



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: International Resources Group, Ltd.
File: B-234629.2
Date: August 31, 1989

DIGEST

Although an agency may exclude an offeror from a competition because of an apparent conflict of interest in order to protect the integrity of the competitive procurement system even if no actual impropriety can be shown, where protester argues that awardee should be excluded from competition for proposing as its "chief of party" a senior agency official but concedes that there is no evidence that actual improprieties occurred in the conduct of the procurement, General Accounting Office has no basis to disagree with the agency that no conflict of interest justifying exclusion of awardee occurred.

DECISION

International Resources Group, Ltd., protests the award of a contract to Tulane University under request for proposals (RFP) No. OS/AFR-88-008, issued by the Agency for International Development (AID) for technical services for AID's Famine Early Warning System (FEWS), a project to reduce the incidence of famine in Africa. We deny the protest in part and dismiss it in part.

Six firms submitted initial proposals including International, Tulane and Price, Williams and Associates. Based on the evaluation of the technical proposals, the contracting officer initially established a competitive range that included only Tulane and advised the other offerors that their proposals had not been included in the competitive range. Following the review of Tulane's best and final offer (BAFO), AID decided to expand the competitive range to include International and Price, Williams, and by letters of February 9, 1989, so notified those firms.

AID then conducted discussions with all three firms in the competitive range and requested and received BAFOs on or

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before March 20. Based on a review of the BAFOs, the agency awarded a contract to Tulane on May 2. International protested on May 12.

Essentially, International contends that an apparent conflict of interest resulted from Tulane's proposing a then-current AID employee as its "chief of party" 1/ in its first BAFO. As a result, the protester maintains that AID was required to exclude Tulane from the competition.2/

The record indicates that the AID employee to whom the protester refers was an Assistant Director in the Office of Technical Resources of AID's Bureau for Africa while AID was evaluating proposals for this procurement. That office had the original responsibility for implementing the FEWS project, although the project was placed under the Africa Bureau's Program and Regional Operations Office in mid-1987 prior to the issuance of the subject RFP. A number of the technical evaluation panel members were, however, employed in the Technical Resources Office. The employee in question was the FEWS project manager for approximately 2 years until the summer of 1987, after which time he had no supervision or control over FEWS, although he did attend meetings to comment on the project.

When the RFP was issued in October 1988, Tulane asked the AID employee in question to serve as Tulane's "chief of party" for the contract following his planned retirement in the spring of 1989. The employee declined the position but, after obtaining written advice from AID's Office of General Counsel that serving Tulane as a consultant on the contract would not create a conflict of interest, he agree to accept a consultant position with Tulane.

1/ The "chief of party" is the contractor's team leader and point of contact between AID and the contractor.

2/ Initially, International argued that more than just an appearance of a conflict of interest had occurred--that the AID employee proposed by Tulane had reviewed the proposals of the other offerors, had passed information to Tulane about its competitors' proposals and had influenced a member of the evaluation panel to select Tulane. Also, International filed a second protest (B-234629.3) arguing that AID improperly evaluated its proposal and failed to conduct meaningful discussions. After AID filed its report and provided other information that satisfied most of International's concerns, the protester withdrew these grounds of protest and its second protest.

Subsequently, Tulane again asked the AID employee to be its "chief of party" for the contract. The AID employee obtained written clearance from AID's Office of General Counsel and agreed to accept the position. His name was submitted with Tulane's January 27 BAFO.

In an opinion issued on February 24, AID's General Counsel's Office instructed the FEWS project director that Tulane should be notified that it would be considered "nonresponsible" if it nominated the employee in question as its "chief of party" for the FEWS contract. According to that opinion, since the AID employee held a senior position, there was an opportunity for preferential treatment and that opportunity alone created a conflict of interest. Based on that advice, the FEWS project director instructed the evaluation panel to disregard the AID employee in Tulane's proposal and evaluate the proposal based on an alternative candidate proposed by Tulane. Shortly thereafter, AID advised Tulane and the AID employee of its decision, which was based on the potential opportunity for preferential treatment. The final selection of Tulane was based on its use of a "chief of party" other than the former AID employee. The former employee is not working for Tulane on the contract.

International maintains that under Federal Acquisition Regulation (FAR) § 1.602-2 and § 3.101-1, and based on the opinion from AID's General Counsel's Office, AID was required to disqualify Tulane from the procurement because of the appearance of a conflict of interest caused by Tulane's proposed use of the AID employee. Among other things, FAR § 1.602-2 requires that contracting officers ensure that contractors receive fair, impartial and equitable treatment and FAR § 3.101-1 requires contracting agencies to avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. According to International, the February 24 opinion issued by AID's Office of General Counsel indicated that the agency recognized that Tulane's proposal of the then current AID employee as its "chief of party" created an opportunity for Tulane to obtain preferential treatment and should have resulted in a determination that Tulane was nonresponsible. The protester notes that the AID opinion said that it is not necessary to prove that an offeror was actually given preferential treatment to exclude the firm; the agency can exclude a firm as a result of an opportunity for preferential treatment. Further, International argues that, based on the AID opinion, the agency should have found Tulane nonresponsible based on the apparent conflict of interest that resulted

from Tulane's proposal of the AID employee as a consultant in its initial proposal.

An agency may exclude an offeror from a competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638. Our role is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation or indication of an apparent conflict of interest. Laser Power Technologies, Inc., B-233369 et al., Mar. 13, 1989, 89-1 CPD ¶ 267.

Based on our review of the record, we do not find an apparent conflict of interest that justifies precluding Tulane from the award. Although International initially alleged that the AID employee passed information about the other proposals to Tulane and that other improprieties occurred, the protester now concedes that no actual improprieties occurred in the conduct of this procurement. International now argues that Tulane should be excluded based on the "policy" enunciated in the February 24 AID General Counsel opinion, that Tulane should be found nonresponsible if it nominated the current AID employee.

We disagree. The agency's obligation here was to award a conflict of interest and prevent one competitor from obtaining an unfair competitive advantage. Here, to prevent what it concluded could constitute an appearance of a conflict of interest, AID evaluated Tulane's proposal only on the basis of an alternate "chief of party" and advised Tulane that the AID employee was not acceptable. Under the circumstances, in the absence of any evidence whatsoever that the AID employee in question had access to other offerors' proposals or to other procurement sensitive information, that he improperly passed information or, in any manner, influenced the procurement, we have no basis to disagree with AID's handling of the situation or to require it to disqualify Tulane from the competition. See Laser Power Technologies, Inc., B-233369 et al., supra.

The protest is denied.


James F. Hinchman
General Counsel