

**DECISION**

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

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**FILE:** B-218457 **DATE:** July 19, 1985  
**MATTER OF:** R. W. Beck & Associates

**DIGEST:**

Request for proposals for study of Guam Power Authority excluded "offerors who, within the last seven years, have had a contract with the Guam Power Authority to study the electric utility power system on Guam." Since protester's 1978 study contract with Guam was similar to contemplated contract, and protester would be required to evaluate 1978 contract report as part of contract effort under present procurement, GAO cannot question procuring agency's view that protester should not be permitted to participate in procurement in the interest of obtaining current, independent study of Authority. Protester also could not substitute new employees who had not participated in prior study in attempt to eliminate exclusion since new employees would still know identity of prior study which they would have to review under contemplated contract.

R. W. Beck and Associates (Beck) protests its exclusion from the competition for the award of a Department of the Interior (Interior) contract to "identify financial, management and service criteria for the Guam Power Authority (GPA) and recommend a plan for takeover by the GPA of island-wide power responsibilities."

We deny the protest.

Interior excluded Beck from participating in the procurement under paragraph (4), Organizational Conflicts of Interest, of the request for proposals (RFP) which was issued on March 13, 1985 for this work. That paragraph reads:

"Proposals shall not be considered from offerors who, within the last seven (7) years, have had a contract with the U.S. Navy Public Works Center on Guam or with the Guam Power

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Authority to study the electric utility power system on Guam."

Specifically, Interior's contracting officer informed Beck in March 1985 that the work performed by Beck for GPA during the past 7 years was of a "similar nature to that required under the RFP" and that, therefore, a "proposal from [Beck] will not be considered."

Interior explains that the solicitation provision under which Beck was excluded stems from a "directive by the U.S. Congress in [the conference] report . . . on the Continuing Resolution Act for Fiscal Year 1985 appropriations." Interior states that the referenced Congressional report details the pertinent history of electric power generation on Guam as well as the work to be done under this contract, as follows:

"Bill language concerning the transfer of power facilities on Guam has not been included at this time in lieu of the following directive of the managers:

"On October 5, 1972, the Department of the Navy and the Guam Power Authority (GPA) entered into an agreement which provided for the pooling of power production and transmission systems and for an equitable sharing of costs. The ultimate objective of this agreement was to transfer the control of the island-wide power production and transmission systems to the Guam Power Authority after GPA had demonstrated the capability to successfully operate the system. The Department of the Navy then would become a customer of GPA.

"Because GPA's financial viability has been tenuous, primarily caused by the Guam legislature's interference in rate setting, the military has been reluctant to terminate the existing arrangement. It is essential that the military operations on Guam have an assured adequate supply of electric power. Therefore, the managers believe that an independent rate setting body needs to be established in Guam before the power pool agreement is terminated, and the financial condition of GPA must be monitored carefully.

. . . . .

"It is the intent of the managers to see the customer-supplier relationship established. The Secretaries of Interior and Navy shall commission an independent third party in coordination with GPA to identify financial management and service criteria for GPA, and recommend a plan, with performance standards and milestones, for takeover by GPA of island-wide power responsibilities. In addition, the Independent third party shall insure that the plan addresses adequately the specific minimum power required now and for the next twenty years by any Department of Defense Agency or facility currently sited on Guam. The Independent third party will judge when the plan's performance standards and milestones are met, and shall complete the plan and present it to the House and Senate Committees on Appropriations within 12 months of the enactment of this Act." (Emphasis supplied.)

Interior argues that:

". . . R. W. Beck has aligned itself with the GPA on a list of study contract since 1978, involving suggestions for implementing the transfer of operations or evaluation of GPA management and operations with recommendations for improving same, GPA position classification and salary administration, assistance in amendment of the Power Pool Agreement, and general counseling services to GPA, including rate studies, cost of service studies, and revisions to retail rates. The GPA has paid over \$400,000 for those studies since 1978. These studies were performed over a long period of time for and about the GPA."

Given Interior's view of Beck's relationship with GPA over the past 7 years, Interior states that it had no alternative--even conceding that the firm is otherwise objectively professional and unbiased--other than to exclude Beck from consideration for award as not being the "independent third party" sought to perform the study. For example, Interior argues that a comparison of Beck's 1977 contract with GPA and the current solicitation "reveals the extensive overlap of the two procurements." Interior also argues that, once the contract under this RFP is awarded, the contractor will be furnished with "prior reports and studies concerning the Power Pool Agreement" in order for the "contractor to review that information in performing

this contract." Consequently, Interior argues that, if Beck were to be the successful contractor, Beck would be in the untenable position of reviewing its own prior report to GPA and the "success of recommendations" which Beck made under the contract in "determining the GPA's readiness to assume island-wide power responsibilities"--a determination which is obviously key, so Interior says, to the "takeover" plan which the contractor is charged with recommending.

Beck insists, however, that its prior work for the GPA "involved only a continuation or modification to the existing Power Pool Agreement and did not involve an evaluation of contractual and ownership relationship" and argues that the present RFP is for different work--"to evaluate various contractual and ownership relationships as an alternative to the present Power Pooling Agreement."

In reply, Interior notes that in a 1978 study which Beck prepared for the GPA, Beck stated (in Section II, page 1 of the study contract) that the "ultimate intent of . . . [its effort was] to provide a contractual vehicle that would assist [GPA] to develop into the basic electric utility on the island and operate the IWPS [Island Wide Power System]"; moreover, Beck stated in Section II, page 7 of the study contract that "in anticipation of the transfer of control [to GPA] in the reasonably near future, a program for accomplishing same should be initiated." Thus, Interior argues, the objectives of the RFP would be partially or entirely accomplished by Beck's prior recommendation; that is, a resulting contract whereby GPA operates and maintains the power plant and the control of the power system would be transferred to GPA with the result that the Navy would become a customer of GPA.

Interior also notes that the general manager of GPA, in a letter dated April 16, 1985, has expressed the view that, given Beck's prior consulting work involving, in part, the "development of different operating scenarios in relation to the Power Pool Agreement," there "[could] be possible repercussions" if Beck were to do the proposed work and that it was "GPA's intention . . . to [avoid] all possibilities of an adversarial relationship between the Navy . . . and the GPA." The GPA representative further stated that the "only way" to carry out its intention would be to use a contractor who has not dealt with GPA and the Navy within the last 7 years. A representative of the Navy has also joined in Interior's position in the case by arguing that Beck should

be excluded because it has "previously been involved in . . . financial, management, [and service analysis] and [has made] recommendations to GPA . . . ."

The responsibility for determining whether a firm has a conflict of interest and to what extent the firm should be excluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 C.P.D. ¶ 17. Further, it is also established that a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable procurement regulations, when the needs of the agency or the nature of the procurement dictates the use of such restrictions even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94.

Notwithstanding Beck's position that its past work for the GPA and the present work contemplated under the RFP are markedly different, it seems clear that the work aims of its prior contract do overlap the aims of the present RFP. We agree with GPA that the stated objectives, quoted above, of Beck's prior contract arguably relate to the same "plan for takeover by the GPA of the island-wide power responsibilities" ultimately contemplated under this RFP.

Although Beck argues that the specific recommendations it made in the 1978 contract were merely for specific "changes and improvements and did not relate to the above general objectives," Interior points out that embedded in these recommendations was a conclusion that GPA had successfully operated the power plants in question for a certain period of time such that a transfer of control of one of the plants to GPA was recommended by Beck. This conclusion is related to the present RFP which requires the contractor to review GPA's performance relative to industry standards.

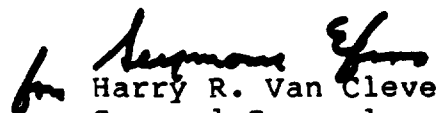
Other conclusions Beck made in its 1978 study which the contractor under the present RFP is also asked to make relate to the adequacy of GPA's "spinning reserve capacity" and the general adequacy of GPA's management structure including operations, generation, engineering, purchasing and stores, and personnel and safety departments.

Given the above similarities in work requirements, it seems clear that, if Beck were awarded the contract, it would surely have to evaluate at least some of its prior

conclusions and recommendations--given Interior's requirement that the contractor review prior reports on the GPA. In light of the clear need to obtain the views of an independent third party on the GPA, we cannot question Interior's position that this circumstance should not be permitted despite Beck's repeated assurances, which we do not question, that it is a professional organization.

Finally, Beck argues that, even if Interior had a legitimate concern about Beck's possible bias, Beck should have been allowed to propose "personnel with relevant experience but with no previous experience with GPA" rather than being totally excluded as a company from the procurement. It is Interior's apparent position, however, that it would still be inappropriate for Beck employees to review the company's prior findings even if the reviewing employees had no previous association with the GPA. We cannot disagree with Interior's position since these new Beck employees would still know the identity of the prior Beck report which they would be required to review.

The protest is denied.

  
Harry R. Van Cleve  
General Counsel