The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RCA Service Company

File: B-224366

Date: August 28, 1986

DIGEST

Where the protester fails to show that a competitor's employment as a consultant for an unrelated procurement of a former employee of the procuring agency who had participated in the initial stages of proposal evaluation in any way influenced the procurement, then protester has failed to carry its burden of affirmatively proving that the procurement was tainted by conflict of interest.

DECISION

RCA Service Company, a division of RCA Corporation (RCA), protests any award of a cost-plus-award-fee contract for base operation support services and related materials to Serv-Air, Inc. (SAI), under request for proposals (RFP) No. DAAB07-85-R-J010, issued by the Army Communications-Electronics Command, Fort Monmouth, New Jersey. RCA alleges that any award to SAI would be tainted by a conflict of interest because a current consultant of SAI held an important position relating to the procurement with the Army and that therefore SAI should be excluded from further consideration for award.

We deny the protest.

BACKGROUND

The Army issued the RFP on July 25, 1985, and six proposals were received by October 7, 1985, the closing date for receipt of proposals, including proposals from RCA and SAI. A Source Selection Evaluation Board (SSEB), consisting of three evaluation teams (technical, management and cost/pricing) was officially convened by the Army on October 8, 1985 to evaluate proposals. Three sets of questions were sent by the evaluators to the six offerors for clarification purposes on November 14, 1985, December 6, 1985, and January 6, 1986. All six offerors responded to each set of questions with revisions to their proposals.

Following this initial evaluation of proposals, a military member of the technical evaluation team participated in several employment interviews that had been scheduled by a job search firm in Alexandria, Virginia, on January 24, 1986. This individual had previously submitted an unqualified resignation of his commission in November, 1985, which was approved by the Army on January 8, 1986, with a release date of May 26, 1986. Shortly after the interviews, this person became aware that General Electric, one of the firms with which he had interviewed, was conducting merger negotiations with the protester, RCA. On February 19, 1986, he consulted with the Base Standards of Conduct Counselor concerning the matter. As a result of this meeting, he disqualified himself from performing official acts relating to General Electric and four other listed firms. On that same date, the chairman of the SSEB formally released this individual from the technical evaluation team, directed the return of all papers, notes, and documents concerning the evaluation, and reminded him that he could not reveal any information to which he had access while he was a member of the technical evaluation team. After his removal from the technical evaluation team on February 20, he had no further access to evaluation documents or information concerning the evaluation process. Further, he had never had access to the cost proposals of the offerors since cost evaluation was performed by a different team.

On April 16, 1986, the contracting officer sent notices to four firms that they were not found to be in the competitive range. Discussions were held with the remaining offerors on April 29, and best and final offers were received on May 9. The Army evaluated best and final offers and found the proposals of RCA and SAI to be acceptable. While the solicitation requires that award be made to the acceptable offeror that is lowest in cost, no award has yet been made.

In the meantime, on April 20, 1986, approximately 2 months after the employee in question was released from the technical evaluation team, he sent several resumes soliciting employment as a consultant to several firms, including SAI. On April 23, he was interviewed by an SAI representative. At that time, he informed the SAI representative that his consulting activities must be unrelated to the Fort Monmouth procurement and that he could not discuss any aspect of that procurement with SAI representatives. The SAI representative then suggested that he obtain a "written ruling" on the propriety of accepting a consulting job, even on an unrelated procurement, with SAI.

The employee then had another meeting with the Standards of Conduct Counselor who informed him that there was no need to obtain a written ruling since the lack of conflict of interest was apparent. However, the Counselor did caution him not to discuss the Fort Monmouth procurement with SAI representatives. In early May, 1986, SAI hired him as a consultant for an unrelated procurement at Fort Knox. He again consulted with the Deputy Standards of Conduct Counselor who informed him by letter dated June 11, 1986, that his proposed employment was lawful and proper. In this regard, the record also contains notarized statements from all SAI personnel involved with preparation of SAI's proposal that they never received directly or indirectly any information from the former officer concerning the Fort Monmouth procurement.

CONTENTIONS BY RCA

RCA generally argues that its right to a fair and open competition would be compromised unless SAI is disqualified from consideration for award of the contract. According to RCA, the former military officer's "demonstrated knowledge" of the strengths and weaknesses of competing proposals and his employment by one of the competitors, SAI, prior to the submission of best and final offers, are "hard facts" which justify disqualification of SAI from the competition. Additionally, RCA posed a series of questions to the Army concerning the individual's conduct which the Army specifically answered in its report. Nevertheless, RCA apparently remains skeptical that the procurement was untainted by conflict of interest or at least by appearance of impropriety.

ANALYSIS

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 CPD ¶ 17. Further, our traditional view has been that offerors should not be excluded because of a "theoretical" conflict of interest, Cardiocare, a division of Medtronic, Inc., 59 Comp. Gen. 355 (1980), 80-1 CPD ¶ 237, and we have applied this standard specifically to a protester's allegations of impropriety involving a former government employee assisting a proposed awardee with proposal preparation. See Culp/Wesner/Clup, supra. This standard is consistent with the decision of Federal Circuit in CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), in which the court reversed a judgment of the

United States Claims Court enjoining an award because the lower court's inferences of actual or potential wrongdoing were based upon "suspicion and innuendo" rather than "hard facts."

However, as we stated in NKF Engineering, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638, there is no requirement that an "actual" impropriety or conflict of interest must be established before an agency may exclude an offeror from the competition to protect the integrity of the procurement system. Our role is simply to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety does or does not warrant exclusion of a firm. Id. A reasonable basis must include more than mere innuendo or suspicion. Id.

On the basis of the record before us, we find a reasonable basis for the Army's determination that the former government employee's association as a consultant with SAI does not warrant the exclusion of SAI from the competition. The former government employee was retained by SAI as a consultant on a totally unrelated procurement more than 2 months after he severed all ties with the Fort Monmouth evaluation panel. Generally, the incidence of a former government employee's subsequent employment with an awardee is not, alone, a sufficient basis to disturb an otherwise proper award. Walker's Freight Line, B-220216.2, Jan. 15, 1986, 86-1 CPD ¶ 45. Therefore, we do not think that acting as a consultant to SAI on an unrelated procurement, standing alone, is sufficient to warrant exclusion of SAI. RCA also relies on a statement by one of its representatives who allegedly had seen the employee copying evaluation documents in his possession in early March 1986. Not only does the employee categorically deny this but the Army flatly states that technical evaluation was not completed until April 12, and that the employee did not have access to the technical evaluation results. There is otherwise no evidence in the record whatsoever to indicate that information concerning the initial evaluation was improperly revealed to any SAI representative. Given the early removal from the evaluation panel and the unrelated nature of his employment as a consultant with SAI, we have no basis to conclude that the Army acted unreasonably in not excluding SAI from the competition since the likelihood of an actual conflict of interest or impropriety was not evident.

In any event, the Army reports that final evaluation of best and final offers resulted in a higher technical rating for RCA than for SAI. Since the individual in question never had access to cost information, we fail to find any indication of

prejudice in the ultimate selection for award regardless of the protester's allegations.

Finally, RCA has requested reimbursement for the costs it incurred in preparing its proposal and pursuing this protest. Such costs are not recoverable where there has been no procurement impropriety. Feinstein Construction, Inc., B-218317, June 6, 1985, 85-1 CPD ¶ 648.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel