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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Naddaf International Trading Company

File: B-238768.2

Date: October 19, 1990

Joseph J. Brigati, Esq., Kirkpatrick & Lockhart, for the protester.
Paul Shnitzer, Esq., Crowell & Moring, for Engineered Air Systems, Inc., an interested party.
Craig E. Hodge, Esq., and Tony K. Vollers, Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly terminated the contract of firm and disqualified firm from further participation in the procurement where agency reasonably concluded that telephone calls made by a former government official whose duties included the procurement, on behalf of the awardee, to various government officials involved in award decision, while award was pending, could be construed as possibly violating the restrictions of 18 U.S.C. §§ 203,205 and 207 (1988) and created appearance of impropriety detrimental to the competitive system.

DECISION

Naddaf International Trading Company (NITCO) protests the Department of the Army's determination to terminate a contract previously awarded to the firm and to disqualify the firm from further participation in the competition for the acquisition of 600 gallon per hour reverse osmosis water purification units (ROWPU).^{1/} Request for proposals (RFP) No. DAAK01-89-R-0153 was issued by the U.S. Army Troop Support Command (TROSCOM). The Army terminated the award and disqualified NITCO because an Army colonel, while on terminal leave from the Army and an employee of NITCO, telephoned several government agencies regarding award of the ROWPU contract to NITCO. The Army concluded that these conversations created

^{1/} ROWPUs are used to treat sea water or contaminated water to make it potable for troop use under field conditions.

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the appearance or likelihood of an unfair competitive advantage pertaining to the contract award. NITCO challenges the agency's decision to disqualify it as unreasonable.^{2/}

We deny the protest.

The agency issued the solicitation as a total small business set-aside on July 26, 1989. Five proposals were received by the closing date of September 14. NITCO was the apparent low offeror and a pre-award survey of NITCO was requested. The pre-award survey team consisted of personnel from the Petroleum and Water Logistics' office, including the project manager, and other TROSCOM offices. The pre-award survey recommended no award to NITCO based on unsatisfactory quality assurance and financial capability factors. The production office of TROSCOM also recommended no award for additional reasons; that NITCO had not previously produced a similar item, and did not appear to understand the extensive testing requirements of the solicitation. By letter dated November 14, the contracting officer subsequently found NITCO nonresponsible and forwarded the matter to the Small Business Administration (SBA) under its certificate of competency (COC) procedures. During the COC process, NITCO corrected their quality assurance deficiencies by obtaining a system from a commercial source. The SBA, however, declined to issue a COC and notified the contracting officer of the denial on January 8, 1990. The SBA's basic reason for denying the COC was NITCO's failure to obtain adequate financial resources to perform the contract. NITCO had obtained a line of credit from a Cayman Island bank, while the SBA required financial backing from a domestic source. After receipt of the SBA's COC denial, based on new information made available to the contracting officer from the SBA while the COC was pending,

^{2/} Initially, the decision to proceed with the procurement without excluding NITCO, as well as the decision to award to NITCO, was made by the buying activity, TROSCOM. The Army Materiel Command (AMC), the parent organization of TROSCOM, initially supported the TROSCOM position but, after further development of the facts, AMC directed TROSCOM to terminate the contract and exclude NITCO from further participation in the competition. NITCO, in its protest, argues that AMC's decision to direct TROSCOM to terminate the contract is incomprehensible, unsupportable, and entitled to no deference. In this regard, we have held that the authority of agency supervisory level officials to direct and supervise agency functions of lower echelon agency components necessarily encompasses procurement operations, including the evaluation of proposals and the award of contracts. See Scheduled Airlines Traffic Offices, Inc., B-229883, Mar. 29, 1988, 88-1 CPD ¶ 317.

the contracting officer reconsidered NITCO's responsibility. The contracting officer specifically concluded that: (1) NITCO had the technical capability to perform the contract because of its recent successful completion of the first article test on the 1500 foot well-drilling system; (2) that NITCO had obtained from a commercial source an acceptable quality assurance manual and would have the required quality assurance system in place at the beginning of contract performance, and (3) that NITCO had an adequate source of financing in the form of a line of credit from a French bank, as opposed to the credit line from the Cayman Island bank. Consequently, on February 1, the contracting officer reversed his nonresponsibility determination and found NITCO responsible. The ROWPU contract was awarded to NITCO on February 22.

On March 1, Engineered Air Systems, Inc. (EASI), one of the unsuccessful offerors, protested the award to our Office. EASI contended that the award to NITCO should be terminated because a retired colonel who participated in the NITCO pre-award survey, and who then was employed by NITCO and while in NITCO's employ during January 1990, had improper discussions with government officials, including TROSCOM officials concerning the ROWPU procurement.

The Army initially opposed the protest and supported the award decision. A conference was held and testimony was given by both the retired colonel and the contracting officer concerning the actions taken by each in the conduct of this procurement. The record shows that the retired colonel was the project manager for the ROWPU project and had participated in the NITCO pre-award survey on October 12, 1989. Shortly thereafter, the colonel decided to retire from the Army and to seek outside employment and indicated to the pre-award team he might submit a resume to NITCO. The colonel notified TROSCOM authorities and was disqualified from further participation in the ROWPU procurement. In mid-November, the colonel went on terminal leave, moved to Texas where NITCO is located and applied to NITCO for employment. The colonel and NITCO were advised by TROSCOM counsel that during terminal leave the colonel could accept employment with NITCO as long as he had no involvement in the ROWPU procurement and did not represent NITCO in any matter involving TROSCOM or other "off limits" government agencies.

The former colonel's employment with NITCO commenced on January 2, 1990. On January 5, by telephone, the former colonel talked to the leader of the pre-award survey team that reviewed the responsibility of NITCO employed by the Defense Contract Management region in Austin, Texas, to find out who would be available to assist NITCO in becoming financially qualified for award. In early January 1990, he spoke to an employee of the SBA regional office who conducted

the ROWPU-related COC review of NITCO and questioned the authority of the SBA to decline issuance of a COC on the basis of NITCO's use of foreign rather than domestic financing. The colonel communicated his dissatisfaction with the decision not to accept a foreign bank's financing for the COC, and stated he would call higher level officials in Washington, D.C. The SBA employee subsequently received a call from the SBA office in Washington concerning his decision.

Also in January, the retired colonel twice called an employee of the TROSCOM project manager's office responsible for the ROWPU project and a former subordinate to the colonel, to discuss the ROWPU award. On January 23, he called the contracting officer and asked for information relating to the contracting officer's request for extension of offers for the ROWPU procurement. All of these conversations occurred prior to February 1, 1990, when the contracting officer reversed his earlier determination and found NITCO responsible. The record shows that this decision was based, at least in part, on new information received from the SBA employee concerning NITCO's quality assurance program and financing.

The Army reviewed the record and concluded that the former colonel's telephone conversations with the various government officials were improper and violated the post-employment restrictions of 18 U.S.C. § 207 (1988). In addition, the Army concluded that the colonel's employment contacts with NITCO in November and December 1989, while on terminal leave, violated 18 U.S.C. §§ 203 and 205, which relate to the ethical conduct of government officials.^{3/} The Army determined that the award to NITCO should be terminated and that NITCO should be excluded from further participation in the ROWPU procurement in order to protect the integrity of the federal procurement system from the appearance or likelihood of an unfair competitive advantage. The award to NITCO was terminated for convenience on May 30, 1990. Our Office was notified of the Army's decision to terminate the contract and we subsequently dismissed the protest as academic. This protest followed on June 12.

NITCO argues that the contract was properly awarded to NITCO because the retired colonel (1) did not have prohibited employment discussions with NITCO before he left government employment, (2) did not have prohibited discussions with government representatives following his employment by NITCO, and (3) did not influence the contracting officer in his decision to award the contract to NITCO. In the alternative,

^{3/} Prior to award of the contract, the Army Criminal Investigative Command (CID) opened an investigation into this matter. That investigation has not been completed.

NITCO argues that if the termination is considered proper, then the decision to bar NITCO from further participation in the procurement was unreasonable and amounted to a de facto suspension or debarment in violation of the law.

Where there is an apparent conflict of interest or appearance of impropriety, an agency may exclude an offeror from a procurement in order to protect the integrity of the federal procurement system, even if no actual impropriety can be shown, provided that the agency's determination is based on fact and not mere innuendo or suspicion. MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81. We will review the record to determine whether the agency had a reasonable basis for excluding an offeror from the competition in the face of an allegation or indication of an apparent conflict of interest or appearance of impropriety.

The Army maintains that the colonel's participation in the procurement on behalf of NITCO violated the restrictions of 18 U.S.C. §§ 203, 205 and 207. Section 203 forbids an employee's receipt of compensation for service rendered by himself in relation to any particular matter before any department or agency if the United States is a party and has a direct and substantial interest. Section 205 mandates that government employees may not act as agents or attorneys for anyone before any Federal department or agency in connection with any particular matter in which the United States has an interest. Section 207(a) prohibits former government officers from acting as agents or attorneys or otherwise representing anyone else before the government with the intent to influence a decision in connection with a particular government matter involving a specific party, if the individual had participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed.

Here, the record establishes that the colonel decided to retire and seek employment with NITCO after participating in the pre-award survey of NITCO. Prior to retiring, the Colonel was the ROWPU project manager. This solicitation was part of his official responsibilities and he had access to proposals. He was given ethics counseling and although he was advised that he could seek employment with NITCO upon departing his duty station while a government employee on terminal leave, he also was advised not to have contact with TROSCOM or any government agencies regarding ROWPU. Thereafter, while on terminal leave and an employee of NITCO, the colonel made telephone calls to at least four government employees on behalf of NITCO. The calls appear to have been placed to obtain the award for NITCO. For example, the record demonstrates that two calls to a TROSCOM employee who had been a subordinate of the colonel was placed to specifically

determine whether there were some actions being taken to avoid awarding to NITCO. It appears that during this telephone call and in other conversations the colonel was using his involvement with ROWPU as a government employee to help NITCO gain access to more than publicly available information. In fact, in making his telephone calls to the SBA officials he specifically identified himself as both a NITCO employee and a retired colonel. He then questioned the SBA's findings that NITCO's foreign banking source could not be considered by the SBA in its COC proceeding. He also stated he intended to discuss the issue with higher-level SBA officials. If these telephone calls were merely for the gathering of publicly available information, as alleged by the protester, given the colonel's involvement with ROWPU as a government employee and the advice that he was given concerning any subsequent involvement with the ROWPU procurement, it would appear to have been more reasonable for NITCO to have had one of its employees with no government ROWPU experience make the requests for this information.

The record establishes that the colonel's conversations with the SBA officials, the pre-award survey leader, the former project manager's subordinate and the contracting officer all occurred while the award decision was pending and concerned NITCO's eligibility for award. Further, there is no reasonable explanation in the record for these discussions other than to affect the award decision. On the basis of these facts, we cannot say that the Army was unreasonable in its view that the former government employee's actions were in violation of the restrictions of 18 U.S.C. §§ 203, 205 and § 207(a). Therefore, we conclude that the agency decision to disqualify NITCO from further participation in the procurement to eliminate any appearance of impropriety and to protect the integrity of the competitive system was reasonable.

Finally, we do not find that the Army's termination of NITCO's contract and exclusion of NITCO from the procurement amount to a de facto suspension or debarment. There is no evidence in the record that the actions taken by the Army for this procurement will preclude awards to NITCO in future procurements. The Army's determination applied to this one procurement only. When a contractor is deprived of an award in only a single procurement, there is no basis for a finding of constructive or de facto debarment unless there are

specific facts warranting such a conclusion. Energy Management Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38. There is nothing in the record warranting such a conclusion here.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel