

Arsenoff



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Agusta International S.A.

File: B-237724

Date: March 21, 1990

David B. Dempsey, Esq., and Janet Z. Barsy, Esq., Akin, Gump, Strauss, Hauer & Feld, for the protester. Laura K. Kennedy, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Kay & Associates, Inc., an interested party. Lt. Col. Howard G. Curtis, Office of the Judge Advocate General, Department of the Army, for the agency. Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation did not require personnel to be committed to performance under the resulting contract, awardee did not misrepresent the availability of persons it "intended for assignment" by submitting the resumes of three of the protester's employees as part of its proposal since the record discloses that, prior to the submission of the resumes, two of the individuals took direct actions expressing a willingness to consider employment with the awardee, and the third individual relayed a similar willingness through his supervisor.

DECISION

Agusta International S.A. protests the award of a fixed-price requirements contract to Kay & Associates, Inc., under request for proposals (RFP) No. DAJA37-89-R-0169, issued by the Department of the Army for helicopter maintenance services to be performed in several NATO countries as part of the agency's "South-of-the-Alps" (SOA) program. Agusta alleges that Kay acted in bad faith when it included three resumes in its proposal without first obtaining the permission of the individuals involved. We do not agree that the record establishes that Kay acted in bad faith, and we therefore deny the protest.

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The RFP was issued on June 14, 1989, and closed on August 14. Award was to be made to the offeror whose proposal was determined to provide the greatest value to the government based on an integrated assessment of three evaluation factors: technical, management, and price. The technical and management factors were of approximately equal importance and each was more important than price; however, the RFP provided that price could become determinative if the proposals were considered "essentially equivalent."

In the technical evaluation area, there was a subfactor which indicated that "[r]esumes of personnel intended for assignment" to 19 service positions described in the RFP would be evaluated. The RFP did not require offerors to obtain letters of intent or other forms of personnel commitments from the individuals they were proposing for assignment. Moreover, there was not a separate evaluation factor for personnel availability and, although the Army could order a contractor to remove personnel for reasons of security or safety, there was no provision for the agency to preapprove substitute personnel. Rather, the RFP required the contractor to use only experienced, responsible and duly licensed personnel.

Agusta, who was the incumbent SOA maintenance contractor, and Kay were the only offerors. Both were determined to have submitted technically acceptable offers. In the case of 3 out of 19 service positions for which the firms submitted resumes, they both proposed the same individuals: Mr. R. Rambo as a UH-1 helicopter specialist; Mr. G. Liska as a supply specialist; and Mr. B. Cleary as an aircraft mechanic/site supply specialist. All three individuals were, and remain, employees of Agusta.

As a result of the combined technical/management evaluation, Agusta received 95.29 percent of the total points possible while Kay received 90.84 percent. However, Agusta's price for the 9-month basic period with two 1-year options was \$3,349,744--some 32 percent (or \$818,133) higher than Kay's price of \$2,531,611 for the same period.

The Source Selection Authority (SSA) concluded that Agusta's slightly higher (4.45 percent) technical/management score was probably attributable to the firm's status as an incumbent on the SOA maintenance contract and determined the proposals to be "essentially equal." Although personnel factors were not specifically mentioned by the SSA in his decision, he did note that Kay had ten similar helicopter maintenance and repair contracts with the Air Force and the

Navy which demonstrated "the firm's ability to perform both technically and managerially." The SSA concluded that Agusta's slightly higher technical/management score did not warrant paying an additional \$818,133. Kay was then awarded a contract on October 31.1/

Agusta has submitted affidavits from Messrs. Rambo, Liska and Cleary in which they describe their contacts with Kay representatives concerning possible employment. Among other things, Agusta submits that these statements establish that none of the individuals involved ever gave the awardee permission to use his resume in its proposal in response to this particular RFP. Further, the protester argues that the record of contacts between the individuals and the awardee discloses that there was no other basis to believe that any of the individuals would be available to work for Kay upon contract award. As a result, Agusta alleges that Kay misrepresented the availability of its personnel and argues that, therefore, its contract should be terminated because the procurement process was impermissibly tainted.

Agusta argues that our decisions over the last 10 years, and most notably in Ultra Tech. Corp. et al.--Requests for Recon., B-230309.7, B-230309.8, June 6, 1989, 89-1 CPD ¶ 528, establish a single test to determine whether an offeror acted in "good faith" in submitting resumes of key personnel.2/ According to Agusta, an offeror does not act in good faith unless: (1) it has sufficient, direct, contacts with an individual concerning a specific solicitation to be able to represent that he expressed a willingness to work for the offeror; and (2) the individual has actually given his express permission to use his name in a proposal for that specific solicitation.

With respect to the first part of the "test" described by Agusta, the protester submits that Kay had insufficient contacts with Messrs. Rambo and Liska and no direct contact at all with Mr. Cleary. As to the second part of the "test," Agusta reiterates that each individual has denied giving Kay permission to use his resume. The protester has submitted affidavits from all three individuals in support of its position.

1/ The Army advises us that Agusta is continuing to perform the maintenance services for the SOA program, as the incumbent, pending resolution of this protest.

2/ The Army has stipulated that all 19 service positions under the RFP involve "key personnel."

Kay, on the other hand, has submitted affidavits, principally from its chief recruiter, Mr. L. Hudson, describing events surrounding the firm's use of the three individuals' resumes. Kay submits that these statements establish that Messrs. Rambo and Liska were contacted directly concerning the SOA solicitation and that each gave the firm permission to use his resume. With respect to Mr. Cleary, Kay acknowledges that he was not directly contacted, but submits that it reasonably relied on representations from his supervisor, Mr. J. Nelson, to the effect that Mr. Cleary had indicated his willingness to work for the firm under the 1989 SOA contract. Kay maintains that, in light of the RFP terms which did not require formal letters of commitment, and in consideration of the totality of circumstances involved in this procurement, it acted reasonably in representing that it intended to assign Messrs. Rambo, Liska and Cleary to the service positions indicated in its proposal.

Contrary to Agusta's characterization of our decisions in the area, no strict "consent/permission test" has ever been established as the single measure by which an offeror's good faith in proposing personnel is to be determined. While various factors contained in the protester's formulation of the "test" may well have provided sufficient indicia of an offeror's good faith in a given set of circumstances, we do not agree that they necessarily apply in some rigid form to every situation involving the use of resumes.

In the absence of a specific solicitation provision requiring personnel whose resumes are included in proposals to be committed to any resulting contract, "no general principal may be derived from our decisions requiring that such personnel must be committed to the contract." QED Sys., Inc., B-189410, Dec. 15, 1977, 77-2 CPD ¶ 467. As a general rule, the evaluation of an offeror's proposed personnel is not objectionable where the names are submitted in good faith by the offeror with "some type of consent" from the individuals in question. That permission need not be direct in every case, as suggested by Agusta, and, in determining whether "some type" of permission has been obtained, we look to the entire record. Scheduled Airlines Traffic Offices, Inc., B-235134, July 18, 1989, 89-2 CPD ¶ 57.

Accordingly, we will examine the circumstances surrounding Kay's actions with respect to each of the individuals involved to determine whether the awardee acted reasonably in believing that each would be available for employment with the firm, Pacific Architects & Eng'rs Inc., B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494, and, thus, whether the

awardee acted in good faith in representing that it "intended" to assign them to the contract.

In order to place our analysis of the communications between the three individuals and Kay in the proper context, we think it is important that certain factors which constitute important elements of the circumstances surrounding this procurement be borne in mind.

First, the RFP merely required the submission of resumes for individuals "intended for assignment," and did not require any form of personnel commitments; it also did not require a contractor to begin or continue performance with the individuals it initially proposed insofar as the RFP did not provide for agency preapproval of substitute personnel. In our view, any analysis of Kay's good faith in proposing individuals with whom it had contact should not require more of the offeror in terms of the degree of assurances obtained from prospective employees during the preaward recruitment stage than the RFP required of a successful contractor during performance.

Further, we note that the affidavits of all three individuals involved contain almost identical statements about their practice of never committing themselves to the employ of a firm before a contract award. We believe these statements to be indicative of the available European aircraft maintenance labor force in general. From the record, it appears that prospective service employees in that labor market do not often establish formal commitments to work for another firm during the procurement process. This conclusion is underpinned by the Army's explanation that it avoided requiring letters of commitment in the protested RFP in an effort to broaden competition beyond the incumbent. In our view, this is further supported by a post-award statement attributed by Agusta to Kay's Regional Director, Mr. Floyd, to the effect that the firm was never sure until it surveyed the incumbent's personnel after award as to whether the persons it had proposed would actually work for the firm. Although Agusta characterizes this alleged remark as confirming its theory that Kay knowingly misrepresented personnel in its offer, we believe that the remark, at best,^{3/} confirms our conclusion that significant

^{3/} Mr. Floyd's statement, even if accurately reported in all respects, appears to be of little relevance to the preaward recruitment of the individuals involved in this case because the record reflects that Mr. Hudson, and not Mr. Floyd, had responsibility for, and actually conducted, those efforts.

assurances of a willingness to work for a particular firm are difficult, if not impossible, to obtain in the relevant labor market.

Also, the uncontradicted record discloses that each of the three individuals in issue met with Mr. Floyd in November 1989, following the announcement of the contract award, to discuss employment under the SOA contract. The record indicates that none of the individuals reached agreement on such matters as salary and none signed a "letter of intent" to work for Kay. Although Agusta suggests that this failure to reach a formal agreement shows that Kay's earlier decisions to propose the men were baseless, we disagree. The November meetings, in our view, evidence the culmination of earlier expressions of a willingness to consider serious employment discussions once a contract was in place. Furthermore, in our view, unsuccessful post-award salary negotiations are not necessarily an indication of an offeror's bad faith in proposing specific individuals. Individual Dev. Assocs., Inc., B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.

We think that these matters form part of the surrounding circumstances which must be considered as we analyze the reasonableness of Kay's actions to determine whether the awardee acted in bad faith in proposing each of the three individuals. Recognizing that the statements submitted by both sides do, at times, contain conflicting accounts of relevant events, our analysis uses the protester's version of those events in most cases, and sets forth the awardee's conflicting version where necessary.

MR. RAMBO

The record establishes that Mr. Rambo sent Kay a letter forwarding his resume in April 1989--2 months before the RFP was issued. The letter noted that the contract under which he was working was due to expire at the end of September 1989, and stated that "after this date I will be available." It also requested "consideration for possible employment by your firm."

Mr. Rambo states that he then received a mailgram from Kay requesting a collect call; although he does not recall whether the mailgram referred to the SOA contract, Mr. L. Hudson (Kay's chief recruiter) states that it did.^{4/}

^{4/} It appears that Mr. Liska received a similar mailgram from Kay. He states in his affidavit that the mailgram he received did indeed refer to the 1989 SOA contract.

Mr. Rambo states that he called Mr. Hudson in May and was asked if Kay could use his resume. While Mr. Hudson states that Mr. Rambo gave his permission, Mr. Rambo states that he told Mr. Hudson that he would have to discuss salary before he could decide about the use of his documents. According to Mr. Rambo, he requested an employment application, which he apparently never received.

Mr. Rambo also states that, during the May conversation, he told Mr. Hudson that he would not discuss "wages until Kay got the contract." Contrary to the conclusion reached by Mr. Hudson, Mr. Rambo states that there was "no understanding at all . . . that Kay could use my resume. . . ." As indicated earlier, Mr. Rambo later met with Kay to discuss possible employment.

Agusta argues that, during the May conversation, Mr. Rambo expressly conditioned the use of his resume on salary discussions; since these did not occur before Kay submitted its proposal, the protester argues that the awardee acted in bad faith in using the resume.

In our view, the disparate recollections of the May telephone conversation provide an insufficient basis for concluding that Kay acted in bad faith. Even if we consider Mr. Rambo's version as being entirely accurate, we believe that, at best, it placed Kay in a difficult position of determining what Mr. Rambo actually intended. He seemed to want to work for Kay if it got the job, but was reluctant to make a firm commitment prior to that time. On the other hand, Mr. Hudson's recollection of the conversation (i.e., that Mr. Rambo gave permission to use the resume) is at least consistent with earlier, uncontradicted, documentary evidence in the form of the letter and resume Mr. Rambo sent to Kay indicating a desire to be employed by the firm in October. We think it is also significant that Mr. Rambo initiated the contact with this specific contract in mind. Under the circumstances, and based on the uncontradicted documentary record, we believe that Kay had a reasonable basis for believing that it could use Mr. Rambo's resume in its proposal. As stated above, we will not infer bad faith simply in the absence of successful salary negotiations. Individual Dev. Assocs., Inc., B-225595, supra.

MR. G. LISKA

Mr. Liska states that he first sent his resume to Kay in late 1986 and at that time expressed an interest in employment under an earlier SOA contract. Upon learning that Agusta, and not Kay as he had been informed, received the award, Mr. Liska joined the protester's firm. Mr. Liska

also states that in June 1989, Mr. Hudson called him and asked if he had received a mailgram from the firm. Upon receiving the mailgram, which referenced Kay's intention to compete for the 1989 SOA contract, Mr. Liska states that he called Mr. Hudson. According to Mr. Liska, he was asked if he wanted to be part of Kay's "team" and replied that he "did not want to be part of any team until someone was awarded the contract." According to Mr. Hudson, Mr. Liska gave his express permission to use his resume in Kay's proposal at this time. The record indicates that salary was briefly discussed.

Mr. Liska then states that he was asked to send his resume to Kay to update its files. Mr. Hudson denies that he indicated the resume was sought for that purpose. In any event, Mr. Liska then sent this resume to Kay. On July 5, Kay sent him an employment application which he began to fill out on July 17. He states that he stopped on July 21 at the request of Agusta's Project Manager, who had asked all of the firm's employees not to submit applications or resumes to competing firms until after August 14, when proposals were due.

According to both Messrs. Hudson and Liska, Kay attempted to contact Mr. Liska about the status of his application in early August 1989; Mr. Liska states that he did not respond at that time because of Agusta's standing request not to have such contacts. On September 11, Mr. Liska sent his completed application to Kay.^{5/} As discussed above, Mr. Liska later met with Kay to conduct further negotiations. Like Mr. Rambo, Mr. Liska states that he does not believe that he said anything to Mr. Hudson during their June conversation which would lead to the belief that he was willing to work for Kay on the 1989 SOA contract.

As with Mr. Rambo, we do not believe that the conversation between Mr. Hudson and Mr. Liska provides a basis for concluding that Kay acted in bad faith. While the participants have conflicting recollections about the purpose of Kay's soliciting a resume, neither mentions how the subject of an employment application came up. Nonetheless, an employment application was sent to Mr. Liska and he began to fill it out quite promptly. These actions are, in our view, consistent with Mr. Hudson's assertion that he had obtained some expression of willingness from Mr. Liska about considering employment with Kay on the SOA contract. Also,

^{5/} Mr. Liska's resume was not part of Kay's initial proposal; rather, it was submitted on or about September 7 as a response to written discussions with the Army.

Mr. Liska's actions in beginning to fill out the employment application, which were cut short by Agusta's request, appear to be at variance with his assertion that he only sent a resume to Kay to update its files. In the absence of any convincing evidence to the contrary, we conclude that Kay reasonably relied on the June conversation, and Mr. Liska's submission of a resume after that conversation, as expressions of a willingness to consider working on the 1989 SOA contract.

MR. B. CLEARY

The record discloses that Mr. Cleary sent Kay an employment application in December 1986; the application contained resume information which was later updated and used by Kay in its proposal under the protested procurement. According to Mr. Cleary, he was contacted by Kay in October 1987 and offered a job which he initially accepted, but later declined. Mr. Cleary also states that he spoke to Mr. Hudson in November 1988 about an offer of upcoming employment in El Salvador, which he declined by saying he "wasn't interested in moving without a firm job commitment." Mr. Hudson recalls the November 1988 conversation as referencing the upcoming 1989 SOA contract competition and he recalls that Mr. Cleary expressed an interest in working on the project for Kay; Mr. Cleary states he has no recollection of discussing the 1989 SOA contract at that time. Mr. Cleary does, however, state that, during the November 1988 conversation, he informed Mr. Hudson that, because he did not have a telephone at his job location in Izmir, Turkey, he could be reached at his supervisor's home phone--i.e., Mr. J. Nelson's phone--to discuss further employment matters.6/

According to the statements of Messrs. Hudson and Nelson, in May or June 1989, Mr. Hudson called Mr. Nelson in Izmir, Turkey. Mr. Nelson states that Kay's recruiter told him he wanted to contact Mr. Cleary about employment on the 1989 SOA contract. Mr. Nelson states that, on the following day he asked Mr. Cleary if he would work for Kay if it got the contract and that Mr. Cleary stated that he would "stay on." Mr. Nelson also states that Mr. Cleary said he did not need to talk to Kay himself, but that Mr. Nelson should relay the message about his willingness to work for Kay. Mr. Cleary denies that the conversation took place. Messrs. Nelson and Hudson both state that Mr. Cleary's message was promptly relayed to Kay.

6/ Mr. Nelson has accepted employment with Kay.

Mr. Cleary does, however, recall that he and Mr. Nelson had a conversation in early October 1989 when he informed his supervisor that he would be willing to "stay on" in Izmir if Kay won the contract, assuming that a successful salary could be negotiated. As with Messrs. Rambo and Liska, Mr. Cleary later conducted unsuccessful employment negotiations with Kay.

We think that Mr. Cleary's situation presents a closer question than the other individuals because of the lack of any direct contact with Kay during the proposal process. While, as Agusta maintains, there may have been other ways for Kay to contact Mr. Cleary rather than through Mr. Nelson, we note that Mr. Cleary himself had earlier authorized this form of contact as a method to discuss employment matters, and, in essence, admits that he was somewhat difficult to reach at his location in Izmir, Turkey. Also, while Mr. Cleary denies he ever had a conversation in May or June telling Mr. Nelson he was interested in employment with Kay, we cannot simply discuss Mr. Nelson's detailed account of such a conversation.

Mr. Nelson states that he told Kay that Mr. Cleary had indicated he would "stay on" shortly after the May/June conversation--well before Kay used Mr. Cleary's name in its proposal. Mr. Hudson's statement confirms that he received and relied on this precise advice. Mr. Cleary's denial that the conversation took place at all, however, stands alone. We also note that Mr. Cleary does not contradict Mr. Nelson's version of what transpired, before award in early October, to the effect that he then expressed a willingness to "stay on" to work for Kay--substantially the same advice that Mr. Nelson reported to Kay earlier in the year. In view of these circumstances, we think the record supports the conclusion that Mr. Nelson did, in fact, believe in May or June that Mr. Cleary was willing to work for Kay, and that Kay then reasonably relied on the assurances of Mr. Nelson--Mr. Cleary's friend and supervisor--in using his resume in its proposal. See Scheduled Airlines Traffic Offices, Inc., B-235134, supra.

Finally, in its comments on the agency report, Agusta alleges that the Source Selection Board (SSB) should have independently questioned Kay's submission of three resumes that were also included in Agusta's proposal on the basis

that the prospective awardee's low price reflected an indication that Kay had not entered into serious salary discussions with the individuals and, therefore, probably did not have permission to use their resumes. Apart from requiring a rather attenuated analysis on the part of the SSB, we believe that Agusta's line of reasoning fails to recognize that detailed salary negotiations with proposed personnel are not generally required to establish an offeror's good faith in submitting personnel resumes in its proposal. See Individual Dev. Assocs., Inc., B-227595, supra.

The protest is denied.



for James F. Hinchman
General Counsel