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DECISION

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

FILE: B-219666 **DATE:** December 5, 1985

MATTER OF: Defense Forecasts, Inc.

DIGEST:

1. An agency may reject an offer, which proposes a special government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the RFP.

2. Even where discussions are conducted with the sole remaining offeror in the competitive range, no discussions need be held with the protester, who had previously been determined in the competitive range, in a case where the protester's offer proposing an agency employee as a major consultant is rejected because of a potential conflict of interest and the agency reasonably determines that the employee was a primary factor in the protester's high ranking and is integral to the protester's proposal, which cannot readily be changed through negotiations.

Defense Forecasts, Inc. (DFI), protests the rejection of its proposal under request for proposals (RFP) No. 85-06, issued by the United States Arms Control and Disarmament Agency (ACDA). We deny the protest.

The RFP requested proposals for a research project on alternative approaches to arms control. Thirteen proposals were received and three were found to be within the competitive range. The ACDA source selection board ranked the three competitive proposals in the following order: (1) Systems Planning Corporation (SPC); (2) DFI; (3) The BDM Corporation (BDM).

Although this matter was not mentioned in the solicitation, questions were raised by the board regarding potential conflicts of interest in making award to either SPC or DFI. The board was concerned over SPC's use of the National Institute of Public Policy (NIPP) as its major subcontractor because the NIPP's president is a member of ACDA's General Advisory Committee. See section 26 of the Arms Control and Disarmament Act, 22 U.S.C. § 2566 (1982). The board also was concerned over DFI's proposed use of Thomas J. Hirschfeld as a major consultant. Mr. Hirschfeld periodically performs consultant work for ACDA and is currently a special government employee of ACDA. ACDA's contracting officer and counsel determined that there would be no actual conflict of interest in making award to any of the three competitive offerors. However, they recommended that the Director of ACDA make a policy decision on this matter because of the possible appearance of a conflict of interest if award were made to SPC or DFI.

The Director of ACDA recommended BDM for selection as the only competitive offeror which did not have an apparent conflict of interest. He found that the subcontract and consultant arrangements of SPC and DFI were a primary factor in their high technical evaluations and were integral to their proposals. He based his decision to reject SPC's and DFI's proposals on Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1984), which provides:

> ". . . a contracting officer shall not knowingly award a contract to a Government employee or a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees."

DFI protested to our Office that its proposal should not have been rejected because DFI is not "owned or controlled" by Mr. Hirschfeld or any other government employee and, thus, did not fall under the FAR, § 3.601, proscription. DFI contends that in the absence of an applicable statute, regulation or solicitation provision, offerors cannot be rejected for a potential conflict of interest. DFI further states that its proposal can only be rejected if there are "hard facts" showing an "actual" conflict of interest--a situation which ACDA concedes does not exist--and that a proposal cannot be rejected on the basis of a theoretical or potential conflict of interest. DFI finally contends that this matter should have been negotiated with it in any case, particularly since negotiations were admittedly conducted with BDM to revise its proposal after it was selected. SPC did not protest the rejection of its proposal.

We have consistently held that the responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency; we will overturn such a determination only when it is shown to be unreasonable. Iris International, Inc., B-216084.2, May 10, 1985, 85-1 C.P.D. ¶ 524. It is also established that a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictates the use of such restriction, even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. R.W. Beck & Associates, B-218457, July 19, 1985, 85-2 C.P.D. ¶ 60.

Mr. Hirschfeld, DFI's consultant, is an independent consultant who had reportedly never previously been employed in any capacity by DFI. His work as a special employee for ACDA has been sporadic; he had performed no work for a year before the proposal was submitted although he performed some work for ACDA after proposal submission. It appears that none of Mr. Hirschfeld's work directly related to the subject matter of this contract, and that he was not in a position to exercise any authority or influence at ACDA over this procurement. There is no allegation that Mr. Hirschfeld's activities in this case violate the sanctions contained in 18 U.S.C. §§ 205, 208 (1982) against improper outside employment by government employees. Moreover, ACDA is not concerned with "organizational conflict of interest" problems in making an award to DFI. That is, ACDA did not find that DFI or Mr. Hirschfeld had any special inside information which would give DFI an

unfair competitive advantage. Moreover, ACDA is not concerned about DFI's objectivity in performing the contract work. FAR, subpart 9.5 (1984).

The statutes governing the conduct of government employees do not expressly prohibit contracts between the government and its employees except where the employee acts for both the government and the contractor in a particular transaction or where the service to be rendered is such as could be required of the government in his capacity as a government employee. 18 U.S.C. §§ 205, 208 (1982); Ernaco, Inc., B-218106, May 23, 1985, 85-1 C.P.D. ¶ 592. FAR, § 3.601, clearly does not preclude the acceptance of DFI's proposal in this case, since DFI is not owned or controlled by a government employee. The policy statement in the second sentence of the regulation only explains the reasons for this preclusion and does not specifically prevent government employees from serving as independent consultants to government contractors which they do not own or control.

Nevertheless, the policy against contracting with government employees is deep-seated and longstanding because such awards invite criticism as to alleged favoritism and possible fraud. See 55 Comp. Gen. 681 (1976) and cases cited therein. Since such allegations or beliefs by competitors for government contracts can adversely affect the integrity of the procurement system, we have held that awards to firms controlled by government employees should not be made except for the most cogent reasons. 41 Comp. Gen. 569, 571 (1962); Capitol Aero, Inc., 55 Comp. Gen. 295 (1975), 75-2 C.P.D. ¶ 201. Contrast Chemonics International Consulting Division, 63 Comp. Gen. 14 (1983), 83-2 C.P.D. ¶ 426, and Edward R. Jareb, 60 Comp. Gen. 298 (1981), 81-1 C.P.D. ¶ 178 (government policy on proposing former government employees). We have drawn no distinctions between special and regular government employees with regard to the application of this policy. Ernaco, Inc., B-218106, supra.

ACDA reports that it is a very small independent agency, which significantly aggravates the allegations of conflict of interest if its employees can be proposed by offerors on competitive solicitations. In this regard, ACDA references BDM's comments on the DFI protest, which include a number of allegations about the "cozy" relationship, including access to inside information, that Mr. Hirschfeld had with ACDA officials. These allegations are denied by ACDA and DFI.

The nature of the appearance of a possible conflict of interest in making award to firms owned or controlled by government employees as compared to award to firms which propose current government employees of the procuring agency as major subcontractors or consultants can be reasonably found to be indistinguishable. The apparent pecuniary interest of the government employees and the potential adverse affect on the integrity of the procurement system may be found to be the same in both situations. Therefore, we believe that it is within ACDA's discretion to establish a stricter policy with regard to the eligibility for award of firms which propose to use ACDA employees as major consultants on ACDA procurements. Cf. 41 Comp. Gen. 569, 570, supra (an agency may reasonably establish a policy which precludes the use of government employees as subcontractors on its contracts). Contrast B-144482, Feb. 20, 1961 (voucher for contract performance may be paid to a contractor which used a government employee as a major subcontractor where the employee received assurances from the agency before performing the subcontract work that the work was not illegal or improper.)

Due to the type of the apparent conflict of interest, which concerns the activities of a current government employee, no "hard facts" of an actual or potential conflict of interest need be shown for an agency to reject an affected proposal because the "policy is intended to avoid even the appearance, much less the fact, of favoritism or preferential treatment." Valiant Security Agency, B-205087, Dec. 28, 1981, 81-2 C.P.D. ¶ 501. Contrast, CACI Inc.-Federal v. United States, 719 F.2d 1539 (Fed. Cir. 1983) (protester must show "hard facts" of the likelihood of a conflict of interest to overturn an agency determination to make an award).

DFI contends that since it was not given notice of ACDA's restrictive policy on proposing government employees, that policy cannot be retroactively employed to reject DFI's proposal. FAR, § 9.504 (1984), requires agencies to determine what potential conflicts of interests may exist in a procurement and to include notice of such restrictions in the solicitation. In this case, the RFP did not indicate that proposals could be rejected because of potential conflicts of interest. ACDA claims that FAR, § 9.504, is inapplicable since it only concerns organizational conflicts of interest. However, FAR, § 3.603(b) (1984), provides that the contracting officer shall comply with FAR, subpart 9.5, with regard to the application of agency policy on the use

of agency employees by government contractors. ACDA explains that it did not put a specific provision in the solicitation announcing its policy on proposing government employees because no previous offerors on its competitive solicitations had proposed using government employees. ACDA proposes to specifically announce this policy in future solicitations.

Ordinarily, proposals cannot be rejected because of an appearance of a conflict of interest unless there is a solicitation provision or other notice in laws or regulation which so provides. PRC Computer Center et al., 55 Comp. Gen. 60, 81 (1975), 75-2 C.P.D. ¶ 35. However, in appropriate circumstances, we have recognized the propriety of rejecting bids or proposals because of an actual or potential conflict of interest, even though the affected offeror or bidder had not been previously apprised that its bid or proposal may be rejected on this basis. See Nelson Erection Company, Inc., B-217556, Apr. 29, 1985, 85-1 C.P.D. ¶ 482; LW Planning Group, B-215539, Nov. 14, 1984, 84-2 C.P.D. ¶ 531; Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94.

We believe the instant situation is one where no prior notice is necessary. DFI was cognizant of Mr. Hirschfeld's status with ACDA when it submitted its proposal and did not inquire of ACDA regarding the propriety of proposing him as a principal consultant. In our opinion, DFI reasonably should have been aware that proposing a government employee could present a problem. ACDA acted in good faith and has a reasonable basis for the application of its restrictive policy on the use of ACDA employees. Consequently, we find that ACDA's failure to announce this restriction in the solicitation would not justify resolicitation of this requirement or nonapplication of the policy to DFI.

Finally, DFI argues that since ACDA conducted discussions with BDM after selection concerning its staffing mix and cost proposal, ACDA was required to conduct discussions with all offerors within a competitive range. DFI states that had it been apprised of ACDA's concern with Mr. Hirschfeld, it would have replaced him with an equally competent consultant.

However, ACDA's Director, in selecting BDM, concluded that Mr. Hirschfeld was a primary factor in DFI's high ranking and an integral part of DFI's proposal, which could not readily be changed through negotiations. That is, ACDA eliminated DFI from the competitive range because the apparent conflict of interest could not be resolved through meaningful discussions without changing an integral part of DFI's proposal.

We agree that changing DFI's proposal to replace Mr. Hirschfeld would be a major change to its proposal. DFI has provided no evidence, other than its bare assertion, that it would be able to provide a consultant with the same strengths and reputation of Mr. Hirschfeld, as evaluated by ACDA, or that its proposal would not have to be significantly modified to accommodate the abilities and strengths of an alternative consultant. Therefore, we conclude that ACDA's determination to hold no further discussions with DFI was reasonable.

Since SPC was eliminated from the competitive range for the same basic reason and the other offerors had already been eliminated, only BDM remained in the competitive range. A procuring agency may reverse its competitive range decision, eliminating a proposal formerly considered to be within the range, if it later reasonably determines through discussions and/or evaluation that the proposal is unacceptable, even if only one proposal then remains in the competitive range. SDC Integrated Services, Inc., B-195624, Jan. 15, 1980, 80-1 C.P.D. ¶ 44. WASSKA Technical Systems and Research Company, B-189573, Aug. 10, 1979, 79-2 C.P.D. ¶ 110. In such circumstances, the unacceptable offeror need not be provided an opportunity to submit a revised proposal. Pettibone Texas Corporation, B-209910, June 13, 1983, 83-1 C.P.D. ¶ 649.

Since DFI's protest is denied, its claim for proposal preparation costs and attorney's fees is denied. 4 C.F.R. § 21.6(d) (1985); Santa Fe Engineers, Inc., B-218268, June 3, 1985, 85-1 C.P.D. ¶ 631.

Harry R. Van Cleve
General Counsel