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DECISION — THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C. 20548

FILE: B-212499.2 **DATE:** June 29, 1984

MATTER OF: Pinkerton Computer Consultants, Inc.

DIGEST:

Protest that awardee benefited from favorable treatment in the evaluation of its proposal because employees of awardee were ex-employees of contracting agency is denied where protester has not shown, and record contains no evidence of, "hard facts" showing actual bias.

Pinkerton Computer Consultants, Inc. (Pinkerton), protests the award of a contract to National Con-Serv, Inc. (NCSI), under request for proposals (RFP) No. DTNH22-83-R-05023, issued by the Department of Transportation, National Highway Traffic Safety Administration (NHTSA). Pinkerton alleges that the procurement was biased by friendships and working relationships between NHTSA employees and two NCSI employees who previously worked for NHTSA.

We deny the protest because the record before us contains no substantive evidence of bias in the award of the contract.

The RFP contemplated a cost-plus-fixed-fee contract for the design of an automatic data processing system for the National Driver Registration (NDR) program. Eight proposals were received. After initial technical evaluations and consideration of initial proposed costs, three offerors were selected for competitive range negotiations. Of those three offerors, NCSI had the highest initial technical score and the middle proposed cost. Pinkerton's proposal was the middle technically rated proposal and the lowest cost proposal. After best and final offers, the technical ranking remained the same, but NCSI became the low offeror with a proposed cost of $396,332 compared to Pinkerton's second low cost of $396,592. NHTSA found that NCSI's technically superior low cost offer represented the best value to the government and awarded it the contract.

Pinkerton alleges that the fact that two former NHTSA employees who worked in the NDR program area were now

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employees of NCSI and helped prepare its proposal (one was proposed as co-project manager) tainted the entire procurement process. Pinkerton claims that the two former NHTSA employees may have drafted the contract statement of work before they left NHTSA. Also, Pinkerton argues that personal and professional ties between the two former employees and NHTSA contracting personnel make an unbiased proposal evaluation unlikely.

Pinkerton has provided no substantive evidence showing bias in the award of the contract, but, as support for its position, points to NCSI's final cost coming in just below Pinkerton's. Pinkerton argues that if NCSI dropped its costs substantially between initial proposals and best and finals to just below Pinkerton's, it must have received cost information from NHTSA contracting personnel. Pinkerton was not provided NCSI's initial cost figure in response to the protest. Pinkerton also argues that the existence of and narrow wording of conflict of interest statements signed by the two ex-NHTSA employees and the president of NCSI lead to the conclusion that a conflict of interest does exist.

NHTSA reports that the former employees in question did not draft the statement of work for this contract before leaving NHTSA. Concerning the conflict of interest statements signed by the two former employees and the president of NCSI to the effect that they had never discussed this contract while the employees were working for NHTSA, NHTSA states that it was aware that award to NCSI might present potential conflict of interest problems. Consequently, it requested an opinion from its Office of Chief Counsel. That Office reviewed the activities of the ex-employees while they were employed by NHTSA and determined that there was no conflict of interest. The Office of Chief Counsel also suggested that the conflict of interest statements be executed. The Department of Transportation Office of Inspector General and Office of General Counsel reviewed the Office of Chief Counsel opinion and concurred.

Pinkerton's protest essentially revolves around alleged violations of the Ethics in Government Act of 1978, 18 U.S.C. § 207 (1982), which prohibits a former government employee from representing a firm before the government in connection with a particular matter, such as a contract, in which he participated personally and substantially while employed with the government. As Pinkerton recognizes, the Ethics in Government Act is a criminal statute, the enforcement and interpretation of which are the province of the Department of Justice. Sterling Medical Associates, B-213650, January 9, 1984, 84-1 C.P.D. ¶ 60. However, our Office will examine the record in regard to allegations of Ethics in Government Act violations to determine whether the alleged conflict of interest resulted in bias on behalf of the contract awardee. Sterling Medical Associates, B-213650, id. at 3. In doing so, our standard of review is that we will overturn an agency determination concerning conflict of interest only when the protester shows that the determination is unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94. In meeting this burden of proof, the protester must establish the existence of an actual conflict of interest; mere inferences of actual or potential conflict are not sufficient. Culp/Wesner/Culp, B-212318, December 23, 1983, 84-1 C.P.D. ¶ 17.

The allegations and facts in this case are very similar to those in CACI-Federal v. United States, 719 F.2d. 1567 (1983), in which the Court of Appeals overturned a Claims Court finding of conflict of interest and bias in the award of a government contract. The Court of Appeals found that the Claims Court had erred by ascribing evil motives to government contracting personnel in the award of the contract on the basis of their professional and social relationship with the awardee's vice president, who was an ex-colleague. The Court of Appeals found that the appearance of conflict and the opportunity for bias were not sufficient to overturn the award of the contract in the absence of "hard facts" showing actual bias. We find that Pinkerton has not shown with "hard facts" that a conflict of interest existed which biased the procurement in favor of NCSI. Pinkerton's allegations are mere speculation. NHTSA denies that the former NHTSA employees had any input in drafting the statement of work, and there is no evidence in the record suggesting that they did. Also, while NCSI did lower its proposed costs in its best and final offer, there is no evidence that the closeness of its costs to Pinkerton's is anything more than coincidence. Best and final offers were all due at the same time. As is common in negotiated procurements, all three offerors in the competitive range lowered their proposed costs in similar proportions in their best and final offers. Additionally, NCSI justified the reduced costs, which were related to specific elements of its cost proposal. Also, all cost proposals were audited. Finally, the fact that NCSI's costs were slightly lower than Pinkerton's does not appear to be the deciding factor in the award of the contract; rather, NCSI's technical superiority seemed to be the most important factor.

While we agree with Pinkerton that the conflict of interest statements are narrowly worded, we do not view that as evidence that a conflict exists. The fact that the statements were executed at all was adequately explained by NHTSA.

We understand that Pinkerton was somewhat hindered in its attempt to show a conflict of interest, because some of the materials concerning the evaluation of proposals were withheld from it by NHTSA under Freedom of Information Act exemptions. However, we have examined the record of proposal evaluations and discussions, and we have discerned no evidence of bias in the award of this contract.

Milton J. Socolar

Acting Comptroller General
of the United States