the information necessary to reach a reasonable judgment as to the potential OCI, and thus there is no basis for us to question the contracting officer's determination that there was no need to exclude M&T from competing for the requirement, because any OCI had been mitigated or neutralized. CIGNA Govt. Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ __ at 12-13 (where record shows that contracting officer thoroughly considered all facts and circumstances surrounding alleged OCI and sought the advice of counsel and technical experts, we will not substitute our judgment for that of the contracting officer absent clear evidence that the agency's determination was unreasonable).

The protest is denied.

Lynn H. Gibson
Acting General Counsel