



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Professional Gunsmithing Inc.

File: B-279048.2

Date: August 24, 1998

Matthew Gish for the protester.

Alan M. Grayson, Esq., and Ira E. Hoffman, Esq., Grayson & Associates, for Springfield Armory, Inc., an intervenor.

John A. Krump, Esq., Federal Bureau of Investigation, for the agency.

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

DIGEST

Protest that agency's award decision was affected by an improper conflict of interest between a consultant to the agency technical evaluation panel and the awardee (arising from a possible financial relationship established by a settlement agreement from a trademark infringement lawsuit) is denied where there is no credible evidence that the consultant was in a position to receive any financial benefit as a result of the award of this contract, and no evidence that the consultant exerted any improper influence in the procurement on behalf of the awardee or against the protester.

DECISION

Professional Gunsmithing Inc. (ProGun) protests the award of a contract to Springfield Armory, Inc., under request for proposals (RFP) No. 6990, issued by the Department of Justice, Federal Bureau of Investigation (FBI). ProGun argues that the agency's decisions were tainted as the result of an improper conflict of interest arising from a financial relationship between the awardee and an outside consultant hired by the agency to assist in the evaluation process.¹

We deny the protest.

BACKGROUND

The RFP, issued on October 25, 1996, sought proposals to provide .45 caliber, semi-automatic, single-action pistols to the various Special Weapons and Tactics (SWAT) teams throughout the agency. The RFP, which reflected an effort to

¹The protester initially raised another argument that was summarily dismissed as untimely.

standardize the pistols of the various SWAT teams of the FBI, contemplated the award of a fixed-price, indefinite-quantity, indefinite-delivery contract for a 1-year base period with four 1-year options.

The RFP advised that award would be made to the offeror whose proposal was most advantageous to the government, and that technical factors were significantly more important than price. Technical proposals were to be evaluated under the following factors, listed in descending order of importance: weapon testing, field suitability and past performance. With regard to weapon testing, the RFP required that each vendor provide five sample weapons for the following tests: physical and technical, abuse, accuracy, endurance, and field suitability. The RFP provided that a proposed weapon, in order to continue the testing process, must pass each test in the order prescribed above. After one test failure, a vendor would have an opportunity to correct any deficiency, and the weapon would be retested. Failure of the weapon during retest would result in elimination from competition.²

The pistols to be purchased under this RFP were for distribution to the members of the FBI's SWAT teams in the agency's 56 various field offices. The agency recognized that once these weapons were dispersed across the country any maintenance problems would become more costly and more time consuming, and would sacrifice agent readiness. As an additional measure to help ensure the avoidance of quality control problems, the agency hired a "custom gun builder" as a consultant to advise the agency on the specific technicalities of the weapons. June 26, 1996 letter from Contracting Officer's Technical Representative (COTR) to Contract Specialist at 2.

The FBI received proposals and pistols for testing from eight offerors by the May 15, 1997 closing date. The evaluation team evaluated the initial proposals and pistols and established a competitive range consisting of the proposals of ProGun and Springfield Armory. Written discussions were conducted with those two firms and, after being notified of deficiencies during testing, both offerors were given the opportunity to resubmit pistols for retesting. For example, ProGun's weapons were returned after they failed the accuracy test. ProGun's weapons were then resubmitted, retested, and found to perform within the acceptable limits. The SWAT evaluation committee performed the final (field suitability) test on the pistols of Springfield Armory and ProGun. That test allowed SWAT agents to subjectively evaluate the weapons based on specific evaluation criteria. This test was conducted twice with two separate groups of 10 shooters over a 2-week period. A total of 5,000 rounds of ammunition were shot through each of the 10 pistols from the two offerors totaling more than 50,000 rounds for this test phase. Operator perception resulting from this test unanimously favored the pistols of Springfield Armory.

²The physical and technical, abuse, accuracy, and endurance tests were scored on a pass/fail basis. The final test, for field suitability, was numerically scored.

Numerically, the scores of the Springfield Armory pistols also surpassed ProGun's pistols in each of the 30 evaluation categories of the field suitability test. Both ProGun and Springfield Armory submitted best and final offers (BAFO) by the January 8 due date, and Springfield Armory was subsequently awarded the contract, in large measure because of its higher technical evaluation under the field suitability test. This protest followed.

DISCUSSION

ProGun alleges that the agency's decision to award to Springfield Armory was tainted because an improper conflict of interest existed arising from a financial relationship between the gun consultant hired for evaluation purposes and the awardee, Springfield Armory. ProGun asserts that there had been litigation by the consultant against Springfield Armory regarding a particular hammer design to which the consultant holds a trademark. According to ProGun, a settlement in the suit between the consultant and Springfield Armory resolved the past infringement issues and allowed Springfield to use the consultant's trademarked hammer design in future guns. ProGun asserts that "[i]f there is any payment for future use of the hammer design (e.g. royalties, etc.) it is impossible, regardless of intent, for the selection process, with [the consultant's] involvement, to have been fair and unbiased." Protest at 3. The protester alleges that the settlement date predates the award decision and that the settlement negotiations were ongoing during the evaluation phase of the present procurement.

Contracting agencies are responsible for reviewing potential conflicts of interest created by relationships between evaluators and offerors in order to ensure impartiality in the evaluation and to preserve the integrity of the procurement process. DRI/McGraw-Hill, B-261181, B-261181.2, Aug. 21, 1995, 95-2 CPD ¶ 76 at 3. Where, as here, a protester asserts that an evaluator is biased because of his past experience or relationships, we will examine both the nature of the relationship and whether the evaluator exerted improper influence in the procurement on behalf of the awardee, or against the protester. Id.; E.J. Richardson Assocs., Inc., B-250951, Mar. 1, 1993, 93-1 CPD ¶ 185 at 6. Here there is no improper conflict, both because the hammer design that Springfield Armory proposed under this procurement is not the one that ProGun alleges was subject to the consultant's settlement agreement, and because the record indicates that the consultant did not improperly influence the outcome of the evaluation.

The protester's allegation that the consultant will directly benefit as a result of Springfield Armory's receiving the award is not supported by the record. The consultant will not receive any economic benefit as a result of Springfield Armory's award, because the proposed Springfield Armory hammer design under this procurement is that of another specific designated hammer producer, and not the consultant's trademarked hammer design that is allegedly the subject of the settlement agreement. The protester takes the position that any hammer with an

oval style design is one of the consultant's hammers, the sale of which would allegedly result in an economic benefit to the consultant under the terms of the settlement agreement. ProGun Aug. 3, 1998 submission at 1. However, the record includes definitive assessments by both the chief contracting officer and the technical advisor on this procurement that none of the pistols that Springfield submitted for testing use the consultant's hammer. FBI July 24, 1998 submission at cover letter and Tab 1. In addition, Springfield Armory's proposal specifically provides that it will use a hammer from a designated manufacturer, not the consultant, in production. In light of this, there is no basis to conclude that Springfield Armory's contract will result in the sale of the consultant's hammers.

Accordingly, any potential conflicts of interest involving the consultant, and any royalty payments that he may receive from Springfield as the result of it using his trademarked hammer design, are remote and speculative. Such speculative conflicts of interest do not amount to violations of the Federal Acquisition Regulation (FAR), which requires only that agencies avoid or mitigate "significant potential conflicts." FAR § 9.504(a)(2) (emphasis added). See also Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

In addition, with respect to the conduct of the evaluation, the record reveals that the consultant did not exert improper influence in the procurement on behalf of the awardee, or against the protester. The chief contracting officer states that the consultant's participation in this procurement was "closely monitored." FBI July 24, 1998 submission cover letter at 1. This same individual states that the FBI's technical advisor and the FBI's COTR were always involved when the consultant addressed technical issues, and that the COTR made all final decisions with regard to technical issues. The COTR submitted an affidavit in which he stated that the consultant assisted in running various phases of the testing, and was consulted if problems arose, but that the COTR made the final decision. COTR June 11, 1998 affidavit at 2. For example, in the event of a misfire during the field suitability test the COTR and the consultant would be consulted, but the decision concerning whether the misfire was due to the pistol or the ammunition was ultimately the COTR's.

In addition, the record contains affidavits from the SWAT team members that made up the SWAT evaluation committee for the field suitability test, which all state that at no time did the consultant attempt to influence their evaluation of the pistols. The evaluation of the pistols of both firms by the SWAT evaluation committee is fully documented, and each member of the SWAT evaluation committee specifically states that the final evaluation memorandum is reflective of his views. Accordingly, there is no basis to conclude that the consultant exerted improper influence in the procurement on behalf of the Springfield Armory or against ProGun.

Based on this record, we find that there is no evidence of the existence of any improper conflict of interest arising from the consultant's participation in the procurement.

The protest is denied.

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