

Wolcott



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Holsman Services Corporation

File: B-230248

Date: May 20, 1988

DIGEST

1. Former agency employee's employment by company awarded contract did not constitute conflict of interest where there is no evidence that former employee improperly influenced award.
2. General Accounting Office will not conduct investigations to establish the validity of a disappointed offeror's speculative allegations.
3. Where incident giving rise to protest occurred more than 4 months before protest was filed, protest is untimely.
4. Post-award protest concerning allegedly defective specifications is untimely where protester was aware of basis for protest prior to closing date.

DECISION

Holsman Services Corporation protests award of a contract by the National Aeronautics and Space Administration (NASA) to Quad-S Corporation pursuant to request for proposals (RFP) No. 3-222556. The solicitation requested proposals for the maintenance, repair, testing, and reconditioning of specified mechanical equipment at NASA/Lewis Research Center, Cleveland, Ohio. We dismiss the protest in part and deny it in part.

The RFP was issued on June 19, 1987, and contemplated award of a cost-plus-award-fee contract. The closing date for receipt of proposals was August 17, 1987. On or before that date, NASA received proposals from six offerors, including Quad-S and Holsman. The proposals were technically evaluated by a source evaluation board. Quad-S and Holsman received the highest technical rating, with both proposals being rated "very good"; however, Quad-S' proposed cost was significantly lower than Holsman's. NASA conducted a probable cost analysis which resulted in the reduction of

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both Holsman's and Quad-S' proposed costs, with Holsman's reduction being greater than Quad-S'. Nonetheless, after the probable cost analysis, Quad-S' evaluated cost was still significantly lower than Holsman's, due primarily to Holsman's higher general and administrative (G&A) costs. Accordingly, on November 12, 1987, the source selection official selected Quad-S for final negotiations leading to award of the contract to that firm on February 12, 1988.

Holsman filed its first protest with NASA on December 14, 1987, which was followed by two more protests filed with NASA on January 4, 1988. In its three protests to NASA, Holsman presented a total of 14 separate bases for protest along with multiple sub-issues and questions concerning each basis. By letter dated February 4, 1988, NASA responded to all three of Holsman's protests, dismissing several of its arguments and denying the remainder.

On February 18, Holsman filed a protest with our Office, incorporating the arguments previously made in its agency-level protests as well as raising yet another basis for protest. NASA responded by providing our Office with an administrative report, explaining its basis for dismissing and denying Holsman's agency-level protests. In responding to NASA's report, Holsman has offered only limited rebuttal of NASA's position on the issues raised, but asks that we render a decision on each issue on the basis of the existing record.

Many of Holsman's arguments are in the form of speculative assertions followed by a series of questions concerning various aspects of the procurement process. Further, with regard to several of its allegations, Holsman does not identify any specific statute or regulation it believes NASA has violated. Nevertheless, we will attempt to summarize the issues raised and resolve them accordingly.

Holsman first states that a former NASA/Lewis Research Center employee represented Quad-S during negotiations and was proposed by Quad-S to function as its project manager under the contract. Holsman protests that this constitutes a conflict of interest between NASA and Quad-S which violates Federal Acquisition Regulation (FAR) § 3.101-1 (FAC 84-5) which states:

" . . . The general rule is to avoid strictly any conflict of interest or even the appearance of conflict of interest in Government-contractor relationships"

Holsman also refers to 18 U.S.C. § 207 (Supp. III 1985), which prohibits a former government employee from becoming

involved in any matter "in which he participated personally and substantially as an officer or employee [of the government]."

NASA responds that the individual in question retired from the government 9 months before NASA began to prepare for this procurement, 15 months before the source evaluation board was formed and 18 months before the RFP was issued. Accordingly, NASA states that the former employee did not personally and substantially participate in this procurement while he was a government employee. At the bid protest conference held at our Office, and in its comments following that conference, Holsman offered no rebuttal of NASA's statements on this issue.

Our Office has held that the mere fact that a former government employee is subsequently employed by a company awarded a contract by the employee's former agency is an insufficient basis to challenge the award where there is no evidence that the former employee improperly influenced the award. FXC Corporation, B-227375.2, Nov. 6, 1987, 87-2 CPD ¶ 454; Louisiana Foundation for Medical Care, B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451. Here, Holsman has presented no evidence that the former NASA employee improperly influenced award of the contract. Accordingly, this portion of its protest is denied.

Holsman next protests that the relationship between the former NASA employee and Quad-S appears to violate the FAR's restriction on contingent fee arrangements for soliciting or obtaining government contracts.

Holsman refers to FAR sections 3.400 and 3.401, which restrict payment of a fee which is contingent upon receipt of a government contract and define "contingent fee" as "any commission, percentage, brokerage, or other fee that is contingent upon the success that a person has in securing a government contract." Holsman acknowledges that section 3.402 expressly exempts agreements between contractors and their bona fide employees from the restriction. However, Holsman suggests that the former NASA employee may not be a "bona fide" employee of Quad-S and argues that any remuneration flowing to him from Quad-S as a result of receiving the contract violates the restriction on contingent fees.

As NASA pointed out in its response to Holsman's initial protest, Quad-S' proposal contained the required certification that it had not entered into any prohibited contingent fee arrangements. Holsman has not produced any evidence, other than its speculative suggestions, that Quad-S' certification is false. Our Office will not conduct investigations for the purpose of establishing the validity

of a disappointed offeror's speculative allegations concerning an awardee. Louisiana Foundation for Medical Care, B-225576, supra. Accordingly, this portion of Holsman's protest is denied.

Holsman next relates two unrelated incidents concerning an individual it employs as its project manager on a current NASA/Lewis Research Center contract and proposed for the same position under this procurement. Holsman states that both incidents occurred during July or August 1987.

Holsman first alleges that a NASA employee improperly offered Holsman's project manager a document containing the government's cost estimate of the work solicited. Holsman states that, although its project manager saw a portion of the government's cost estimate he declined to accept the document offered, and maintains that the limited information obtained was not used in submitting its cost proposal. Holsman suggests that a similar offer may have been made to Quad-S and that Quad-S may have thereby gained an unfair competitive advantage.

Concerning the second incident, Holsman alleges that its project manager had a conversation with a Quad-S employee during which the Quad-S employee made statements indicating that NASA's contracting officer had an improper relationship with Quad-S and that Quad-S was sure to be awarded the contract.

We note that although Holsman asserts that both incidents occurred sometime during July or August 1987, it did not raise either matter with any government official until December 14--after its offer had been rejected. Our Bid Protest Regulations provide that protests shall be filed not later than 10 days after the basis of the protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). Since Holsman's project manager knew of the bases for protest some 4 months prior to the time the protests were filed, we will not now consider the matter. This portion of Holsman's protest is dismissed.^{1/}

Holsman next protests that the RFP was defective in that it was incomplete and unclear. Holsman goes to great lengths explaining how it found the specifications ambiguous at the time it was preparing its proposal. Holsman's arguments

^{1/} NASA advises us that, upon learning of Holsman's allegations, its Office of Inspector General initiated an investigation. That office concluded that Holsman's allegations were without merit.

make it clear that it was aware of the alleged deficiencies prior to the closing date for submission of proposals.

Our Bid Protest Regulations require protests based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals to be filed prior to that date. 4 C.F.R. § 21.2(a)(1). Since Holsman was aware of the alleged deficiencies prior to the time it submitted its proposal, its post-award protest is untimely. This portion of its protest is dismissed.

Holsman next protests that NASA may have improperly evaluated its cost proposal by including the cost of two lift trucks, which Holsman proposed as optional items, as part of its evaluated overall cost. NASA responds that its evaluators recognized that the two proposed lift trucks were optional and therefore did not include the cost of that equipment in Holsman's overall evaluated cost.

Holsman also refers to its proposed cost for liability insurance, and noting that this item was derived as a percentage of overall costs, states that when NASA reduced the protester's other costs during the probable cost analysis, it also should have decreased the cost of Holsman's proposed liability insurance. NASA acknowledges that it did not adjust Holsman's proposed cost for liability insurance to reflect its lower overall costs, but states that such an adjustment would have been minor and would not have affected the source selection in light of the significant difference in total cost between Holsman and Quad-S.

Although our Office declines to perform a comprehensive, independent cost evaluation of Holsman's proposal, we have reviewed the record and find it consistent with NASA's assertions. Accordingly, we find no merit in Holsman's suggestions that its cost proposal was improperly evaluated with regard to lift trucks or liability insurance. This portion of the protest is denied.

Holsman next protests that NASA should have negotiated with it concerning its proposed costs, asserting that any "price weaknesses" could have been resolved through negotiations. NASA responds that there were no "price weaknesses" in Holsman's proposal--its cost was simply higher than Quad-S' due primarily to Holsman's higher G&A expenses.

This Office's authority to review and resolve bid protests is contingent on the existence of an alleged violation of a procurement statute or regulation. 31 U.S.C. § 3552 (Supp. III 1985). Holsman has not identified any statute or regulation that required NASA to negotiate with it to

resolve what Holsman refers to as "price weaknesses." Accordingly, this portion of the protest is dismissed.

Holsman next protests that NASA did not conduct oral discussions with it to discuss the qualifications of its key personnel. Holsman refers to the NASA Source Evaluation Manual which indicates oral discussions are necessary when the offerors' key personnel are unknown to agency evaluators.

It appears that the manual Holsman refers to is an internal agency document concerning NASA's procedures which does not have the force and effect of law. Our Office will not review an agency's compliance with such internal procedures in performing our bid protest function. See Spectrum Caribe, Inc., B-224251, Nov. 25, 1986, 86-2 CPD ¶ 609. In any event, NASA responds that its evaluators knew the key personnel proposed by Holsman and, therefore, found it unnecessary to conduct discussions on that matter. In its comments on NASA's report, Holsman did not rebut NASA's assertion. Accordingly, we conclude that this portion of Holsman's protest is without merit.

Holsman next states that, after the contract was awarded, it learned that NASA/Lewis Research Center employs a small business specialist who, it asserts, is available to help small businesses prepare their proposals and provide assistance to them during contract negotiations. Holsman protests that NASA did not advise it of the existence of this specialist. NASA responds that the small business specialist Holsman refers to is an employee of NASA/Lewis Research Center and is not authorized to assist offerors either in preparing proposals or in negotiating with NASA. Holsman's comments on the agency report fail to rebut NASA's position on this matter in any way.

We conclude that Holsman has failed to show that NASA violated any procurement statute or regulation concerning the small business specialist. This portion of its protest is dismissed.

Holsman next protests that NASA did not follow the evaluation criteria contained in section M.4 of the RFP, which states that "cost proposals will be evaluated on the estimates in [RFP sections] L.20 and L.21." Holsman notes that sections L.20 and L.21 contain the government's estimates for three factors: productive (that is, non-administrative) man-hours; dollar cost of material/replacement parts; and dollar cost of overtime. Holsman argues that pursuant to section M.4, NASA's evaluation of cost proposals should have been limited to the three cost

elements listed above, that is, that the cost evaluations should not have considered administrative costs.

In addition to requesting offerors to provide cost data on the three specific elements identified, however, section L.20 also required that "offerors shall propose man-hours, classification, management/administrative, material cost, subcontract effort, and overtime, based on their technical approach to accomplishing the work." (Emphasis added.) Clearly section L.20 directed offerors to provide cost data in addition to the three cost elements Holsman identifies, and specifically sought cost data on management and administrative costs. Therefore, when NASA evaluated cost proposals based on all the cost items contemplated in section L.20--including management and administrative costs--its evaluation was consistent with the evaluation criteria established in section M.4 of the RFP. Holsman's protest on this issue is denied.

Holsman next refers to the RFP provision requiring offerors to hold their offers open for a 120-day period from the date of submission. Holsman notes that proposals were submitted on August 17, 1987, and that award was not made to Quad-S until February 12, 1988--more than 120 days after proposals were submitted. Holsman suggests that Quad-S may not have extended the period for acceptance of its offer, and therefore maintains that award was improper.

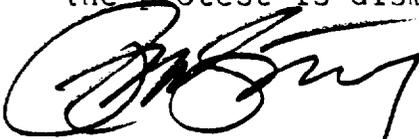
In its comments following the conference, NASA states that Quad-S agreed to extend its proposal acceptance period. Holsman's protest on this issue is denied.

Finally, in its protest to our Office, Holsman for the first time argues that NASA's award of the contract to Quad-S was contrary to the intent and purpose of the small business set-aside program. Holsman asserts that, to the best of its knowledge, Quad-S' only business is managing cost-plus-award-fee contracts at NASA installations which are awarded under small business set-aside procedures. Holsman argues that the set-aside program was intended to help small businesses become independent, viable parts of the free enterprise system and, since Holsman is unaware of any competitive commercial business Quad-S has performed, Quad-S should be considered ineligible for award.^{2/}

^{2/} Holsman states this issue is separate from that of the awardee's small business size status, which Holsman unsuccessfully challenged before the Small Business Administration, and which it recognizes is a determination we do not review. 4 C.F.R. § 21.3(m)(2).

Our Office is unaware of any statute or regulation limiting award of contracts under the small business set-aside program to firms which also perform commercial work. In any event, Holsman was notified that NASA had selected Quad-S for negotiation leading to award on November 13, 1987, but failed to raise this issue until it filed its protest with our Office on February 18, 1988. Accordingly, we dismiss this portion of its protest. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed in part and denied in part.



for James F. Hinchman
General Counsel