



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Revet Environment & Analytical Laboratories, Inc.

File: B-221002.2; B-221003.2

Date: July 24, 1986

DIGEST

Responsibility for determining whether a firm competing for a contract should be excluded from the competition in order to avoid actual or apparent favoritism or preferential treatment primarily rests with the procuring agency, and GAO will not object to the agency's determination unless the protester establishes that it is unreasonable.

DECISION

Revet Environmental & Analytical Laboratories, Inc., protests the rejection of its bids under invitations for bids Nos. WA85-J838 and WA85-J839 issued by the Environmental Protection Agency (EPA) for the procurement of analytical services to determine the presence of specified metals and inorganic compounds in samples collected from hazardous waste sites. Revet complains that EPA improperly rejected its bids for a conflict of interest between Edward Taylor, a current EPA employee, and Revet. We deny the protest.

The solicitations were issued on September 3, 1985, with bid openings on November 19. Revet's low bids were signed by Virginia Taylor, Edward Taylor's wife.

On December 20, a representative of the incumbent contract laboratory informed EPA that Mr. Taylor, an EPA deputy project officer in region I, Boston, Massachusetts, also was president of Revet. A subsequent investigation by EPA confirmed that Mr. Taylor was the sole incorporator of Revet; that Mr. Taylor was listed in Revet's articles of incorporation as president, treasurer and member of the Board of Directors; and that Mr. Taylor owned all of Revet's 9,000 outstanding shares of stock.

On February 25, 1986 (according to Revet, after a meeting between Revet and EPA concerning Mr. Taylor's involvement with Revet), Mr. Taylor transferred all of his shares of stock to his wife, resigned from his position on Revet's Board of Directors, and resigned from his positions

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as president and treasurer of Revet. Also on that date, Mrs. Taylor, as the new sole stockholder of Revet, selected a new Board of Directors for Revet and, in turn, that Board of Directors elected Mrs. Taylor to positions as Revet's president and treasurer.

In early March, EPA became aware of the fact that Mr. Taylor is the sole guarantor of a \$550,000 Small Business Administration (SBA) loan to Revet and that this guaranty is secured by mortgages on properties held jointly by Mr. and Mrs. Taylor. EPA also learned that Mr. Taylor personally has loaned Revet \$125,000. Two months later, EPA advised Revet that contract award would not be made to the firm, after which Revet filed its protest in our Office.

Revet argues that it is not owned or controlled by a government employee within the meaning of Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1985), so as to warrant its preclusion from contract award. The regulation prohibits the government from knowingly awarding a contract to a government employee or to a business or other organization "owned or substantially owned or controlled" by a government employee and states that the policy of the section is "to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the appearance of favoritism or preferential treatment by the government toward its employees." Revet notes that Mr. Taylor, having transferred all of his stock to his wife and having resigned his positions of responsibility in Revet, has done everything legally possible to relinquish control of Revet and, thus, avoid a conflict of interest.

Revet also cites our decision in Defense Forecasts, Inc., B-219666, Dec. 5, 1985, 65 Comp. Gen. _____, 85-2 C.P.D. ¶ 629, as holding that control by the government employee is necessary for preclusion from a contract and contends that the policy statement in FAR, 48 C.F.R. § 3.601, prohibiting the appearance of favoritism, is not the operative language of the regulation, but only explains the reason for precluding contracts with firms owned or controlled by the government employees. Further, Revet claims there is no basis for EPA to conclude that Mr. Taylor controls Revet and notes that in CACI Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), the court determined that conflicts of interest must be resolved on the basis of hard facts, not supposition or innuendo. Moreover, Revet points out that in several affidavits, Mr. and Mrs. Taylor have stated that in the event of a contract award, Mr. Taylor would exercise no control over Revet, and that no documentation relating to the aforementioned loans permits Mr. Taylor to exercise such control.

EPA argues that irrespective of Mr. Taylor's divestment of ownership and responsibilities in Revet, Mr. Taylor, a government employee, still retains an apparent precunary interest in that firm's operations. Thus,

according to EPA, the award of a contract to Revet would create the appearance of a conflict of interest and threaten the integrity of the procurement system. We agree with EPA.

We have recognized that the responsibility for determining whether a firm competing for a contract should be excluded from the competition in order to avoid actual or apparent favoritism or preferential treatment rests primarily with the procuring agency. Cooley Container Corp., B-220801, Jan. 31, 1986, 86-1 C.P.D. ¶ 114. We believe that EPA had a reasonable basis to conclude that there was an apparent conflict of interest regarding Mr. Taylor's role as an EPA employee and his interest in Revet sufficient to preclude Revet from the award of a contract. As EPA correctly points out, although Mr. Taylor, after bid opening, took steps to remove all signs of his ownership and control of Revet, a significant connection between Mr. Taylor's interests and Revet's success in securing business from a contract exists: if Revet, through lack of business opportunity or otherwise, fails to repay its SBA loan, Mr. Taylor must assume the firm's debt, or, to the extent that he cannot repay the firm's debt, he must surrender his interest in the jointly held property securing that debt. Likewise, Mr. Taylor's personal loan to Revet creates an obvious and significant interest in the firm's ability to secure future business, as future business for Revet assures repayment of that debt.

With regard to Revet's specific arguments, Revet is correct in pointing out that the statement in FAR, 48 C.F.R. § 3.601, that the regulation's policy is to avoid the appearance of favoritism or preferential treatment only explains the reasons for precluding certain government employees from government contracts, but does not constitute, in and of itself, the preclusion. Nevertheless, we have, in fact, enforced this policy in circumstances where a conflict of interest appears to exist. Thus, in Defense Forecasts, we noted only that the cited regulation does not preclude the acceptance of an offer from a firm that is not owned or controlled by a government employee, but we denied a protest against an agency determination of a conflict of interest on the part of such a firm where the offeror proposed a special government employee as a consultant, recognizing that an apparent conflict of interest existed and that the stated policy intends to avoid even the appearance of favoritism.

Revet also is correct in pointing out that the court in CACI required conflicts of interest to be resolved on the basis of hard facts. This standard is consistent with our traditional view that bidders should not be excluded because of a "theoretical" conflict of interest. See NKF Engineering, Inc., B-220007, Dec. 9, 1985, 65 Comp. Gen. ____, 85-2 C.P.D. ¶ 638. We do not believe, however, that the court intended to prevent an agency from taking action the agency believes is necessary to maintain the integrity of the competitive procurement system--precluding contract award--in circumstances where, as here, hard evidence demonstrates the appearance of a conflict of interest. Id. The court merely

was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. 719 F.2d at 1575, 1581-2.

Thus, we believe EPA acted reasonably in concluding that an apparent conflict of interest existed between Mr. Taylor's employment with EPA and his connection to Revet and in precluding Revet from the award of any contract for these procurements.

Revet raises certain other allegations in its comments on EPA's report responding to the protest which, while they have no effect on the outcome of the protest, warrant addressing. First, Revet states that Mr. Taylor has not served as deputy project officer since February 1986 and includes another affidavit from Mr. Taylor challenging an EPA description (contained in the report) of his duties and attempting to cast doubt on the notion that Mr. Taylor could bestow an advantage on anyone by releasing information he obtained from his job. As noted above, however, the conflict of interest policy is intended to avoid even the appearance of favoritism by the government toward its employees. Thus, Mr. Taylor's position and access to information are of little relevance. Cf. Cooley Container Corp., B-220801, supra (policy against the appearance of favoritism by the government toward its employees applies to firms owned or controlled by any government employee, not just an employee of the contracting agency).

Second, Revet argues that because EPA included no notice in the solicitation that bids would be rejected for the appearance of a conflict of interest where a government employee is a surety for or creditor of the bidder and because no law or regulation so provides, Revet's bids cannot be rejected by EPA. We disagree.

In appropriate circumstances, we have recognized the propriety of rejecting bids because of an actual or apparent conflict of interest, even though the affected bidder had not been apprised previously that its bid or proposal may be rejected on this basis. See Defense Forecasts, Inc., B-219666, supra. We believe the instant situation is one where no prior notice is necessary. Revet was cognizant of Mr. Taylor's status with EPA and itself when it submitted its bid and, in our opinion, Revet reasonably should have been aware that loans secured by and obtained from a government employee might present a problem in its effort to secure a government contract from the employing agency.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel