



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Holmes and Narver Services, Inc./Morrison-Knudson Services, Inc., a joint venture;  
Pan Am World Services, Inc.

**File:** B-235906; B-235906.2

**Date:** October 26, 1989

### DIGEST

Where a former government officer who had access to restricted information concerning a procurement helped prepare the awardee's proposal, the likelihood that the awardee had an unfair competitive advantage warrants corrective action, despite the good faith behavior of the parties, in order to protect the integrity of the competitive process.

### DECISION

Holmes and Narver Services, Inc./Morrison-Knudson Services, Inc., a joint venture, and Pan Am World Services, Inc., protest the award of a contract to Brown Associates Management Services, Inc., under request for proposals (RFP) No. DAAH03-88-R-F050, issued by the Army for installation support services for Redstone Arsenal. Generally, the protesters contend that Brown Associates had an improper competitive advantage and that the evaluation of the protesters' technical and cost proposals was faulty. We sustain the protest on the first issue.

The solicitation was issued on September 6, 1988, and provided for a cost-plus-award-fee contract covering a 2-month phase-in period of August 1 to September 30, 1989, with four 1-year options covering fiscal years 1990 through 1993 and one 10-month option for fiscal year 1994. The contract encompasses a wide range of services which are divided into 27 functions, such as military housing services; water supply, treatment and distribution systems; sewage collection; buildings and structures; roads, pavements and appurtenances; fire protection systems; moving operations on Redstone Arsenal; supply; transportation; and administrative services.

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The solicitation indicated that award would be made to the offeror whose proposal represented the best value to the government based upon technical, cost and management criteria. The solicitation did not assign precise weights to those criteria but indicated that the technical criteria were more important than the cost and management criteria combined and that the cost criteria were more important than the management criteria.

After a draft solicitation was issued in May 1988, Holmes, the incumbent support services contractor at Redstone Arsenal, informed contracting officials by letter that Brown Associates had recently hired three former Redstone officials, a retired colonel who was the former Commander of the Redstone Arsenal Support Activity (RASA), the former director of the Department of Engineering and Housing at Redstone and the former contracting officer's representative for the buildings and structures function under the contract.<sup>1/</sup> In its letter, Holmes explained that it was concerned that Brown Associates' employment of these individuals would compromise the integrity of the impending procurement if, as expected, that firm submitted a proposal to perform the support services at Redstone Arsenal. According to the Holmes letter, the three former government officials were involved in preparation of the RFP and were exposed to the standards to be used to review proposals and information regarding performance of the services which were being solicited. Holmes asked that the Army assure that no procurement sensitive information be provided to Brown Associates and, if the agency was unable to do so, that Brown Associates be disqualified from submitting a proposal in response to the RFP.

In a letter responding to Holmes' concerns, the Army stated that the three individuals in question had been advised prior to their departure from federal service of their post-employment "statutory and ethical responsibilities" and that the Army had sent a letter to remind each of the individuals of those responsibilities. The letter also said that there was no prohibition on Brown Associates offering or the three individuals accepting employment with the firm and requested that Holmes provide to the Army any evidence of

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<sup>1/</sup> All of the services to be performed under the contract are under the authority of RASA. The Department of Engineering and Housing appears to encompass 15 of the 27 support service functions and buildings and structures is one of those 15 functions.

criminal violations by the individuals. Finally, the letter stated that, although the agency would disqualify an offeror if there was a reasonable basis to conclude that the integrity of the procurement process had been damaged, to disqualify an offeror prior to receiving its proposal would be "arbitrary and capricious."

Nine firms submitted proposals on or before the January 6, 1989 closing date. After evaluating the proposals, conducting discussions and requesting and receiving best and final offers (BAFOs), the Army awarded the contract to Brown Associates on June 6. The award was primarily based on the source selection authority's conclusion that the evaluation record showed that Brown Associates' technical proposal offered a "marked superiority" over the others. After debriefings with the agency, Holmes and Pan Am protested to this Office on June 19 and June 20, respectively. On June 22, the Army determined in accordance with 31 U.S.C. § 3553(d)(2)(A) (Supp. IV 1986) that it was in the best interest of the United States to allow performance of the phase-in portion of the contract despite the pending protests and on September 12 determined that urgent and compelling circumstances significantly affecting the interests of the United States would not permit delaying performance until our decision on the protest. Brown Associates began performing the main portion of the contract on October 2.

Holmes and Pan Am both argue that the award was tainted by the possibility that Brown Associates received procurement sensitive information from the three former Redstone Arsenal officials. The protesters assert that from April through June 1988, Brown Associates systematically hired key government personnel from Redstone Arsenal, including the three mentioned above, and that each of those individuals had directly participated in preparation of the RFP and government estimates relevant to the procurement.

In this respect, the protesters focus on the retired colonel who was, until his retirement, the Commander of RASA. According to the protesters, this individual had access to source selection sensitive information such as the acquisition plan, which included the Army's independent government estimate (IGE) of costs to perform the contract and the source selection plan, which, the protesters argue, usually includes the precise numerical weights assigned to the evaluation factors and subfactors in the RFP. The protesters argue that the sensitivity of these documents is demonstrated by the Army's refusal to make them available for review by the protesters because, according to the agency, they contain procurement sensitive information.

The protesters also maintain that as the Commander of RASA, the colonel had access to virtually all other information regarding the Arsenal's operations.

The protesters note that almost immediately after his May 31, 1988, retirement and only a few months after reviewing source selection sensitive information, the colonel was hired for the exclusive purpose of drafting substantial portions of Brown Associates' proposal. According to the protesters, he was hired to prepare the proposal despite the lack of any experience in proposal preparation. The protesters maintain that, by virtue of the employment of this individual, Brown Associates acquired access to source selection information not available to the other competitors such that the integrity of the procurement process demands termination of the contract and disqualification of Brown Associates' proposal from consideration.

In response, the Army reports that each of the former agency officials retired from government service prior to release of the RFP and that none had access to useful source selection information not also released with the RFP. With respect to the colonel, the Army says that, as the Commander of RASA, he was required to concur with the acquisition plan because RASA is the organization responsible for supervising the support services under the contract. The Army argues, however, that the only procurement sensitive information in the acquisition plan was the IGE which was used for budget and accounting purposes only and was not used to evaluate proposals. In fact, according to the agency, the IGE was not even disclosed to the evaluators.

The Army also says that the IGE, which was based on the cost of the prior contract with adjustments, only provided a dollar estimate of the work to be performed and did not itemize staffing or equipment costs necessary to perform the required services. The Army also argues that it is apparent that Brown Associates did not rely on the IGE, which totaled approximately \$126 million, because Brown Associates proposed a total cost of only \$90 million.

The Army also says that the colonel was appointed a member of the source selection advisory council (SSAC)<sup>2/</sup> on March 22 but excused himself from the council on April 19

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<sup>2/</sup> The SSAC assists the source selection authority in the selection process and reviews, amends and approves submissions by the requiring element (RASA), the contracting officer and the source selection evaluation board.

because of his imminent retirement and lack of time and interest in the procurement. According to the Army, the only sensitive information which the colonel had access to as an SSAC member was the draft source selection plan, which the agency says was revised substantially after the colonel retired on May 31. Further, the agency maintains that the protesters are mistaken in their contention that the source selection plan included precise numerical weights for the evaluation criteria; according to the Army, the precise weights were not identified in either the draft or final source selection plan but were established by the SSAC.

According to the agency, the employment of the colonel and the other former agency officials by Brown Associates did not violate any statutes or regulations prohibiting employment of former government employees and the only advantage that Brown Associates may have gained was based upon those individuals' years of experience with the work requirements of the RFP. The Army reports that when Holmes initially raised the allegation of misconduct by the colonel and the other former officials, its legal office conducted an "informal investigation" and the matter was referred to the Army Criminal Investigation Division (CID). Its investigation found no evidence of wrongdoing, nor did the CID find evidence of criminal misconduct. Further, the Army says that the CID declined to open a new inquiry when the protests were filed. Nonetheless, on September 27, the Army subsequently informed this Office that the CID has opened a new inquiry into the matter.

We have carefully reviewed the facts and circumstances of this case, and conclude that there is sufficient evidence of an unfair competitive advantage such that corrective action is warranted.<sup>3/</sup>

First, the record indicates that as the Commander of RASA and as a member of the SSAC, the colonel had access to source selection sensitive information such as the

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<sup>3/</sup> The Army argues that Holmes' protest relating to this issue is untimely because Holmes was aware of the colonel's employment by Brown Associates in July 1988 but did not protest until June 1989. We do not agree. Since, under this negotiated procurement, Holmes was not informed by the agency of who had submitted a proposal or which proposals were being considered, Holmes had no way of knowing until it received the notice of award on June 9, 1989, that Brown Associates had not been excluded. Holmes filed a timely protest on June 19.

acquisition plan, which included the IGE, and the source selection plan. We think the IGE included in that plan would have been useful to an offeror in the preparation of its proposal. Although the IGE did not itemize equipment or staff costs, it was made up of many separate estimates each of which comprised the government's best estimate of the cost of each of the 27 functions to be performed under each fiscal year of the contract. In our view, a firm preparing its proposal would find it helpful to know how much the Army expected each function to cost and that value is not lessened by the fact that the IGE was not used by the agency to evaluate proposals. Although the Army argues that the IGE was the only procurement sensitive information in the acquisition plan and indicates that the IGE would not have been useful to a firm competing for the contract, the Army's refusal to make any portion of the acquisition plan available to the protesters due to its sensitivity, without further explanation, suggests that the acquisition plan may contain information that could be beneficial to an offeror.

Second, with respect to the source selection plan, although the Army argues that the colonel reviewed only a draft and that the plan was revised substantially after his retirement, the agency did not submit to this Office a copy of that draft or any other evidence to detail the alleged changes in the source selection plan. Moreover, since the Army refused to release the source selection plan because it considered it to be procurement sensitive, we have not had the benefit of the protesters' views as to the value of that document to a firm preparing a proposal. We believe that document clearly included information that would have been useful. For instance, the source selection plan, which was more than 90 pages long, included subfactors for the RFP technical and management evaluation criteria, detailed narrative standards which were to be used by the evaluators to determine ratings under each technical and management criterion, a detailed explanation of how the evaluators were to assign adjectival ratings (superior, excellent, etc.) for key personnel proposed and an explanation of how the agency planned to rate offerors' cost estimates.

Since we are unable to determine that the final source selection plan is materially different from the draft plan, and since the final source selection plan does include information that would have been useful to a vendor preparing a proposal, we must conclude that the draft plan to which the colonel had access included useful information not available to other offerors.

An affidavit submitted by the colonel states that on May 31, when he retired from the service, he planned to take a job

with a firm that did not participate under this solicitation but, 2 weeks later, on June 15, he accepted a position as a consultant with Brown Associates. According to the colonel, prior to his retirement, he had no contact with the awardee.

The colonel's affidavit states that he drafted portions of Brown Associates' proposal for six different areas under the contract. The affidavit also states that he did not release procurement sensitive information to Brown Associates and that he does not remember the contents of the draft source selection plan that he reviewed before retirement. Accordingly, he maintains that he could not have released any information from that plan to Brown Associates. He also states that he did not participate in the preparation of Brown Associates' cost proposal.

The record is, however, clear that, as the Commander of RASA and as a member of the SSAC, the colonel had access to and had reviewed a significant amount of information on the installation support services contract which the Army considered, and still considers, procurement sensitive and which would have been useful to an offeror preparing a proposal. It is also clear that the colonel helped to draft the firm's proposal on that acquisition. In fact, the colonel admits that he was responsible for drafting sections of the firm's proposal relating to quality control; security and emergency service; transition; elevators; security alarms and intrusion detection; and administrative services. Further, the record shows that the agency evaluators concluded that the Brown Associates technical proposal was superior to all the others.

Thus, the record shows that the awardee's proposal was drafted in significant part by a former government official who, by virtue of his official responsibility, had access to restricted information concerning the procurement. As a practical matter, it was, in our view, unlikely that the colonel could have avoided using the restricted information to which he had access as a government official in drafting Brown Associates' proposal. Any restricted information he might have been aware of as a result of his prior association with the Army we think would necessarily shape his judgment. We therefore must assume it is likely that the colonel used the restricted information to which he had access in forming his judgments. As a result, Brown Associates' proposal may have been rated higher technically than was the incumbent's because the awardee had the

benefit of restricted information.<sup>4/</sup> These circumstances lead us to the conclusion that despite the absence of specific evidence of bad faith, there is a likelihood that Brown Associates obtained an unfair competitive advantage.

An offeror may not have an unfair advantage over other competitors, and an agency may go so far as to exclude an offeror from the competition because of the likelihood that it has obtained an unfair competitive advantage. See NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; RCA Serv. Co., B-224366, Aug. 28, 1986, 86-2 CPD ¶ 241; NKF Eng'g Co. v. United States, 805 F.2d 372 (Fed. Cir. 1986). We need not go that far here. The best way to eliminate Brown Associates' likely unfair competitive advantage, and therefore to ensure the integrity of the competitive system, is for the agency to reopen negotiations with all the offerors within the competitive range, to release to each the restricted information--the acquisition plan, including the IGE, and the source selection plan--and to request new BAFOs. If the evaluation of the new BAFOs results in the selection of an offeror other than Brown Associates, the agency should terminate the contract with that firm and award the contract to the new firm.

In so recommending, we are mindful that this information is not generally released to offerors. Nonetheless, the release of information that is normally protected is an appropriate remedy in circumstances where it is necessary to eliminate a possible unfair competitive advantage. TM Sys., Inc., *supra*; The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD ¶ 194. Although release might not be an appropriate remedy if the government would be harmed thereby, we note that here the Army, while referring to the information as "procurement sensitive," has not even alleged that its release would be harmful to the government. Accordingly, we view release here as a proper remedy to

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<sup>4/</sup> Contrary to the Army's contention, the fact that Brown Associates proposed a cost of only \$90 million compared to the IGE of \$126 million does not demonstrate that the IGE would not have been of use to Brown Associates. The IGE included the government's cost estimate for each of the 27 functions under the contract by fiscal year and we think that an offeror, without relying on the overall total, could benefit by knowing the government's estimate for some of the individual functions.

eliminate any appearance of Brown Associates' unfair competitive advantage.<sup>5/</sup>

We also find that the protesters are entitled to the costs of filing and pursuing their protests. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) and (e) (1989).

The protests are sustained.

*Winston J. Jordan*  
for Comptroller General  
of the United States

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<sup>5/</sup> Although the protesters have made a number of allegations regarding the Army's evaluation of their proposals, until the Army makes a new selection, the issues relating to the evaluation are premature and will not be considered at this time. Joseph Carter, B-227094, June 17, 1987, 87-1 CPD ¶ 608.