

DECISION

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

B-220801

FILE:**DATE:** January 31, 1986

Cooley Container Corporation

MATTER OF:**DIGEST:**

1. Low bid was properly rejected where agency had reasonable basis for conclusion that firm was substantially owned or controlled by a government employee since employee represented himself as president of the firm during preaward survey and in the firm's bid. Although protester believes it should have been given an opportunity to refute preaward survey, the regulations do not require that a contracting officer discuss a preaward survey with a prospective contractor.
2. Rule prohibiting award of government contracts to federal employees is intended to avoid even the appearance of favoritism or preferential treatment by the government and by its terms applies to firms owned or controlled by a government employee, not just by an employee of the contracting agency.

Cooley Container Corporation (CCC) protests the determination by the Army Troop Support Command that CCC is ineligible for award of a contract for a quantity of oil sample bottles under invitation for bids (IFB) No. DAAJ10-85-B-A230, because that firm was substantially owned or controlled by a government employee. The protest is denied.

Since CCC was the apparent low bidder when bids were opened on July 16, 1985, the contracting officer requested a preaward survey of the firm. The preaward survey report dated September 10 recommended that CCC be found ineligible for award because its financial capacity was unsatisfactory and because its president, Mr. James V. Cooley, was a full-time employee of Wright Patterson Air Force Base. The

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contracting officer concluded that an award to CCC would violate the Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1984), which prohibits an award to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees. On September 16, the contracting officer awarded the contract to the second low bidder and advised CCC that it was ineligible for award because of the conflict of interest.

CCC argues that there is no conflict of interest because Mr. Cooley's wife, Mrs. Joanna D. Cooley, owns all the stock and controls the corporation and is not a government employee. CCC also maintains that Mr. Cooley's involvement in the firm did not cause a conflict because it was temporary, lasting only while Mrs. Cooley was hospitalized for surgery and during her recovery. According to CCC, although Mr. Cooley owned 10 percent of the outstanding stock when the firm was formed in 1983, on December 8, 1984, Mr. Cooley resigned as an officer and director of the corporation and transferred his shares to Mrs. Cooley. CCC maintains that, in March 1985, Mrs. Cooley transferred all stock in the corporation to Mr. Cooley to be held in trust and empowered Mr. Cooley to act as a director of the firm until she recovered from surgery. Further, CCC maintains that Mr. Cooley resigned his position and returned ownership and control of the corporation to Mrs. Cooley on September 10, before the contract was awarded on September 16. Finally, CCC contends that since Mr. Cooley is employed by the Air Force and not the Army, he could not have influenced this Army procurement.

In response to CCC's explanation, the Army states that CCC did not tell the Army of Mrs. Cooley's involvement with the firm until its letter dated September 28 objecting to the rejection of its bid. During the preaward survey and until after the award, Mr. Cooley represented the firm and did not indicate that he was acting only in a temporary capacity. For instance, during the preaward survey, Mr. Cooley represented himself as the president of the firm, and indicated that he would also be in charge of quality control. The Army also points out that Mr. Cooley certified in CCC's bid when it was signed in April that he was the president of the firm. The agency further notes that in the bid Mrs. Cooley certified that she was vice president. Finally, the Army learned from the Ohio Secretary of State's Office that Mr. Cooley was the sole incorporator of the firm and from Ohio's state tax office

that Mr. Cooley represented himself as the president, secretary and treasurer of the firm when the latest state tax form was filed. Based on its investigation, the Army maintains that CCC's explanation lacks credibility.

The regulation relied upon by the Army implements a well established policy that contracts between the government and its employees are undesirable because they invite criticism and give rise to the appearance of favoritism and fraud and should be authorized only in exceptional cases where the government's needs cannot reasonably be otherwise supplied. Ernaco, Inc., B-218106, May 23, 1985, 85-1 CPD ¶ 592. The responsibility for determining whether a firm competing for a contract should be excluded from the competition in order to avoid actual or apparent favoritism or preferential treatment primarily rests with the procuring agency so long as its determination is reasonable. J. Allen Grafton, B-212986, Mar. 5, 1984, 84-1 CPD ¶ 263.

We believe that at the time of award the Army had a reasonable basis for its conclusion that CCC was substantially owned or controlled by a government employee. Since Mr. Cooley represented himself as president of the firm during the preaward survey and in the firm's bid, it was reasonable to conclude that he controlled the firm. Further, although CCC believes that it should have been given an opportunity to refute the preaward survey, and while the contracting officer could have advised CCC that it could not receive the award if Mr. Cooley actually controlled the company, the regulations do not require that a contracting officer discuss a preaward survey with a prospective contractor. FAR, 48 C.F.R. § 9.105-3(b); Manufacturing Systems International, Inc., B-212173, May 30, 1984, 84-1 CPD ¶ 586.

CCC also contends that since Mr. Cooley works for the Air Force he is in no position to influence this Army procurement. The conflict of interest policy is, however, intended to avoid even the appearance of favoritism or preferential treatment by the government towards a firm competing for a government contract and by its terms applies to firms owned or controlled by any government

employee, not just by an employee of the contracting agency. See FAR, 48 C.F.R. § 3-601; Valiant Security Agency, B-205087.2, Dec. 28, 1981, 81-2 CPD ¶ 501. The fact that Mr. Cooley does not work for the Army, therefore, is of no consequence.

The protest is denied.

for Seymour E. ...
Harry R. Van Cleve
General Counsel