



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Dayton T. Brown, Inc.  
File: B-231579  
Date: October 4, 1988

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### DIGEST

Protest that proposed awardee's employment of a former agency employee as its program manager constitutes a conflict of interest which should disqualify the firm from the award is denied where the record does not show that any action by the former agency employee resulted in prejudice for, or on behalf of, the proposed awardee or establish violation of post-employment restrictions on government employees.

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### DECISION

Dayton T. Brown, Inc. (DTB) protests the award of a cost-plus-fixed-fee contract to National Technical Systems (NTS) under request for proposals (RFP) No. N00123-87-R-0998, issued by the Naval Regional Contracting Center, Long Beach, California, for the acquisition of services to test aircraft suspension and release systems, components, and associated support equipment. DTB contends that award to NTS violates the conflict of interest statutes and that discussions were held solely with NTS, making award on the basis of initial proposals improper.

We deny the protest.

The solicitation was issued September 3, 1987, as a small business set-aside. The testing is required to support test programs required under various other government contracts as well as development and engineering support efforts by the Pacific Missile Test Center (PMTTC), Point Mugu, California. The requirement is for a 1-year base period with two 1-year options. The services required by the solicitation are a continuation of services currently being performed by DTB under a contract awarded in 1984.

The RFP included four technical evaluation criteria, with these factors combined weighted more than cost. Technical was weighted 60 percent; cost was weighted 40 percent. The

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RFP also stated that as offers became more equal technically, cost would become more important. Offers were received from DTB and NTS. NTS proposed the employment of a former Navy employee as its program manager for the procurement. Prior to his retirement, the former Navy employee was the branch head of Integrated Systems in the Armament Systems Division of the PMTC, the requiring activity for this acquisition. DTB received a higher technical score than NTS, but both proposals were determined technically acceptable, and NTS, with the lower-cost proposal, was determined to have the more advantageous offer after it received the highest combined technical and cost score.

On March 17, 1988, a preaward survey was conducted at NTS with the former government employee present. No award was recommended. The survey found that, although NTS possessed the technical capability to perform the required engineering function, NTS currently lacked in-house capability to perform certain testing required by the RFP and questioned therefore its ability to timely perform the testing. The contracting officer apparently concurred with the no award recommendation and referred NTS' nonresponsibility to the Small Business Administration (SBA) which issued a certificate of competency (COC) on April 26. Based on information NTS provided to the SBA concerning NTS' alleged lack of testing capability, the SBA found that NTS had the necessary experience and could meet the specified requirements, that it could build the testing equipment in a timely manner, and that it had adequate facilities.

By letter dated April 27, the contracting officer formally advised DTB of the selection of NTS as the successful offeror. Subsequently, DTB filed a protest against NTS' status as a small business with the SBA. The SBA affirmed NTS' small business size by decision dated May 26. DTB was advised on May 31 of the agency's decision to award to NTS. DTB filed this protest with our Office on May 31.

DTB claims that the former Navy employee proposed by NTS was involved in the drafting of the instant RFP including the statement of work (SOW) and that he left the government in July 1987 to join NTS just weeks before the RFP was released. DTB further claims that the employee was a member of the evaluation team that reviewed the proposal of DTB under the predecessor contract. The protester is concerned that in evaluating DTB's proposal, the former employee had access to DTB's highly sensitive and proprietary information under the prior contract, including, for example, DTB's management approaches to the work, the cost impact of such approaches, facilities, employee expertise, direct labor

pricing, overhead and other costs and profits. Therefore, DTB contends that award to NTS would prejudice the protester and would result in a violation of 18 U.S.C. §§ 207(a) and 207(b) (1982), implemented by 5 C.F.R. §§ 737.5 and 737.7 (1988).<sup>1/</sup>

The Navy responds that the SOW in the instant RFP and the two previous contracts are similar and that the employee's involvement, if any, in the preparation of the SOW must necessarily have been very limited. The Navy argues that because the employee was not the contracting officer for these requirements and left the government before the issuance of the RFP, 18 U.S.C. §§ 207(a) and (b) do not apply.

Initially, we note that the record establishes that the employee was not a member of the evaluation team for the predecessor RFP which was awarded in 1984. The team consisted of engineers under the direct supervision of another individual whom the former employee did supervise.

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<sup>1/</sup> 5 C.F.R. § 737.5(a) summarizes the basic prohibition of 18 U.S.C. § 207(a) as follows:

"No former Government employee, after terminating Government employment, shall knowingly act as an agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government employee."

5 C.F.R. § 737.7(a) summarizes 18 U.S.C. § 207(b) as follows:

"No former Government employee, within two years after terminating employment by the United States, shall knowingly act as an agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within period of one year prior to the termination of such responsibility."

The former employee admits he was told of the conclusions of the evaluation team, but not any evaluation details. The record also shows that the employee retired on July 3, 1987, while the current RFP was in preparation and the RFP was formally issued on September 3. The former employee states in an affidavit that he does not have any knowledge of DTB's proposal strategy, management plan, cost analysis or other company-sensitive and proprietary data on the predecessor contract. The former employee also states that he did not participate in any way with the preparation of the SOW for the current RFP.

Our interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee during the award selection process. Wall Colmonoy Corp., B-217361, Jan. 8, 1985, 85-1 CPD ¶ 271. The mere employment of a former government employee who is familiar with the type of work required but not privy to the contents of the proposals or to other inside agency information does not confer an unfair competitive advantage. Regional Environmental Consultants, B-223555, Oct. 27, 1986, 66 Comp. Gen. \_\_\_\_\_, 86-2 CPD ¶ 476. Further, an exclusion for conflict of interest must be based upon "hard facts" and not mere "suspicion or innuendo." CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983); NKF Engineering, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638.

In view of the fact that the employee retired before the RFP was issued and that the evaluators gave DTB a higher technical score than NTS received, we cannot say that any role the former government employee may have played as a Navy employee resulted in an improper advantage to NTS. We further note that despite the former employee's proposed participation in the contract as program manager and his presence at the preaward survey team site visit, the preaward survey team recommended no award, and award was made to NTS only after the SBA granted a COC. Moreover, the former employee states that he does not have any knowledge of DTB's confidential or proprietary data on the predecessor contract. With regard to the former employee's involvement in the evaluation of the RFP in 1984, the record does not show any direct involvement in the evaluation. The former employee was not the immediate supervisor of the evaluation team, but was advised of the evaluation results. We fail to see how this information, if remembered 3 years later, would affect this competition. Thus, we see no "hard" evidence in the record that any action by the former employee resulted in prejudice for, or on behalf of, NTS in the award selection process. In fact, the record suggests that NTS

garnered no advantage during the award process from the employment of the former employee. Accordingly, we find no basis to conclude that the former employee improperly influenced the award selection.

DTB also asserts that NTS is ineligible for award because the employment of the former government employee violated post-employment restrictions on government employees. The post-employment restrictions cited by DTB prohibit a former employee from representing anyone else before the government in connection with a "particular government matter involving a specific party" if the individual had participated personally and substantially or had supervisory responsibility for that same particular matter as a government employee. See 5 C.F.R. §§ 737.5(a) and 737.7(a), *supra*. These post-employment restrictions proscribe representation by a former government employee under certain conditions. For example, the regulations specifically define representation under 18 U.S.C. § 207(a) as "acting as agent or attorney, or other representative in an appearance, or communicating with intent to influence."

Even assuming that the former employee's proposed employment under the contract is in connection with the same "particular matter involving a specific party" in which he participated as a government employee, the agency argues, and the protester does not dispute, that the former government employee had not represented NTS at any time during the award selection process. The record shows that the former government employee's hiring as program manager was contingent on award to NTS. Although the former employee was hired as a consultant to NTS to help prepare NTS's proposal, the record contains no evidence that the former employee represented NTS during the award selection process. In fact, the protester argues in its comments after the bid protest conference that its conflict of interest argument is directed at the retiree's post-award employment as program manager.

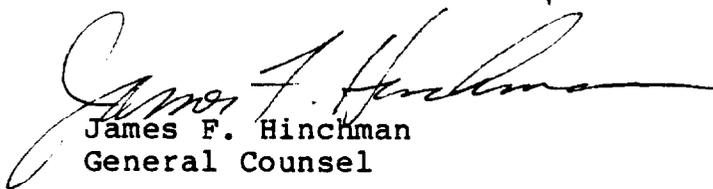
DTB argues that the former employee's proposed employment as program manager under the contract poses a conflict of interest since he will be representing NTS during contract performance. The agency states that the solicitation does not require the program manager to represent the contractor before the government and refers to the SOW which requires the program manager to "productively engage in and lead various . . . evaluation programs." While the protester speculates that at some point during performance of the

contract the former employee may be in the position of representing the company back to the agency, we will not disqualify a company from an award based on speculation as to the future conduct of an individual.

DTB in its conference comments also contends that a senior engineer allegedly proposed by NTS has indicated he does not plan to work on the project and that the agency will have to allow substitution of this individual through improper discussions solely with the awardee. The agency correctly points out, however, that even if this employee is not hired by NTS, a solicitation provision which will be included in the contract provides for contractor substitution of personnel provided the replacement offers the same qualifications established by the resumes of individuals originally proposed. Thus, the possible substitution of employees is a matter which can be resolved after the contract award without discussions during the selection process.

Finally, DTB further contends that the Navy and NTS engaged in improper discussions without providing a similar opportunity to DTB. The Navy denies the charge and there is no evidence in the record to indicate that NTS was afforded an opportunity to revise its proposal or otherwise provide information essential for determining the acceptability of its proposal. In short, DTB has provided no evidence to support speculation that NTS and the agency engaged in discussions and therefore has failed to carry its burden of proof. Cubic Defense Systems, Division of Cubic Corp., B-203597, Dec. 24, 1981, 81-2 CPD ¶ 493.

The protest is denied.

  
James F. Hinchman  
General Counsel