

Lebowitz



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Compliance Corporation--Reconsideration

File: B-239252.3

Date: November 28, 1990

Josephine L. Ursini, Esq., Hogan and Hartson, for the protester.
Terry E. Miller, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Eagan, McAllister Associates, Inc., an interested party.
Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A contracting officer may properly protect the integrity of the procurement system by disqualifying from the competition a firm which engaged in improper business conduct which may have afforded the firm an unfair competitive advantage.

DECISION

Compliance Corporation requests reconsideration of our decision in Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126. In that decision, we denied Compliance's protest of the Department of the Navy's exclusion of the firm from further participation in the competition under request for proposals (RFP) No. NOO421-89-R-0014, for reports processing services at the Naval Electronics Systems Engineering Activity (NESEA). The contracting officer disqualified Compliance based on the results of an investigation by the Naval Investigative Service (NIS) which found that an employee of Compliance improperly obtained, or attempted to obtain, proprietary proposal information from Eagan, McAllister Associates, Inc. (EMA), the incumbent contractor and a competing firm under this RFP.

On October 31, 1990, while the protester's request for reconsideration was pending in our Office, Compliance filed suit in the United States Claims Court seeking declaratory and injunctive relief. Compliance Corporation v. United States, Civil Action No. 90-3896C. The court has requested that we render a decision on the request for reconsideration by November 28.

157110 / 142722

BACKGROUND

The record showed that prior to the closing date for receipt of initial proposals, the president of EMA reported to the contracting officer that one of Compliance's employees had approached an EMA employee to obtain proprietary information concerning EMA's pending proposal for this solicitation.^{1/} EMA alleged that its employee had prepared this information for the Compliance employee and may have actually provided the information to the Compliance employee. An NIS investigation was requested.

The NIS investigation revealed that 2 weeks before the solicitation's closing date, a Compliance program director in charge of contracts approached an EMA employee, who was an assistant security manager with regular access to all proposal information generated by EMA and who was responsible for preparing EMA's proposal for this solicitation, for the purpose of "discuss[ing] the proposal." The Compliance director sought information concerning the reports processing contract for which EMA was the incumbent, including proprietary salary information for EMA employees working on the existing reports processing contract at NESEA, whether EMA employees were interested in working for Compliance if it were awarded the follow-on contract for reports processing services, and a list of government-owned property used by EMA to perform the contract at NESEA. The day after the Compliance director met with the EMA employee, EMA officials found in the EMA employee's workspace EMA's technical proposal for this solicitation, EMA's technical data and capabilities, the EMA employee's resume, a performance review sheet, a marked statement of work for this solicitation, handwritten notes of the EMA employee's previous day's meeting with the Compliance director, and copies of handwritten notes from another Compliance employee. These notes contained confidential information concerning EMA.^{2/}

The EMA employee admitted that she spoke with the Compliance director, and although she admitted that she compiled the

^{1/} Compliance never disputed the underlying facts concerning its employee's conduct.

^{2/} Additionally, although not discussed in our prior decision, the record reflected that when the president of EMA requested from the EMA employee the duplicate, back-up computer disk of EMA's proposal, the EMA employee stated she did not have a duplicate disk. The EMA president noted that, in the past, the EMA employee had always made a duplicate disk of EMA's proposals.

described information found in her workspace, she offered no reasonable explanation for how this information all came together in one packet. The EMA employee also admitted to providing the Compliance director with an estimation of salary scales from 3 years ago (which would have covered the period of EMA's existing reports processing contract awarded on April 7, 1986 for 1 base year plus 2 one-year options). There is also some indication in the report of the NIS investigation that the Compliance director offered the EMA employee a job if she obtained the information.

The NIS investigation also revealed that the Compliance director requested another Compliance employee, a telecommunications specialist, to use her access to a NESEA database maintained by Compliance under a contract at NESEA to obtain the names and phone numbers of all EMA employees working on the existing reports processing contract (information which was subject to federal privacy laws). The Compliance employee provided a written list of the requested information, including the position descriptions of the EMA employees and the amount of time they worked on the existing reports processing contract, to the Compliance director.

In our prior decision, we concluded that, given the NIS findings, the contracting officer had a reasonable factual basis for finding that the Compliance director's improper or illegal conduct may have afforded Compliance an unfair competitive advantage in preparing its proposal for this solicitation which reasonably and properly justified the contracting officer's decision to disqualify the firm from further competition in order to protect the integrity of the competitive procurement system. Specifically, we stated that a contracting officer may protect the integrity of the competitive procurement system by disqualifying a firm from the competition where it reasonably appears that the firm may have obtained an unfair competitive advantage. See Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pam Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, aff'd, Brown Assocs. Management Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299.

ALLEGATIONS BY COMPLIANCE

Compliance argues that we erroneously held that a contracting officer can eliminate a firm from a procurement based on "pure industrial espionage" not involving improper government action. In the protester's view, what occurred in this case was "nothing different than the aggressive and normal business tactics used by hundreds of other contractors [which] Congress and the Comptroller General have determined . . . provide no legal basis for disqualification." (Emphasis in original.)

Such aggressive, normal business tactics, according to the protester, generally result in lower costs to the government. Compliance argues that the contracting officer's disqualification was unreasonable because the underlying facts reflected nothing more than a dispute between private parties. Compliance cites decisions of our Office where we dismissed as disputes between private parties protests containing allegations of improper business practices raised by one firm against another competing firm. See, e.g., Radio TV Reports, Inc., B-224173, Sept. 24, 1986, 86-2 CPD ¶ 344.

ANALYSIS

The Authority of the Contracting Officer

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301 et seq., mandates agencies to "obtain full and open competition" by allowing "all responsible sources" to compete. 10 U.S.C. §§ 2302(3), 2304(a)(1)(A); 41 U.S.C. § 403(6) (1988). The fairness and the integrity of the procurement system are essential for achieving this goal. Thus, for example, firms are required to certify that they have arrived at their prices independently, have not disclosed their prices to other competitors, and have not attempted to induce another concern to either submit or not submit an offer for the purpose of restricting competition. See Federal Acquisition Regulation (FAR) § 52.203-2 (FAC 84-5). In short, there is a clear relationship between full and open competition and protecting the system from those whose improper conduct would adversely affect that goal.

As stated in our previous decision, contracting officers are authorized, as well as required, to enter into contractual relationships that are in the best interests of the government. FAR § 1.602 (FAC 84-33). In meeting his responsibility to safeguard the government's interests, a contracting officer is granted "wide latitude to exercise business judgment," FAR § 1.602-2; Devres, Inc.--Recon., B-228909.2, Apr. 1, 1988, 88-1 CPD ¶ 329, and may impose a variety of restrictions, not explicitly provided for in applicable regulations, in order to preserve the integrity of the competitive procurement system. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986) (affirming our rationale). This includes disqualifying firms for improper or illegal conduct. See, e.g., Nadaff Int'l Trading Co., B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ ____. Not only does the contracting officer have authority to take such corrective action, in some circumstances we have found that his only reasonable action would be to disqualify a firm from the

competition. Litton Sys., Inc., 68 Comp. Gen. 422 (1989), 89-1 CPD ¶ 450, aff'd, The Department of the Air Force--Recon., 68 Comp. Gen. 677 (1989), 89-2 CPD ¶ 228; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, supra; Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53.

In sum, accomplishing the goals of the competitive procurement system requires that the system operate with integrity. The contracting officer has the responsibility and the authority to take corrective action in appropriate circumstances, including rejecting offers based on illegally obtained information and disqualifying firms which submit such offers. Such offers, if ignored and overlooked, would undermine an agency's efforts to obtain the statutory goal of full and open competition and to award contracts at the lowest, most economical price available in the competitive marketplace.^{3/}

The Exercise of the Contracting Officer's Authority

Our prior decision in this case was based on our finding that the contracting officer's decision to disqualify the protester from further competition was clearly justified by the need to preserve the integrity of the competitive procurement system. The protester argues that the conduct involved here does not affect the integrity of the competitive procurement system. We disagree.

The conduct engaged in by the Compliance director went beyond what can be deemed a dispute between private parties with which the government need not be concerned; the conduct in fact reflects an attempt by the Compliance director to undermine by improper or illegal means the contracting

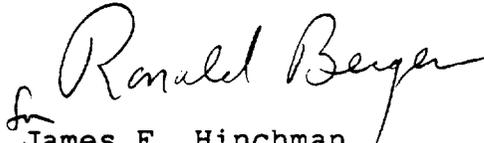
^{3/} See Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971), cert. denied, 405 U.S. 1017 (1972), aff'g in part and vacating in part sub nom. Sperry Rand Corp. v. Electronic Concepts, Inc., 325 F. Supp. 1209 (E.D. Va. 1970) (Action by Sperry against former employees who gave and subsequent employer who received technical data concerning a product being developed by Sperry for the government and Sperry's confidential bid pricing information for upcoming government procurements. Court found defendants misappropriated proprietary data and intended to use the bid pricing information to underbid Sperry. Sperry was granted injunctive and monetary relief.) We do not think that the contracting officer has to rely on a court to vindicate full and open competition.

officer's ability to fulfill the CICA mandate of obtaining full and open competition. For example, the NIS investigation revealed that the Compliance director requested another Compliance employee to use her access to a NESEA (government-owned) database, maintained by Compliance under a contract with NESEA, to retrieve information, specifically, the names and phone numbers of all EMA employees working on the existing reports processing contract. Although this information was subject to federal privacy laws, the Compliance employee provided a written list of the requested information, including the position descriptions and the amount of time that EMA employees worked on the existing reports processing contract, to the Compliance director. While there was no involvement by any former government officials in this case, a government contractor's improper and illegal use of government-owned property to obtain an unfair competitive advantage is not, in our view, significantly different from improper and illegal conduct by a former government official to obtain a competitive advantage for the private contractor he now represents. See Nadaff Int'l Trading Co., B-238768.2, supra. We think that the contracting officer was eminently reasonable in concluding that this information retrieved from the government-owned database, along with the proprietary salary information given to the Compliance director by the EMA employee, likely afforded Compliance an unfair competitive advantage, particularly in light of the fact that Compliance submitted a proposal for this level-of-effort, cost-plus-fixed-fee contract which was priced substantially below EMA's proposal.

While we have considered protests against a competitor's alleged improper business conduct to be outside of our bid protest function, we do not think that these cases stand for the proposition, as Compliance asserts, that a contracting officer does not have the authority and cannot take action in response to known industrial espionage concerning two competitors on a government contract, where, as we found, the contracting officer reasonably concluded that such conduct has likely resulted in an unfair competitive advantage to a competitor under an ongoing procurement and is ultimately detrimental to the integrity of the competitive procurement system. We reject Compliance's position that a contracting officer has no authority to take appropriate corrective action when improprieties and illegalities of the type described here, involving at a minimum the misuse of government-owned property, are brought to the attention of the contracting officer, especially where a firm's possession of such information has likely resulted in an unfair competitive advantage. See Holmes and Narver Servs., Inc./Morrison-Knudson Servs. Inc., a joint venture; Pam Am World Servs., Inc., B-235906; B-235906.2, supra.

In this case, we believe that the contracting officer's decision to disqualify and exclude Compliance from the competition in order to eliminate its likely unfair competitive advantage was reasonable and fully consistent with the contracting officer's role in protecting the integrity of the competitive procurement system.

We deny the request for reconsideration.


James F. Hinchman
General Counsel