

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

21358

FILE: B-185952

DATE: August 18, 1975

MATTER OF: Weisblatt Electric Co., Inc.

98667

## DIGEST:

1. Conflict of interest not created by situation where engineer whose firm designed project specifications is requested by Bureau of the Mint to answer technical questions at prebid conference and is subsequently hired by successful bidder as project engineer.
2. Individual who voluntarily and without compensation answers questions at prebid conference regarding specifications he prepared for Government is not special Government employee as defined in 18 U.S.C. § 202(a) (1970).
3. Apparent technical violation of 31 U.S.C. § 665(b), not relevant to allegation of conflict of interest.
4. Although evidence before GAO does not support finding of actual conflict of interest recommendation is made to Treasury Department that regulations regarding conflicts of interest be developed to preclude even appearance of conflict of interest.

The circumstances of this case present the issue of whether a conflict of interest is created where an engineer--whose firm's contract with the Government for the design of project specifications has ended--serves in a temporary, uncompensated, advisory capacity and is subsequently hired as the project engineer by the eventual contractor for the project in question.

On February 26, 1975, the Bureau of the Mint (Bureau) awarded a firm fixed-price contract (TM75-1052) to Riverside Engineers, Inc., via competitive negotiation, for services necessary for the preparation of a technical data package for the repair of two electrostatic precipitators in the New York Assay Office. Under the contract, Riverside Engineers was required to prepare and deliver engineering drawings, specifications and a cost estimate that could subsequently be used by the Bureau as the basis for preparing a solicitation for the repair of, and modifications to, the electrostatic precipitators. There was no requirement in the contract that any officer or employee of Riverside Engineers explain the specifications. There was nothing in the contract which prohibited Riverside Engineers or its officers and employees from bidding on

the contract for the repair of the electrostatic precipitators. Nor did the contract prohibit officers or employees from working for the successful bidder.

Riverside Engineers commenced performance of the contract in the spring of 1975. In addition to Mr. Jack Kroop, president of Riverside Engineers, who was the project manager, two employees of the firm participated in the project. The project was finally completed on July 23, 1975, when Riverside Engineers submitted the completed technical data package, including a cost estimate in the range of \$375,000 to \$400,000, for the repair of the two precipitators to the Chief of the Bureau's Procurement Division in Washington, D.C. Subsequently, on October 9, 1975, final payment was made to Riverside Engineers and thus, on that date, the contract was fully completed.

In mid-September 1975, the Bureau's Procurement Office in Washington began preparation of the solicitation for the repair of the precipitators. Other than relying on the technical data furnished by Riverside Engineers, the solicitation was prepared by the Bureau without any involvement on the part of that firm. On September 25, the Bureau advertised the solicitation in the Commerce Business Daily as invitation for bids No. BM76-12, calling for the repair and modification of two electrostatic precipitators. Subsequently, on October 6, the Bureau sent solicitations to nine firms, including Weisblatt Electric Co., Inc. (Weisblatt), but not the E. Daskal Corporation (Daskal). About 10 days later, Riverside Engineers requested and was furnished a copy of the bid package by the Bureau. In a followup investigation by our Office it was learned that Mr. Kroop forwarded the information contained in the bid package to several firms including Daskal. It was also revealed that Mr. Kroop did, in fact, help Daskal prepare its successful bid.

As stated in the solicitation, a prebid site inspection and conference for prospective bidders were to be conducted at the United States Assay Office on October 23, 1975. Prior to the prebid conference, where the technical aspects of the solicitation were expected to be discussed, Mr. Kroop had been asked by the New York Assay Office to participate in the meeting with the bidders and respond to questions pertaining to the specifications. Mr. Kroop

states that his presence at the prebid conference was motivated by an interest in having Riverside Engineers bid on the contract. By that time, Riverside Engineers was not under contract with the Bureau nor was Mr. Kroop being compensated for his participation in the meeting by the Bureau in any way.

The October 23 prebid conference was attended by representatives of four prospective bidders, including Weisblatt. No representative appeared for Daskal. At the conference, which lasted approximately 2 hours, Mr. A. B. Macellaro from the Bureau Headquarters was introduced as the Bureau official responsible for the project. Mr. Kroop was presented to the prospective bidders by Bureau officials as the engineer who had prepared the specifications for the repair of the precipitators and who could discuss with them the technical aspects of the specifications.

There is some dispute as to whether Mr. Kroop answered one question or several during the course of the prebid conference. There is also dispute as to whether it was indicated at the conference that Mr. Kroop would be available to answer questions during the period that the bids were being prepared. We have been advised, however, that representatives of two of the prospective bidders did telephone Mr. Kroop some time after the prebid conference for the purpose of clarifying certain aspects of the specifications. There also appears to have been at least some additional contact between Mr. Kroop and engineers at the New York Assay Office after October 23, 1975. The on-site inspection of the electrostatic precipitators at the Assay Office immediately followed the prebid conference. During the inspection, which lasted several hours, Mr. Kroop reportedly answered a number of questions concerning the specifications.

On November 28, 1975, the day of the bid opening, Mr. Kroop hand-delivered a bid by Daskal to the Procurement Office in Washington, D.C., and then attended the bid opening. Although Mr. Kroop had not been requested by the Bureau to attend the bid opening, a question concerning the Government's cost estimate of the project was referred to Mr. Kroop by the contracting officer. The question, which arose after the bids were opened and read, was answered by Mr. Kroop because the contracting officer did not have the figures at hand and because Mr. Kroop was the engineer who had originally prepared the cost estimates.

At the bid opening the following four bids were received:

<u>Firm</u>	<u>Bid Price</u>
E. Daskal Corporation	\$398,757
Weisblatt Electric Co.	436,720
The Norman Co. Inc.	627,495
O'Brien & Heckler	Late bid returned

After the bid opening, the Bureau conducted a reference check on the low bidder and then, on December 5, 1975, requested Defense Contract Administration Services (DCAS) to perform a preaward survey on Daskal. During the preaward survey it was learned by Bureau officials, for the first time, that Daskal had no permanent engineering staff, but if that firm were the successful bidder, Mr. Kroop would be engaged as a project engineer for the repair of the precipitators. In any event, DCAS returned an unfavorable preaward survey on Daskal. However, as required by the Federal Procurement Regulations (FPR) § 1-1.708-2 (1964 ed. amend. 71), the Bureau then referred the matter to the Small Business Administration (SBA), which, on February 3, 1976, issued a certificate of competency for Daskal and consequently, in accordance with the regulations, the Bureau awarded the contract to Daskal as the low responsive, responsible bidder on February 10, 1976.

In a letter to our Office dated February 24, 1976, Weisblatt protested the award of the contract to Daskal on the following grounds:

"(1) \* \* \* [Mr. Kroop] while in the employ of the Government participated in the preparation of the low bidders proposal.

\* \* \* \* \*

"(2) Impropriety in the establishment of low bidders responsibility \* \* \*"

There is no allegation that Mr. Kroop, at any time, distorted, withheld, or provided false information to the prospective bidders.

Although Mr. Kroop was not compensated in any way for his participation at the prebid conference and on-site inspection, the essence of the conflict of interest charge is that Mr. Kroop's service to the Government on October 23, 1975, in combination with his employment relationship with the successful bidder, constitutes a conflict of interest in violation of 18 U.S.C. § 208 (1970). As it is pertinent here, this section prohibits dual agency by providing that:

"\* \* \* whoever, being an officer or employee of the executive branch of the United States Government \* \* \* including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a \* \* \* contract \* \* \* or other particular matter in which, to his knowledge, he \* \* \* or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest - - Shall be fined not more than \$10,000 or imprisoned no more than two years, or both."

The term "special Government employee" has been broadly defined in 18 U.S.C. § 202(a) (1970) as meaning an officer or employee of the Government "who is retained, designated, appointed, or employed to perform, with or without compensation \* \* \* temporary duties either on a full-time or intermittent basis" for a period not to exceed 130 days.

In its report, the Department of the Treasury points out that a Treasury Department Personnel Bulletin dated April 17, 1975, specifically prohibits bureau-level officials from authorizing a temporary or intermittent appointment of a special employee, such as a consultant or expert. While that prohibition is not dispositive of the issue since even an unauthorized appointment may pose a conflict of interest in violation of 18 U.S.C. § 208, the record indicates that the officials of the Bureau did not intend Mr. Kroop's assistance to extend beyond his availability to respond to questions concerning the specifications. In inviting Mr. Kroop to the prebid conference, it does appear that the Bureau officials meant to take advantage of Mr. Kroop's special expertise but there is nothing

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to indicate that they took any affirmative action to "retain, designate, appoint, or employ" him to perform as a special Government employee. Although no precedent exists which provides an operative definition of "special Government employee," we conclude that Mr. Kroop's service to the Bureau, which was limited to the space of a few hours, must be considered as informal, uncompensated, voluntary assistance which falls short of "performance of temporary duties." Moreover, because there was nothing in the design specification contract or the IFB which prohibited Riverside's officers or employees from working for any bidders on the precipitator repair contract, there can be no organizational conflict of interest. Planning Research Corporation Public Management Services, B-184926, March 29, 1976, 76-1 CPD 202.

Although there appears to be a technical violation of 31 U.S.C. § 665(b) (1970) which prohibits any officer or employee of the United States from accepting voluntary services except in cases of emergency, the purpose of the statute is to prohibit claims for unauthorized payments and is therefore not relevant to allegations of conflict of interest. See 23 Comp. Gen. 900, 903 (1944), and cases cited therein.

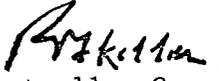
Although our Office has determined that the circumstances of this case do not warrant a termination of this contract, in order to avoid even the appearance of impropriety, we recommend that the Treasury Department draft regulations which will clarify the role of advisors and consultants vis-a-vis contracts in which they may have a potential proprietary interest. The current Treasury Department regulations (31 C.F.R. § 0.735-200, *et seq.* (1975)) do not offer adequate guidance in the area of conflict of interest in general and the responsibilities of advisors and consultants in particular (31 C.F.R. § 0.735-220) and consequently "inadvertent" and "innocent" indiscretions are to be expected. We note that the President's Memorandum of February 9, 1962, entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government" (27 Fed. Reg. 1341) directed that each agency and department revise its regulations to preclude even the appearance of conflict of interest. The memorandum was specifically concerned that regulations cover those individuals whose service to the Government spanned only brief periods of time.

With regard to Weisblatt's second ground for protest, we find nothing in the record which lends any support to the allegation of impropriety in connection with the issuance of the

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certificate of competency by the SBA, or the contracting officer's affirmative determination of responsibility, which decision we will not review absent a showing of fraud or failure to meet specified responsibility criteria. International Computaprint Corporation, B-185403, April 29, 1976, 76-1 CPD 289.

In light of the foregoing, the protest is denied. However, because of the criminal statutes involved we are sending a copy of this decision to the Department of Justice for their information.

  
Deputy Comptroller General  
of the United States