



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: RAMCOR Services Group, Inc.

File: B-253714

Date: October 7, 1993

Richard Fowler, Esq., Proffitt & Fowler, for the protester.
Clinton Fitts, Esq., Department of the Treasury, for the
agency.

Paul Jordan, Esq., and Paul Lieberman, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Protest by incumbent contractor that awardee gained unfair competitive advantage by obtaining names and telephone numbers of two of incumbent's employees from an agency employee who was the awardee's prospective contract manager is denied where there is no evidence that the agency employee engaged in any prohibited procurement practice, nor any indication that his actions resulted in any unfair advantage accruing to the awardee.

DECISION

RAMCOR Services Group, Inc. protests the award of a contract to Star Mountain, Inc. under request for proposals (RFP) No. FTC-92-11, issued by the Department of the Treasury for training and support services at the Federal Law Enforcement Training Center (FLETC) near Tucson, Arizona. RAMCOR contends that a federal employee improperly furnished RAMCOR proprietary information to Star and argues that Star should have been eliminated from the competition as a result.

We deny the protest.

The RFP, issued in August 1992, contemplated award of a fixed-price contract to furnish all supervision and labor for training and various ancillary support at the FLETC, plus the provision of certain role-player services on an indefinite quantity/indefinite delivery basis. Award was to be made to the offeror whose proposal was most advantageous to the government, price and other factors considered. Two offerors, RAMCOR, the incumbent, and Star, submitted proposals by the December 9, 1992, closing date. The agency evaluated the proposals later in December and conducted discussions with both offerors in January 1993. The agency

obtained best and final offers from both offerors in February and April 1993. RAMCOR's technical proposal was scored higher than Star's in most evaluation areas including personnel. Although RAMCOR's proposal scored higher technically (48.8 out of 60 points), the agency determined that the Star proposal, with its slightly lower technical score (41.2 points) combined with a substantial cost savings (27 percent lower price than RAMCOR's), represented the best value to the government.

Prior to making the award, the agency conducted an investigation into the actions of one of its employees, Paul Mathis, the FLETC program manager. In September 1992, a Star representative contacted Mr. Mathis and asked if he would consider being Star's contract manager if Star were awarded the contract. Mr. Mathis agreed and was listed in Star's proposal. Prior to the RFP closing date, Mr. Mathis contacted two RAMCOR employees, Daryl McKinney, rangemaster, and Douglas Walker, driver training specialist, and told them that a Star representative would be contacting them about possible employment. Subsequently, Star contacted both RAMCOR employees, obtained their resumes, and proposed them as key personnel.¹ According to the protester, prior to the award of the contract, Mr. Mathis told these two Ramcor employees his management philosophy and how he would run things when or if Star was awarded the contract. In March 1993, RAMCOR's president complained to Mr. Mathis's supervisor about Mr. Mathis's furnishing RAMCOR employee names to Star. The supervisor later counseled Mr. Mathis about his actions.

Based on its investigation, the agency concluded that Mr. Mathis did not participate in preparation of the solicitation or in the evaluation process, nor did he participate in any way in preparing the Star proposal. Further, Mr. Mathis had no access to restricted source selection information or to agency material pertaining to the subject contract. Apart from the above-mentioned names and possibly telephone numbers, there was no evidence that Mr. Mathis had disclosed any potentially proprietary information related to the procurement to any parties to the procurement.²

¹RAMCOR also proposed these employees.

²It is not clear from the record precisely how Star obtained the RAMCOR employees' telephone numbers. Mr. Mathis denied providing them, while a Star representative recalled telling Mr. Mathis to ask the employees for their numbers when inquiring whether they were interested in working for Star. According to the agency, Star could have obtained the numbers from either an existing roster of all FLETC personnel, or from the local telephone directory.

The agency determined that Mr. Mathis may have violated standards of ethical conduct by using or creating the appearance of use of his public office for private gain. However, the agency concluded that Mr. Mathis's actions had no effect on the integrity of the procurement process. In this regard, the agency found that Star had not been afforded any competitive advantage as a result of the actions of Mr. Mathis.

The agency awarded the contract to Star on June 2. Upon receiving notice of the award, RAMCOR filed this protest. Subsequently, the agency determined to allow Star to continue performance, notwithstanding the protest, based on urgent and compelling circumstances.

RAMCOR contends that Mr. Mathis violated the prohibitions against personal conflicts of interest in Part 3 of the Federal Acquisition Regulation (FAR) and 18 U.S.C. § 208 (1988), by disclosing proprietary information (employee names and telephone numbers) to Star. In RAMCOR's view, disclosure of this information provided Star with an unfair competitive advantage which requires either award to RAMCOR or resolicitation of the requirement. We disagree.

Contracting agencies are to avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. FAR § 3.101-1.³ An agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKE Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; Laser Power Techs., Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. The mere employment of a former government employee who is familiar with the type of work required, but not privy to the contents of the proposals or to other inside agency information does not confer an unfair competitive advantage. Dayton T. Brown, Inc., 68 Comp. Gen. 6 (1988), 88-2 CPD ¶ 314.

³The protester also relies on FAR § 3.101-2 which prohibits a government employee from soliciting or accepting, directly or indirectly, any gratuity, gift, favor, etc. from anyone with or seeking business with the government. We need not address this allegation because the appropriate sanction for a violation would be directed at the employee, not Star, and since we find no evidence that Star obtained a competitive advantage from the information it received, the employee's action provides no basis to exclude Star from the competition.

The responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from the competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629; John Peeples, B-233167, Feb. 21, 1989, 89-1 CPD ¶ 178. Our review is to determine whether any action of the government employee may have resulted in prejudice for, or on behalf of, (i.e., convey a competitive advantage) to the awardee during the award selection process. Dayton T. Brown, Inc., supra.

During the conduct of a procurement, any person with authorized or unauthorized access to proprietary information is prohibited from disclosing it to any unauthorized person. FAR § 3.104-3(c). Here, apart from the names and telephone numbers of incumbent employees, the agency found that Mr. Mathis had no access to proprietary or source selection information regarding this procurement and RAMCOR has presented no evidence to the contrary.⁴ With regard to the names of the two incumbent employees, while Mr. Mathis's actions were inappropriate, the record establishes that his release of these names and telephone numbers did not result in any competitive advantage to Star.

While the release of information made it easier for Star to learn of the two individuals, their identities and phone numbers easily could have been obtained otherwise. Here, a third RAMCOR employee, a role-player, answered Star's classified advertisement regarding this procurement. This employee furnished the name and phone number of a fourth RAMCOR employee on his resume. Either of these employees could have provided other RAMCOR employee names. In addition, the two employees' names and phone numbers are available on a personnel roster compiled by the FLETC and their numbers appear in the local telephone directory.⁵ The

⁴In its comments to the agency report, RAMCOR for the first time alleged that Mr. Mathis provided other proprietary information to Star. These allegations are speculative and RAMCOR was aware of them in March 1993, but did not include them in its original protest. Supplements to protests must independently satisfy the timeliness requirements in our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1993). See Little Susitna Co., 65 Comp. Gen. 652 (1986), 86-1 CPD ¶ 560. Our Regulations do not contemplate the unwarranted piecemeal presentation and development of protest issues. Id.

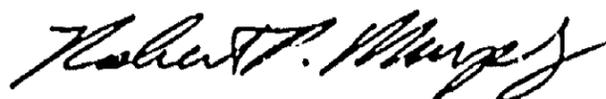
⁵While one of the employees claimed in an affidavit to have an unpublished telephone number, he told agency
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protester has not articulated any specific advantage to Star or detriment to RAMCOR which arose from Mr. Mathis's actions. In this regard, we note that Star's proposal of Messrs, McKinney and Walker did not prevent RAMCOR from proposing the same individuals. In fact, RAMCOR received a higher personnel score on its proposal. Under these circumstances, we find the agency reasonably determined not to exclude Star from the competition.

We also find nothing per se improper in Mr. Mathis's accepting a conditional offer of employment while still an agency employee. Although procurement officials are prohibited from engaging in employment negotiations during the conduct of a procurement, FAR § 3.104-3(b), Mr. Mathis was not a procurement official: he had no involvement with drafting, reviewing, or approving the RFP specifications; evaluating proposals; selecting sources; conducting negotiations; or reviewing or approving the award to Star. FAR § 3.104-4(h). Further, while any government employee is prohibited from "participating personally and substantially" in any matter that would "affect the financial interests of any person with whom the employee is negotiating for employment," 18 U.S.C. § 208; FAR § 3.104-1(b)(2), there is no evidence that Mr. Mathis participated in any way in the procurement.

RAMCOR argues that an appearance of impropriety is created by Mr. Mathis's actions; we do not find that the apparent impropriety in question required the agency to disqualify Star. A contracting agency may not disqualify a firm from the competition for an appearance of impropriety or apparent conflict of interest where, as here, the agency has conducted an internal investigation that established that no wrongdoing affecting the procurement actually occurred. See NES Gov't Servs., Inc.; Urgent Care Inc., B-242358.4; B-232358.6, Oct. 4, 1991, 91-2 CPD ¶ 291.

The protest is denied.



for James F. Hinchman
General Counsel

³ (...continued)

investigators that his number was listed in the telephone directory and it is, in fact, available from the telephone company's directory assistance.