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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: Orbital Sciences Corporation

File: B-400589; B-400589.2

Date: December 15, 2008

DECISION

Orbital Sciences Corporation protests the Naval Air Systems Command's (NAVAIR) award of a contract to Alliant Techsystems Inc. (ATK), under request for proposals No.N00019-07-R- 0089, for system development and demonstration (SDD) of the Multi Stage Supersonic Target (MSST). Orbital asserts that award to ATK is precluded by a conflict of interest arising out of ATK's employment of a former NAVAIR official.

We dismiss the protest.

The MSST will provide a target for use in conducting developmental and operational testing of ship self defense systems defending against Multi-Stage Sea Skimming Anti-Ship Cruise Missiles. The cruise missiles to be represented by the MSST during testing integrate a subsonic bus air vehicle with a supersonic sprint vehicle which separates from the subsonic air vehicle in the terminal phase of the approach to the target and accelerates to supersonic speeds. The precursor to the MSST was the Threat D target effort.

Orbital's protest focuses on ATK's employment in support of its MSST proposal effort of a former NAVAIR official--Mr. JV--involved in the Threat D target effort. Specifically, Mr. JV was the Deputy Program Manager for Supersonic Targets from November 2004 to November 2006. During that time, Mr. JV helped draft a Request for Information (RFI), issued in February 2005, requesting technical information, concepts of operation, estimates of schedules, producibility, maintainability, sustainability, cost data and innovative approaches to support development of a government acquisition strategy for an aerial target system to simulate the subsonic cruise and supersonic sprint sea-skimming anti-ship cruise missile threat. By submission dated April 25, 2005, Orbital joined seven other firms in responding to the RFI. In addition, on March 10, 2005, prior to submitting its RFI response, and on June 6, 2006, after submitting its RFI response, Orbital furnished unsolicited presentations to the agency concerning Orbital's Threat D target solution. Likewise,

on May 19, 2006, ATK furnished an unsolicited presentation to the agency concerning its Threat D target solution. During this period, Mr. JV also was participating in an effort to develop a requirements document and draft RFP for the Threat D target. In May 2006, however, the Navy determined not to fund Threat D target development.

Although the Navy subsequently commenced in October 2006 a study of alternative means for testing against the advanced anti-ship cruise missile threat, Mr. JV left the program in November 2006 for another position in the Navy not related to targets. The new Navy study led to the establishment of the MSST Integrated Product Team in April 2007; none of the government personnel who had worked on the Threat D efforts was assigned to the MSST team. The draft MSST RFP was issued on July 25, 2007, followed by an Industry Day on July 31, a revised draft RFP on October 29, and the final RFP on November 28. Shortly thereafter, on December 17, Mr. JV, commenced work at ATK as a member of a Red Team reviewing ATK's draft MSST proposal.

Three offerors, including ATK and Orbital, submitted initial proposals by the closing time on February 11, 2008. After conducting several rounds of discussions with offerors, followed by revised proposals, NAVAIR, on August 22, 2008, made award to ATK on the basis that its proposal represented the best value to the government. Orbital requested a debriefing, which commenced on August 28 but did not officially conclude until September 12. On September 17, Orbital filed this protest with our Office.

Although Orbital initially challenged the agency's evaluation of proposals, Orbital ultimately abandoned its evaluation arguments, leaving only a conflict of interest assertion. In this regard, as clarified in its October 31, 2008 comments on the agency report, Orbital asserts that ATK's employment of the former government employee, Mr. JV, to work on its MSST proposal resulted in a violation of the Procurement Integrity Act (PIA) which conferred an unfair competitive advantage on ATK and thus required its disqualification from award. Specifically, Orbital notes that the PIA prohibits a present or former official of the United States, who by virtue of that office, has or had access to contractor bid or proposal information or source selection information, from knowingly disclosing such contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. 41 U.S.C. § 423(a) (2006). Orbital asserts that Mr. JV had access to NAVAIR source selection information as a result of his participation in acquisition planning for the Threat D program, as well as access to Orbital bid and proposal information as a result of his access to Orbital's April 25, 2005 Threat D RFI response and its March 10, 2005 and June 6, 2006 Threat D presentations. Orbital further asserts that Mr. JV's involvement with ATK's MSST proposal "likely resulted in the disclosure of the [source selection and Orbital bid and proposal] information." Orbital Comments, Oct. 31, 2008, at 12.

Both our Bid Protest Regulations and the Act require--as a condition precedent to our considering the matter--that a protester have reported the alleged violation of the PIA to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation. 41 U.S.C. § 423(g); 4 C.F.R. § 21.5(d) (2008); SRS Techns., July 30, 1997, 97-2 CPD ¶ 42 at 2. The 14-day reporting requirement affords the agency an opportunity to investigate alleged improper action during the conduct of an acquisition and, in appropriate circumstances, to take remedial action before completing the tainted procurement. See 41 U.S.C. § 423(e)(3).

Here, prior to raising the asserted PIA violation in its initial, September 17, 2008 protest to our Office, Orbital first raised the matter with the agency orally during a debriefing session on August 28, and then on September 4 identified the sensitive information that had been furnished to Mr. JV in its Program D submissions. Orbital advised the agency at that time that it had first learned of Mr. JV's role with ATK on August 26, Email from Orbital to NAVAIR, Aug. 29, 2008, and it likewise maintains in its protest that an Orbital employee first learned on August 26 from a conversation with an ATK employee that Mr. JV was ATK's MSST program manager. Orbital Comments, Oct. 8, 2008, at 1.

Our review of the record, however, confirms that, as asserted by the agency and ATK, Orbital in fact was on notice of the basis for its assertion of a PIA violation not later than February 2008. In this regard, on February 19, Mr. JV advised a number of government and contractor personnel (including Mr. JR and Mr. SH of the Northrop Grumman Corporation (NGC), one of Orbital's two major subcontractors for MSST) by email that:

I have taken a position with ATK of Woodland Hills, CA. . . . What a change from working on the P-3 just a few months ago to living out in sunny California, although I spent the last month and a half in a suburb of Minneapolis working on a proposal.

Email from Mr. JV, Feb. 19, 2008. In response, at 10:15 a.m. that same day, February 19, Mr. JR of NGC, emailed Mr. JVB of NGC to inform of Mr. JV's move. According to Mr. JR, Mr. JV had been the NAVAIR Deputy Program Manager for Supersonic Targets, during which he "led some of the early MSST study efforts," and "[n]ow he is working the MSST proposal at ATK." Email from Mr. JR, Feb. 19, 2008, 10:15 a.m. Likewise, apparently in response to Mr. JVB of NGC's statement that, while "[f]rom a business ethics perspective this does not feel right," "I suppose [Mr. JV] fully understands his bounds," Mr. JR of NGC wrote that "[p]erhaps it is another proposal [Mr. JV] has been working, but he did say that he would be working the MSST if ATK won." Email from Mr. JR, Feb. 19, 2008, 10:24 a.m. Mr. JVB of NGC was directed by Mr. HD of NGC to raise the matter with Mr. MO, Orbital's Vice President of Business Development, "and see what they want to do with it." Email from Mr. HD, Feb. 21, 2008, 2:50 p.m. According to Mr. HD of NGC, "[t]he timeframe

he mentioned is consistent with the MSST proposal although the location is strange. Maybe they went to mama ATK to do the proposal since the booster guys were involved also.” Id. Mr. JVB of NGC subsequently reported on his discussion with Mr. MO of Orbital as follows:

I spoke with [Mr. MO] this AM and filled him in on the basics: [Mr. JV’s] timeline and current location. [Mr. MO] thought that should [ATK] win the contract there would be grounds for protest given that as the Supersonics IPT Lead [Mr. JV] . . . had significant input into requirements and program execution plans as well as being privy to Orbital’s and NGC’s (pre-teaming) design and program streamlining ideas.

He was very appreciative of the information but somewhat shocked by the news.

Email from Mr. JVB, Feb. 22, 2008, 10:42.

The above emails furnish contemporaneous documentation indicating that Orbital, as represented by its Vice President of Business Development, Mr. MO, and NGC, one of its two principal subcontractors, believed or at least strongly suspected that the former NAVAIR employee, Mr. JV, improperly was involved in the ATK MSST proposal effort, with the result that, according to Orbital’s Vice President of Business Development, there would be a basis for protest in the event that ATK was awarded the MSST contract. Moreover, the record includes further evidence that Orbital was on notice, well in advance of its raising the matter with the agency, of Mr. JV’s involvement in the ATK MSST effort. Specifically, the record includes a declaration by Mr. JV that during the March 2008 Navy League Sea, Air and Space Exposition in Washington, D.C., he encountered Mr. JVB of NGC who commented on “my [Mr. JV] being a competitor to NGC on MSST.” Declaration of Mr. JV, Oct. 2, 2008. In addition, a declaration by Mr. RK, a NAVAIR employee who had been a colleague of Mr. JV, indicates that when Mr. JV and Mr. RK visited the Orbital booth at the exposition, Mr. JV talked with the Orbital representative “about his MSST efforts with ATK.” Declaration of Mr. RK, Oct. 8, 2008. While the Orbital representative at the exposition has stated that he has “no recollection” of Mr. JV telling him of his involvement with ATK’s MSST effort, Declaration of Mr. KE, October 3, 2008, we note that Mr. JV in his declaration confirms that his involvement with the ATK MSST effort came up during the conversation with the Orbital representative, raised in fact by Mr. SH, a NGC program manager and former colleague of Mr. JV. Declaration of Mr. JV, Oct. 2, 2008.

In summary, the contemporaneous documentation indicates, and subsequent declarations by government and ATK personnel tend to show, that Orbital and one of its two principal subcontractors was on notice that Mr. JV likely was involved in the ATK MSST effort. Although Orbital suggests that in the absence of more certain evidence of Mr. JV’s involvement in ATK’s MSST effort it had no basis for raising the

matter with the agency, a protester who is already reasonably aware of a protest basis may not wait until it obtains additional information before filing the protest. See Pioneer Aerospace Corp., Dec. 27, 1991, 92-1 CPD ¶ 13 at 2. At a minimum, it is incumbent on a protester to diligently pursue the information necessary to establish its basis for protest; a protester does not meet its obligation of diligently pursuing the information on which it bases its protest where it allows more than 5 months to elapse after learning of a possible basis for protest. See Management Eng'g Assocs., B-253920, Sept. 24, 1993, 93-2 CPD ¶ 182 at 2. We therefore find that Orbital failed to meet its obligation to report the alleged violation of the PIA to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation.

In any case, the record does not show that Orbital was prejudiced by Mr. JV's involvement in ATK's MSST proposal effort. In this regard, we note that NAVAIR compared ATK's May 2006 Threat D response, submitted before Mr. JV joined ATK, with ATK's MSST proposal and determined that there had been no significant change in ATK's approach. While Orbital has identified a change with respect to how many rocket assist takeoff boosters ATK contemplated using to boost the target to flight speed, contemporaneous documentation furnished by ATK establishes that the need for this change was determined prior to the employment of Mr. JV. See, e.g., ATK CCB for MSST Booster Subsystem Baseline Change, Nov. 20, 2007. Thus, there is no basis for concluding that ATK changed its supersonic target approach based upon information regarding Orbital's approach. Gentex Corp.--Western Operations, B-291793 et al., Mar. 25, 2003, 2003 CPD ¶ 66 at 10.

The protest is dismissed.

Gary L. Kepplinger
General Counsel