



Comptroller General
of the United States

Washington, D.C. 20548

REDACTED VERSION'

Decision

Matter of: Science Pump Corporation

File: B-255737

Date: March 25, 1994

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John E. Reilly, Esq., Reilly & Purcell, for EN-SCI Corporation, an interested party.
Lynn Hawkins Patton, Esq., and James K. White, Esq., Department of the Commerce, for the agency.
John L. Formica, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An individual hired and formally employed by the University of Colorado and working at an institute created by cooperative agreement between the University of Colorado and the Department of Commerce--who was not appointed to his position by an employee or officer of the federal government and who is not supervised by employees or officers of the federal government--is not a federal employee such that the award of a contract to a business allegedly owned or substantially controlled by the individual would be improper.
2. Protest that the awardee gained an unfair competitive advantage and should have been excluded from the competition is denied where the agency reasonably concluded that proprietary or procurement sensitive information was not provided or inadvertently disclosed, or likely provided or inadvertently disclosed, to a former government employee currently associated with the awardee.

'The decision issued March 25, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

DECISION

Science Pump Corporation protests the award of purchase order No. NRMGP100400172 to EN-SCI Corporation, under an oral request for quotations by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for 30 ozonesondes.¹ Science Pump argues that EN-SCI should have been excluded from the competition because EN-SCI is owned by a government employee and has an organizational conflict of interest and one of its key employees has a personal conflict of interest.

We deny the protest.²

NOAA orally requested quotations from EN-SCI and Science Pump for the ozonesondes under the small purchase procedures set forth at Federal Acquisition Regulation (FAR) § 13.106. On November 1, 1993, EN-SCI and Science Pump responded to the agency's request, with EN-SCI quoting a price of \$299.31 per ozonesonde, and Science Pump quoting a price of [DELETED] per ozonesonde.

When solicited by the agency, Science Pump asked the agency's purchasing agent whether the solicitation was competitive, and if so, what other firms were being solicited. When informed that the identities of potential competitors could not be revealed, Science Pump stated that it would protest any award to EN-SCI, which Science Pump knew to be a potential competitor, contending that EN-SCI had a conflict of interest due to its relationship with Mr. Walter Komhyr, whom Science Pump claimed was an employee of NOAA.

As a result of this conversation, the purchasing agent decided to ascertain whether Mr. Komhyr was in fact an employee of NOAA. The purchasing agent first contacted the NOAA physicist who had requisitioned the ozonesondes, and was informed that Mr. Komhyr had retired from NOAA, and that the physicist was unaware of any connection between Mr. Komhyr and EN-SCI. The purchasing agent then contacted the cognizant NOAA Personnel Department and was informed

¹Ozonesondes are borne aloft by balloons and take atmospheric pressure, temperature, and humidity readings. These readings are transmitted to a NOAA ground station, and the data received is translated into useful information about the ozone layer.

²A protective order was issued in this case, and counsel for Science Pump and EN-SCI were admitted under the protective order and received access to protected materials.

that Mr. Komhyr had retired from NOAA on December 31, 1992, and that there was no record of any type of current employment of Mr. Komhyr, including, for example, any appointment to a federal position or as a rehired annuitant. The Personnel Department further informed the purchasing agent that there was no information in Mr. Komhyr's file as to any relationship with EN-SCI.

The purchasing agent concluded that, contrary to Science Pump's allegations, Mr. Komhyr was not a federal employee and that no conflict of interest existed. On November 1, a purchase order was issued to EN-SCI at its low-quoted price of \$299.31 per ozonesonde, for a total price of \$8,979.30.

Science Pump first protests that EN-SCI should have been excluded from the competition because Mr. Komhyr is "currently working for NOAA as an employee" and is "the owner of EN-SCI." The protester argues that award to EN-SCI is prohibited by FAR § 3.601-1, which provides generally that a contract may not be awarded to a business substantially owned or controlled by a government employee. The protester also argues that Mr. Komhyr has violated 18 U.S.C. § 208 (Supp. IV 1992) and related regulations, which prohibit certain acts by current government employees which affect their personal financial interest.

The protester's contention that Mr. Komhyr has violated 18 U.S.C. § 208 and related regulations is not within the purview of our bid protest regulations, because 18 U.S.C. § 208 is a criminal statute, and its interpretation and enforcement, and the interpretation and enforcement of related regulations, are matters for the procuring agency and the Department of Justice. Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132; Ernaco, Inc., B-218106, May 23, 1985, 85-1 CPD ¶ 592. Our review, within the confines of a bid protest, is limited to whether the applicable procurement regulations prohibit EN-SCI from receiving a contract because of Mr. Komhyr's alleged employment by both NOAA and EN-SCI.

NOAA and EN-SCI contend that FAR § 3.601-1 is inapplicable here because Mr. Komhyr is not an "employee" of the federal government. Science Pump concedes that "Mr. Komhyr is formally a University of Colorado employee," who works at the University's Cooperative Institute for Research in Environmental Sciences (CIRES) and acknowledges that "Mr. Komhyr is supervised by certain CIRES officials who are employed by the University of Colorado." The protester nevertheless maintains that Mr. Komhyr must be considered an employee of the federal government because "CIRES is substantially funded by NOAA" through a cooperative agreement between the University and NOAA. In the protester's view, because CIRES is partially funded by

the federal government, and because CIRES efforts are "overseen by a Council of Fellows which includes senior NOAA scientists" in addition to University of Colorado faculty, Mr. Komhyr is in effect supervised by federal employees. In this regard, the protester points out that Mr. Komhyr's CIRES office location and telephone number are the same as when Mr. Komhyr was employed by NOAA.

The statutory provision governing the status of an individual as an employee of the federal government is set forth at 5 U.S.C. § 2105 (1988 & Supp. IV 1992), which defines an employee of the federal government as an individual who (1) has been appointed or employed in the civil service by a federal officer or employee performing in an official capacity, (2) is engaged in the performance of a federal function under authority of law or an Executive act, and (3) is supervised and directed by a federal official or employee. 5 U.S.C. § 2105(a); Ernaco, Inc., supra. To be considered a federal employee, an individual must satisfy each of these three requirements. Costner v. United States, 665 F.2d 1016, 1020 (Ct. Cl. 1981).

Mr. Komhyr does not meet the first aspect of the definition set forth above--appointment to the civil service by an authorized federal employee. The record shows that Mr. Komhyr was not appointed to his position at CIRES by a federal officer or employee of the federal government; rather, he was hired by the University of Colorado. Further, as evidenced by the record and acknowledged by the protester, Mr. Komhyr is supervised in his activities by University of Colorado employees, and not by federal officials or federal employees. Although NOAA officials, in conjunction with University of Colorado personnel, govern CIRES, we do not agree with the protester that the involvement by officials of the federal government in the overall governance of an entity created by a cooperative agreement with a University equates to the degree of "supervision" of employees such that employees of the entity would be considered, if the other conditions set forth are met, as employed by the federal government. See 24 Comp. Gen. 384 (1944) (personnel employed and paid pursuant to a cooperative agreement between the United States and a cooperating entity, whose duties and work are supervised jointly by representatives of the United States and the cooperating entity, are not employees of the United States). Accordingly, Mr. Komhyr is not an employee of the federal government, such that the award of a contract to a firm owned or substantially controlled by him would be improper.

Science Pump next protests that if Mr. Komhyr is considered a former--rather than current--government employee, the award to EN-SCI was improper because EN-SCI had an unfair

competitive advantage as a result of Mr. Komhyr's former employment with NOAA and current relationship with EN-SCI.³ The protester explains that Mr. Komhyr worked for more than 25 years at the Department of Commerce, and that during this time Mr. Komhyr invented the ozonesonde,⁴ developed the original specifications used in ozonesonde procurements, and supervised the NOAA physicist who now has requisitioned the ozonesondes and developed the specifications currently used by NOAA for ozonesonde procurements. The protester contends that Mr. Komhyr, because of his position at CIRES, continues to have "significant access" to NOAA officials despite his retirement from the agency, as evidenced by the collaboration of Mr. Komhyr, the NOAA physicist referenced above, and another NOAA official, on a technical paper which was presented during the American Geophysical Union's 1993 Fall Meeting. In sum, the protester concludes that Mr. Komhyr's past employment at NOAA, current "access" to NOAA officials through his position at CIRES, and alleged ownership of EN-SCI and activities on its behalf, created an impermissible conflict of interest such that EN-SCI should have been excluded from the competition.⁵ In support of its contention that an impropriety may have occurred, the protester points out that EN-SCI's quoted price per ozonesonde for this purchase order was approximately \$43 lower than the EN-SCI's price of \$341.85 per ozonesonde for orders of 10-49 units as set forth on an EN-SCI price list dated September 23, 1993, and only [DELETED] lower per ozonesonde than the price quoted by Science Pump.

³The protester also argues, based on the premise that Mr. Komhyr is a former, rather than current, employee of NOAA, that Mr. Komhyr has violated 18 U.S.C. § 207 (Supp. IV 1992), and certain related regulations, which prohibit former government employees from engaging in certain activities. Because 18 U.S.C. § 207 is a criminal statute, this argument is not appropriate for our review. As stated previously, the interpretation and enforcement of criminal statutes and related regulations are matters for the procuring agency and the Department of Justice. Technology Concepts and Design, Inc., supra.

⁴The record indicates that Mr. Komhyr developed the ozonesonde some time in the mid-1960s.

⁵With regard to Mr. Komhyr's relationship with EN-SCI, the protester adds to its claim that Mr. Komhyr is "the owner of EN-SCI," that "Mr. Komhyr is presently actively involved in marketing and advertising ozonesondes on behalf of EN-SCI to private entities . . . government contractors . . . and government agencies."

An agency may exclude an offeror from a procurement where it finds a conflict of interest or impropriety which could affect the award process. NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. A determination that an impropriety is likely to have occurred must be based on facts and not mere innuendo or suspicion, Laser Power Techs., Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267; a firm may not be excluded from participating in a procurement based on an alleged conflict of interest or impropriety where an investigation establishes that no wrongdoing actually occurred. Biomedical Research Inc., B-249522, Nov. 25, 1992, 92-2 CPD ¶ 381, recon. denied, B-249522.2, Apr. 16, 1993, 93-1 CPD ¶ 324. Our role in resolving a bid protest allegation of a conflict of interest or appearance of impropriety is to determine whether the agency has a reasonable basis for allowing an offeror to compete in the face of an allegation or indication of an apparent conflict of interest. Sierra Tech. and Resources, Inc., B-243777.3, May 19, 1992, 92-1 CPD ¶ 450. Here, we do not agree with the protester's assertion that the agency acted unreasonably in not excluding EN-SCI from the competition.

The agency explains that although Mr. Komhyr invented the ozonesonde and developed the original specifications for the item while employed by Commerce, Mr. Komhyr's duties at Commerce have not involved ozonesondes since 1989. The agency explains further that during Mr. Komhyr's tenure at Commerce, he had no involvement in ozonesonde purchases, since he did not, for example, render any advice with regard to the purchase of ozonesondes, did not approve or recommend any sources for ozonesondes, did not evaluate ozonesondes that were purchased by the agency, and did not, with the exception of having drafted the original ozonesonde specifications, participate in any revisions to the ozonesonde specifications or provide any input into the technical requirements for ozonesondes.⁶

In our view, the record does not support the protester's contention that Mr. Komhyr's former employment by the agency resulted in an unfair competitive advantage to EN-SCI. Mr. Komhyr's government employment ended well before the agency's solicitation and receipt of quotations for the ozonesondes, and while it appears that Mr. Komhyr's work for the agency prior to 1989 involved the use of ozonesondes, there is no evidence that he ever participated in any agency procurement for these items. The mere employment of a former government employee who may be familiar with the

⁶The agency points out here, and the protester does not dispute, that the agency's specifications for ozonesondes have changed over time.

product or type of work required by an agency, but who, like Mr. Komhyr, is not privy to the contents of any proposals submitted or to any other procurement sensitive information, does not confer an unfair competitive advantage. Technology Concepts and Design, Inc., supra.

Nor does the record support the apparent contention that Mr. Komhyr, by virtue of his purported "access" to NOAA officials in his current position at CIRES, was provided with, or likely was provided with, any proprietary or procurement sensitive information concerning this or any other recent procurement by the agency for ozonesondes, including information regarding Science Pump's quoted price. Mr. Komhyr has submitted an affidavit explaining that while in his current position he remains involved in research concerning the ozone, he has "no duties at CIRES whatsoever that concern ozonesondes." Mr. Komhyr adds that he has "not participated by decision, approval, disapproval, recommendation, and the rendering of advice with respect to contracts involving ozonesondes" while at CIRES.

The NOAA purchasing agent responsible for placing the purchase order states that, contrary to the protester's assertion, she has not provided any information concerning Science Pump's quoted price to anyone, including Mr. Komhyr or anyone at EN-SCI. According to the purchasing agent, after investigating Science Pump's allegations and determining that Mr. Komhyr was not a federal government employee and that no conflict of interest existed, she "simply placed the order with the [c]ompany giving me the best price."

The NOAA physicist who requisitioned the ozonesondes confirms that he did not provide Mr. Komhyr with any information concerning the agency's need for ozonesondes. The physicist adds with regard to the technical paper that the NOAA scientists and Mr. Komhyr had collaborated on, that the paper "involves the scientific interpretation of ozone data and has nothing to do with the technical aspects of the ozonesonde," and that Mr. Komhyr's contribution consisted of "total column ozone measurements and did not involve . . . ozonesonde data."

Regarding EN-SCI's quoted price, Carol Komhyr, Mr. Komhyr's wife and the president of EN-SCI and owner of all EN-SCI's outstanding shares of stock,⁷ explains that the quoted price of \$299.31 differs from that on the September 1993

⁷Mr. Komhyr states that while he acts as a consultant to EN-SCI, he is not the owner of EN-SCI, is not an officer or board member of EN-SCI, does not own any shares of stock in EN-SCI, and is not an employee of EN-SCI.

EN-SCI price list because it was based on EN-SCI's price of \$316.05 that it generally offers to new customers ordering small quantities of ozonesondes, or, as reflected on the price list, to any customer ordering between 50 and 249 ozonesondes, with an additional 5 percent government discount.

Based on our review of the record, we do not find that any improprieties, including the improper disclosure of any procurement sensitive information, such as Science Pump's prices for ozonesondes, occurred or likely occurred. There is no evidence suggesting that agency personnel either purposefully or inadvertently disclosed to Mr. Komhyr or any EN-SCI personnel any information concerning Science Pump's prices, the agency's needs, or other such proprietary or procurement sensitive information. Mr. Komhyr's past employment with the agency, and current proximity to agency personnel and collaboration with agency personnel on scientific endeavors, do not, without some evidence that an impropriety occurred or likely occurred, provide a basis for excluding EN-SCI from the competition. The protester's mere allegations of possible impropriety simply do not render unreasonable the agency's determination to allow EN-SCI to participate in this competition. See Sierra Tech. and Resources, Inc., supra.

The protest is denied.

Robert P. Murphy
Acting General Counsel