



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Regional Environmental Consultants--Reconsideration

**File:** B-223555.2

**Date:** April 21, 1987

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### DIGEST

1. The General Accounting Office will not question award to offeror on the basis of an alleged conflict of interest where record does not demonstrate (1) that the contracting agency was unreasonable in finding the offeror's employment of a former government employee consistent with post-employment restrictions, or (2) that any action of the former government employee resulted in prejudice for or on behalf of the offeror.

2. The General Accounting Office finds without merit a request for reconsideration of a decision that an agency had a reasonable basis for excluding the protester's proposal from the competitive range where the protester has presented no information bearing on the agency's determination that was not previously considered.

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### DECISION

Regional Environmental Consultants (RECON) requests that we reconsider our decision in Regional Environmental Consultants, B-223555, Oct. 27, 1986, 66 Comp. Gen. \_\_\_\_, 86-2 CPD ¶ 476. In that decision, we denied RECON's protest against the elimination of its proposal from the competitive range under request for proposals (RFP) No. 6-SP-30-04360, issued by the Bureau of Reclamation, Department of the Interior, for historical archaeological studies.

We affirm our prior decision.

As explained in that decision, the solicitation required proposals for detailed archaeological data recovery and related historical documentary studies of specified sites likely to be affected by the construction or modification of four dams in Arizona as part of the Central Arizona Project. Based upon its evaluation of the proposals submitted by RECON, Dames & Moore and a third firm, the agency determined that only Dames & Moore had submitted a technically acceptable proposal and had a reasonable chance for award. The

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Bureau of Reclamation therefore conducted discussions only with Dames & Moore, subsequently making award to that firm.

#### CONFLICT OF INTEREST

In its protest to our Office, RECON argued that Dames & Moore's employment of a former government employee as its project manager/co-principal investigator violated post-employment restrictions on government employees.

As noted in our decision, interpretation and enforcement of post-employment restrictions are primarily matters for the Department of Justice and other agencies. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. Wall Colmonoy Corp., B-217361, Jan. 8, 1985, 85-1 CPD ¶ 27; Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60; see Rosser, White, Hobbs, Davidson, McClellan, Kelley, Inc., B-224199, Dec. 24, 1986, 66 Comp. Gen. \_\_\_, 86-2 CPD ¶ 714. Since a violation of the restrictions might indicate an improper advantage of the awardee in this case, we reviewed the protester's allegations about Dames & Moore's project manager. We concluded that the record did not establish that the former employee's performance as proposed by Dames & Moore would violate the statute or regulations cited by RECON or that Dames & Moore received any improper advantage in the procurement.

Until leaving the Bureau of Reclamation in May 1985, the employee was project archaeologist for the agency's Arizona Projects Office. In this capacity, he was responsible for development of a March 1984 "Stage III Report Addendum" for the Central Arizona Project. This Addendum documented the cultural resources in the project area, analyzed the potential effects from the development, and suggested general research directions and means of mitigating adverse effects. The document was used by the Bureau of Reclamation in preparing the statement of work for the protested procurement, as well as in determining the appropriate cost and level of effort for the contract. The RFP stated that the Stage III Report Addendum, "shall provide general guidance for the research and data recovery undertaken as requirements of this contract."

Before retirement, the employee requested agency guidance as to restrictions on future employment, and he received a letter from the Bureau of Reclamation's regional ethics counselor that generally set forth the post-employment restrictions on government employees. Before contract award RECON complained to the agency about the employee's involvement with Dames & Moore. At that time, the contracting

officer held that the individual's proposed employment as Dames & Moore's project manager/co-principal investigator did not violate applicable post-employment laws, and the agency has reiterated this position in response to RECON's protest to our Office.

The post-employment restrictions cited by RECON prohibit a former employee from representing anyone else back to the government in connection with a "particular Government matter involving a specific party" if the individual had participated personally and substantially or had supervisory responsibility for that same particular matter as a government employee. See 18 U.S.C. §§ 207(a) and 207(b)(i) (1982); 5 C.F.R. §§ 737.5 and 737.7 (1986).<sup>1/</sup> We concluded in our prior decision that the former employee, while at the Bureau of Reclamation, had not been involved in the same particular matter involving specific parties as the contract

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<sup>1/</sup> 5 CFR § 737.5(a) summarizes the basis prohibition of 18 U.S.C. § 207(a) as follows:

"No former Government employee, after terminating Government employment, shall knowingly act as an agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government employee." (Emphasis supplied.)

5 CFR § 737.7(a) summarizes 18 U.S.C. § 207(b)(i) as follows:

"No former Government employee, within 2 years after terminating employment by the United States, shall knowingly act as an agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communications on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party, (3) if such matter was actually pending under the employee's responsibility as an officer or employee within a period of 1 year prior to the termination of such responsibility." (Emphasis supplied.)

at issue here. See also United States v. Medico Industries, 784 F.2d 840, 843 (7th Cir. 1986) (construing 18 U.S.C. § 207(a)). Our analysis in the prior decision was directed at the former employee's involvement in the specific procurement protested by RECON. We noted that the employee had not participated in the drafting of specifications for the contract and that he, in fact, had left the Bureau of Reclamation before any specific party was identified with the solicitation.

In its request for reconsideration, RECON contends that Dames & Moore was responsible for preparation of the Stage III Report Addendum, and that the Addendum constitutes the same particular matter as the current procurement. The record reflects not that Dames & Moore prepared the Addendum, but that surveys of the project area, prepared by subcontractors to Dames & Moore pursuant to an earlier Dames & Moore contract with the Bureau of Reclamation, were used by the former employee in developing the Addendum. The issue then, is whether the protested procurement is part of the same particular matter as Dames & Moore's earlier contract and the preparation of the Stage III Report Addendum. If all three were part of the same particular matter, the former employee would be subject to the ban on representation imposed by 18 U.S.C. § 207(a), since a specific party, Dames & Moore, had been identified with the earlier contract at the time the former employee participated in preparation of the Stage III Report Addendum.

The regulations implementing 18 U.S.C. § 207 discuss a hypothetical case in which a government employee leaves the government after working on the design of a new system, but before the government issues an RFP to construct the system. In discussing whether the employee may represent an offeror under the solicitation, the regulation states that the "contract became a particular matter when the RFP was being formulated; it would ordinarily not become one involving a specific party or parties until initial proposals or indications of interest therein by contractors were first received." 5 C.F.R. § 737.5(c)(2), Example 2.

The regulations further provide that:

"If a Government employee (i) personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons was identified to perform services thereunder and (ii) actively urged that such a contract be awarded, but the contract was

actually awarded only after the employee left, the contract may nevertheless be a particular matter involving a specific party as to such former Government employee." 5 C.F.R. § 737.5(c)(3).

As an example of when this provision would indicate that subsequent representation by a former employee was prohibited, the regulations discuss a hypothetical case where:

"A Government employee advises her agency that it needs certain work done and meets with private firm X to discuss and develop requirements and operating procedures. Thereafter, the employee meets with agency officials and persuades them of the need for a project along the lines discussed with X. She leaves the Government and the project is awarded by other employees to firm X. The employee is asked by X to represent it on the contract. She may not do so." 5 C.F.R. § 737.5(c)(3), Example 1.

The same particular matter must be involved both at the time the government employee acts in an official capacity and at the time in question after government service. 5 C.F.R. § 737.5(c)(4). In determining whether two particular matters are the same, the regulations indicate that an agency should consider such factors as the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, and the same confidential information. Id.

The record filed in this case does not establish that Dames & Moore's original contract is the same particular matter as preparation of the Stage III Report Addendum. The only link between the two appears to be the fact that the survey reports produced by Dames & Moore's subcontractors under its prior contract were used as a source by the Bureau in preparing the Addendum. As the bibliography for the Addendum makes clear, however, the former employee drew on many sources besides the surveys prepared by Dames & Moore's subcontractors when he developed the Addendum.

Nor does the record establish that preparation of the Stage III Report Addendum, which was basically a review of prehistoric and historic sites, is the same particular matter as the current contract to conduct historical archaeological studies. Although the RFP referred offerors to the Addendum for general guidance, it did not require them to assign the same priority for investigation of the historic sites as did

the Addendum or mandate that the contract be performed in accordance with the Addendum. On the contrary, the solicitation provided that the research design need not be limited to the themes set forth in the Addendum and that the agency would "welcome proposals that thoughtfully consider alternative or additional research areas." Moreover, preparation of the Addendum and the employee's involvement (as a government employee) with this part of the Central Arizona Project concluded in March 1984. Preparation of the RFP did not begin until July 1985, 2 months after the employee left the agency. There is no evidence that the employee originated the idea for the procurement or persuaded the agency that historical archaeological studies were needed (as in 5 C.F.R. § 737.5(c)(3), Example 1). Accordingly, based upon the record filed in this case, we cannot say that the agency should have found a violation of the post-employment restrictions.<sup>2/</sup>

Since the protester has provided no other evidence that any action of the former government employee resulted in prejudice for or on behalf of Dames & Moore, and no evidence demonstrating that he was accorded access to inside agency information concerning the procurement or that his prior employment otherwise improperly influenced the evaluation and award, we are unwilling to modify our prior decision in this regard.

#### COMPETITIVE RANGE DETERMINATION

RECON questions our conclusion that the record reflected a reasonable basis for the Bureau of Reclamation's determination that RECON had "no reasonable chance to be awarded the contract without a major technical rewrite." RECON, however, presents no information bearing on the agency's determination that we did not consider in reaching our initial decision.

In finding a reasonable basis for the agency to exclude RECON from the competitive range, we noted, among other things, that the firm proposed a level of effort significantly less than, and markedly different in emphasis from, that which the

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<sup>2/</sup> In view of our conclusion that RECON has not shown the existence of the required "particular Government matter involving a specific party," we need not address RECON's arguments as to whether the former Government employee's representation of Dames & Moore would occur within the 2-year period of prohibition under 5 C.F.R. § 737.7.

agency believed necessary to perform the contract. For example, RECON proposed a much lower level of effort for laboratory analysis, report preparation, and study management than the Bureau of Reclamation considered reasonable. The agency was also concerned about RECON's plan to commence fieldwork before completing the contract research design.

In its request for reconsideration, RECON asserts that the "work effort" upon which the Bureau of Reclamation based its estimate of the necessary level of effort differed from that in the solicitation. The protester does not discuss the alleged differences or explain why the agency's estimate is unreasonable, and, as a result, provides no basis for reconsidering our prior decision. See 4 C.F.R. § 21.12 (1986), which requires a detailed statement of the factual and legal grounds that warrant reversal or modification of a decision.

RECON also questions the agency's criticism of its proposal to commence fieldwork prior to completing the contract research design; it alleges that Dames & Moore has commenced fieldwork even though the research design has not been completed. The solicitation required that fieldwork be completed prior to the award of construction contracts for the Central Arizona Project, and estimated that the construction contract for the New Waddell Dam would be the first contract awarded. Both Dames & Moore and RECON divided the sites at the New Waddell Dam into two groups, and both proposed commencing fieldwork at the first group of sites prior to submitting the draft contract research design to the agency. RECON's proposal left open the possibility that the firm might submit the draft research design only after completing the fieldwork at both the first and second groups of New Waddell Dam sites. Dames & Moore, however, proposed submitting the draft research design prior to completing fieldwork at the first group of New Waddell Dam sites and commencing fieldwork at the second group of sites. Thus, it would be consistent with Dames & Moore's proposal for the firm to commence fieldwork before submitting the draft research design, and that fact does not bear on the reasonableness of the agency's evaluation of RECON's proposal.

Since RECON has failed to establish the existence of any mistake of law or fact that warrants reversal or modification of our prior decision, we affirm that decision.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel