The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HLJ Management Group, Inc.

File: B-225843.3

Date: October 20, 1988

DIGEST

1. Awardee's employment of former agency employee, as a temporary consultant and ultimately as a permanent employee, does not disqualify firm from award by individual's former agency where there is no evidence that the person will be employed to work on the contract or that he improperly influenced the award.

2. Allegation that proposed award of contract for civilian mess attendant service resulted from improper political influence is without merit where there is no evidence in record to support allegation.

3. There is nothing wrong with requesting more than one round of best and final offers where a valid reason exists to do so. Changes in the number of dining facilities and clarification of requirements provide adequate justifications for further rounds of best and final offers.

DECISION

HLJ Management Group, Inc., protests the Department of the Army's decision to award a firm-fixed price requirements contract to Dragon Services, Inc. to provide civilian mess attendant service in certain facilities and full food service in various other facilities at Fort Bragg, North Carolina under request for proposals (RFP) No. DAKF40-87-R0016. Since 1980, HLJ has been providing mess attendant services at Fort Bragg under a contract awarded pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). We deny the protest.

The RFP was issued on November 7, 1986 as a 100 percent small business set-aside. The RFP provided that award would be based on the best overall proposal with consideration given to the stated evaluation factors. The three significant evaluation factors besides price were technical,

management and quality control. Technical was approximately twice as important as management and management was three times as important as quality control. The RFP further provided that price would not be scored or weighed but would be evaluated on its relationship to the significant evaluation factors. Offerors were required to submit their proposals in four physically separate parts: (1) the technical proposal; (2) the management proposal; (3) the quality control proposal; and (4) the cost proposal.

The Army received 12 proposals by the RFP's closing date of February 20, 1987. These proposals were referred to the Source Selection Evaluation Board (SSEB) for initial review. Each offeror was assigned an identification letter and these letters were the only designations used in all briefings to the Source Selection Authority (SSA). The SSA was unaware of the identities of any of the offerors, and was aware only of evaluation scores and proposed prices associated with the identification letters.

After the evaluation of initial offers, eight offerors were determined to be in the competitive range. These firms then responded to a further opportunity to clarify their offers by June 29, 1987. Discussions were then held with all offerors in the competitive range. Best and Final Offers (BAFOs) were received on October 2, and were evaluated by the SSEB.

Amendment 0011 was issued on November 5, and called for revised BAFOs to be submitted on November 23, because some dining facilities were transferred from the full food service portion of the RFP to the mess attendant portion. This amendment reduced the full food dining facilities from 12 to 4.

The revised BAFOs were evaluated by the SSEB and the results were referred to the Source Selection Advisory Council (SSAC) and the SSA in "blind" format.1/ Subsequently, the Army Audit Agency conducted an audit of the proposals and recommended that the Army further amend the RFP and request another set of BAFOs.

Final BAFOs were received on April 4, 1988 and the results of the final evaluation was presented to the SSA on May 19.

1/ Each offeror was assigned an identification letter and these were the only designations in all briefings by the evaluation panel to the Source Selection Authority (SSA). Thus, the SSA did not know the identities of the companies being evaluated.

(New identification letters were assigned to the final BAFOs.) The final summary of technical and price showed that Dragon was rated higher technically than was HLJ. HLJ's price was $200,000 lower than Dragon's offer.

On June 2, the SSA determined that award to Dragon was in the best interest of the government and pursuant to Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-13), preaward notification was provided to all offerors.

HLJ has three basic grounds of protest. First, HLJ alleges that award to Dragon is improper because a former Army employee provided information relating to HLJ's proposal to Dragon, creating the appearance of impropriety, and giving Dragon an unfair competitive advantage. To this extent, HLJ also alleges that the evaluation and source selection decision was tainted by the information, opinions and recommendations given to the SSEB by the former government employee. Second, HLJ alleges that the decision to award to Dragon was improperly tainted by political pressure. Lastly, HLJ alleges that the several rounds of BAFOs constituted auctioneering and technical leveling.

CONFLICT OF INTEREST

The major thrust of HLJ's protest is that Dragon should be eliminated from the competition because of the actions of a former government employee, who allegedly had access to HLJ's proposal and other proprietary data, and allegedly provided this information to Dragon. Further, HLJ alleges that this former employee provided tainted information and recommendations to the contracting officer and source selection team regarding HLJ's performance and abilities under the incumbent contract.

The question, 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. 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); NFK Engineering, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638.

While there is disagreement as to when the former employee sought employment with Dragon, the record is clear on a number of points. HLJ is currently providing mess attendant services at Fort Bragg. Since January 5, 1987, and until his resignation on May 10, 1988, the former employee was the

Installation Food Service Steward at Fort Bragg in the grade of GS-11. The employee's duties while employed at Fort Bragg involved supervising the work of the contracting officer's representative in all technical matters associated with the performance of the food service contract at Fort Bragg. In March and April 1988, the former government employee was a member of the team that negotiated a modification to HLJ's current contract to include full food service for the Reserve Officer Training Corps at Fort Bragg. The record further establishes that the employee for a relatively short period of time, March 5 to March 27, 1987, served as a member of the SSEB for this contract. The employee resigned from the government on May 10, 1988, more than a year later, and, according to the employee's affidavit, on May 18 contacted Dragon concerning possible employment as a project manager for a food service contract which Dragon was attempting to obtain at Fort Knox, Kentucky. He apparently has served as a temporary consultant to Dragon for the Fort Knox project and ultimately may be hired as the project manager if Dragon wins the Fort Knox contract.

HLJ contends that Dragon offered the former employee a position in early 1988 and that the former employee, by virtue of his participation in the modification negotiation had detailed knowledge of HLJ's proposal, approach, manpower plans and cost data for this contract. To this extent, HLJ contends that the individual assisted Dragon in preparing its revised BAFO by improperly providing Dragon with inside information concerning HLJ's proposal. The Army, on the other hand, states that by virtue of its own internal investigation, it has found nothing to contradict the individual's statement that he began negotiating for employment after his resignation.

The record shows that, as a government employee, the individual in question participated for a short time as an evaluator for this contract award. The record further shows that the employee has been temporarily employed by the awardee to work on another project which may lead to his permanant employment by the awardee for that project. While these facts cause us concern, HLJ has presented no probative evidence that there was any contact between Dragon and the government employee prior to his resignation from the government or that the employee sought a job with Dragon prior to his retirement.

With regard to the influence of this employee on Dragon's selection as awardee, as previously stated, the record establishes that the source selection process was designed to preclude knowledge of the offerors' identity outside the

closed environment of the SSEB. The evaluation workpapers and proposals were locked away except when being used. The log sheets indicate the employee never logged out a proposal.

While the employee apparently served on the technical committee for a limited time after initial offers had been submitted, he did not actively participate in committee deliberations. Further, we note that amendments were issued after the employee left the SSEB, and that proposals were revised several times thereafter. The protester has not shown that the employee had any impact on the evaluation process, that he possessed information as to the proposals or evaluations which could benefit Dragon, or that he communicated with Dragon prior to the award selection. Regarding the contract modification negotiations conducted in April 1988, the HLJ affidavits do not conclusively show that the employee had knowledge of HLJ's current proposal, or that the individual provided more than technical support to the contracting officer during the modification negotiations.

We also note that Dragon was rated highest technically throughout the procurement process and that its initial proposal received the highest technical rating and subsequent revisions thereto resulted in lower technical ratings. On the other hand, the record demonstrates that HLJ initially was ranked the 3rd best technically but in its final ultimate rating was ranked 2nd best technically. Furthermore, until receipt of revised BAFOs, Dragon's price was lower than HLJ's price. By the time the employee contacted Dragon concerning employment on May 18, 1988, the evaluation was already completed, so that any information he allegedly possessed could not have been used by Dragon in its offer. In any event, after initial evaluations, HLJ and Dragon, during the course of negotiations, significantly lowered their prices, and HLJ improved its technical ranking. These were the only significant changes in the standings that occurred.

Based on the record, there is no evidence that the former employee had any influence on the agency's award selection decision.

POLITICAL INFLUENCE

HLJ argues that the proposed award to Dragon is the result of improper political pressure to award to a North Carolina based firm. HLJ contends that this political pressure caused the Army to bypass an incumbent 8(a) contractor, to ignore several Small Business Administration (SBA) appeals,

and to prematurely and unilaterally announce its requests in the CBD. HLJ further contends that two Senators entered into an agreement to pressure the Army to reject SBA's choice of HLJ and to select other contractors favored by the two Senators.

The record shows that while the Army received many congressional inquiries concerning the status of the contracting process, it does not show that the proposed award resulted from political pressure. The Army asserts that none of the congressional inquiries was shown to the SSEB and the matter was never discussed with it. The overwhelming amount of congressional inquiries was made on behalf of a third company not in line for award. In fact, one Senator who HLJ contends exerted pressure on behalf of Dragon actually wrote a letter on behalf of HLJ.

Our review of the record indicates that the proposed award to Dragon is based on the evaluation scheme. Dragon scored higher technically than HLJ and the superiority of its proposal was found to justify Dragon's price, which was approximately $196,000 higher than HLJ's. Given the fact, as previously stated, that the selection decision was conducted in a blind format, and HLJ has not shown this to be otherwise, we find no evidence that the award resulted from political pressure.

HLJ also suggests that in 1985, two Senators entered into a formal agreement to steer the award under the instant procurement to a North Carolina based firm in exchange for an agreement as to the firm to be awarded the food services contract at Fort Leonard Wood. HLJ contends that this alleged agreement is memorialized in an August 7, 1985 memorandum that HLJ argues is in the Army's possession. The Army indicates that it has no knowledge of such a memorandum and has been unable to locate it in either its Fort Bragg or Fort Leonard Wood files. HLJ requests that we compel the Army to produce this document.

HLJ has no hard evidence supporting the existence of this memorandum. HLJ's outside general counsel has submitted an affidavit describing a meeting and conversation where an Federal Bureau of Investigation (FBI) agent allegedly informed HLJ of the existence of this document. The Army denies the existence of this document. In fact the HLJ affidavit does not state that a memorandum of a meeting exists. The FBI agent apparently advised HLJ's outside counsel only that Army records indicated a meeting between two Senators took place and the subject was the food services contract at Fort Leonard Wood. HLJ's counsel's affidavit also states that the FBI agent "implied" the

meeting concerned a prior contract at another Army base and the affiant states that he believes the meeting also involved an agreement to steer the Fort Bragg contract to a North Carolina firm. This affidavit is entirely speculative as to the nature of the meeting and any written agreement. In any event, given that the purpose of securing this alleged memorandum is merely to further demonstrate improper political pressure, and given the facts as previously discussed, that the award determination was made without knowledge of proposed awardee's identity, we decline to consider this matter further.

AUCTIONING AND TECHNICAL LEVELING

HLJ contends that the contract was improperly auctioned and that the contracting officer engaged in technically leveling. HLJ essentially bases this contention on the fact that several rounds of BAFOs were requested, thus allegedly giving Dragon the opportunity to substantially increase its technical score and/or substantially decrease its price.

We do not believe the Army acted improperly here. The record shows that after initial BAFOs were evaluated, Amendment 0011 was issued which made a change in the requirement by eliminating eight of 12 dining facilities that were scheduled to receive full food service. The record further establishes that after evaluation of the revised BAFOs, the Army Audit Agency recommended that the Army amend the RFP to clarify the ROTC equipment inventory procedures and field feeding, and then request another set of BAFOs. Thus, all amendments were required to clarify solicitation requirements. Clearly, since changes and clarifications to the RFP scope of work were necessary, the Army was not unreasonable in requesting multiple BAFOs to permit offerors to revise their offers to address the changes and clarifications.

In this regard, applicable regulations provide that while the contracting officer generally should not reopen discussions after the receipt of BAFOs, he may do so when it is clearly in the government's interest, such as where it is clear that information available at the time is inadequate to reasonably justify contractor selection and award. FAR § 15.611(c) (FAC 84-16). Consequently, our decisions recognize that there is nothing wrong with requesting more than one round of BAFOs where a valid reason exists to do so. Kisco Co., Inc., B-216646, Jan. 18, 1985, 85-1 CPD ¶ 56. HLJ's contention that the three rounds of BAFOs constituted technical leveling and auctioning is without merit. The mere fact that successive rounds of BAFOs are called does not demonstrate that the procuring agency has

conducted an auction. See Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524. The record is clear that Dragon's proposal was considered technically superior to all other proposals from the very first evaluation through the final evaluation. In fact, Dragon's final technical evaluation was less than its initial evaluation. On the other hand, the multiple rounds of BAFOs gave HLJ an opportunity to substantially increase its technical ranking. Further, prior to the subsequent BAFO requests, Dragon's proposed price was considerably less than HLJs. Once again, in responding to the revised BAFO request, HLJ improved its position by substantially reducing its proposed price. Clearly, the record here indicates that HLJ itself clearly benefitted from the multiple BAFO requests. In any event, we think this is simply a case where the agency's requirement over a relatively long procurement process changed to such an extent that it was only reasonable to request offerors to reconsider their proposals in view of the changed requirements.

OTHER ISSUES

HLJ asserts that Dragon's proposal was drafted in collusion with other affiliated North Carolina firms which allegedly shared pricing information and common suppliers. The protester has presented no evidence to support his allegation. Without such evidentiary support, we think HLJ's allegation is speculative.

HLJ also asserts that Dragon miscertified itself as a small business. On June 30, 1988, the SBA Atlanta Regional Office determined that Dragon was a small business for this procurement. Under 15 U.S.C. § 637 (1982), the SBA has exclusive authority to determine matters of small business size status for federal procurement purposes. Accordingly, our Office does not consider size status protests. 4 C.F.R. § 21.3(m)(2) (1988); Olympus Corp., B-225875, Apr. 14, 1987, 87-1 CPD ¶ 407.

Lastly, HLJ contends that the contract proposed for award is materially different from the contract announced in the Commerce Business Daily on October 2, 1986. HLJ argues that the contract now being proposed for award contains a two-thirds reduction in the government's full food service requirements in that the requirement went from 12 full-time full food service buildings to only four. The reduction in the number of full food service facilities was incorporated in Amendment 0011 issued November 5, 1987, which also requested revised BAFOs by November 23, 1987. Thus, HLJ, in effect, objects to the reduction in work contained in this

amendment. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that a protest of an alleged solicitation impropriety that did not exist in the solicitation as issued initially, but subsequently was incorporated into it, be filed before the next closing date for receipt of proposals following the incorporation. That date here was November 23, 1987--HLJ, in fact, submitted a timely revised proposal--so that the protest, filed only after HLJ learned of the proposed award to Dragon, is untimely.

The protest is denied.

James F. Hinchman
General Counsel