



Comptroller General  
of the United States

Washington, D.C. 20548

144997

## Decision

**Matter of:** NES Government Services, Inc.; Urgent Care, Inc.

**File:** B-242358.4; 4-242358.6

**Date:** October 4, 1991

Stephen S. Kaye, Esq., Bryan, Cave, McPheeters & McRoberts, for NES Government Services, Inc.  
Kenneth A. Martin, Esq., Elliott, Bray & Riley, for Urgent Care, Inc.  
Sophia L. Rafatjah, Esq., and Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.  
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. A contracting officer may not disqualify a firm from the competition for an appearance of impropriety and apparent conflict of interest where the agency's internal investigation established that no wrongdoing occurred.
2. Where General Accounting Office sustains protest against termination of protester's contract and disqualification of protester from competition, protest by second disqualified firm is dismissed, since second protester is not in line for award and therefore does not have the direct economic interest to be considered an interested party under General Accounting Office's Bid Protest Regulations.

### DECISION

NES Government Services, Inc. protests the termination of its contract No. DABT02-91-C-0014 and the rejection of its proposal from further consideration under request for proposals (RFP) No. DABT02-90-R-0028, issued by the Department of the Army for emergency room services at the Noble Army Community Hospital (NACH) at Fort McClellan, Alabama. Urgent Care, Inc. also protests the elimination of its proposal from

consideration under the solicitation. The firms contend that the agency had no basis for disqualifying them from further participation in the solicitation.

We sustain the protest of NES Government Services, Inc. and dismiss that of Urgent Care, Inc.

On July 18, 1990, the agency issued the solicitation for emergency room physician coverage, 24 hours a day, 7 days a week, for a period of 12 months, with two evaluated options for similar periods. The solicitation contained the standard Contract Award clause at Federal Acquisition Regulation (FAR) § 52.215-16, providing for award to the responsible offeror whose offer was most advantageous to the government, considering cost and other factors specified in the solicitation.

The solicitation provided that in determining which offer was most advantageous, the agency would consider the factors of technical excellence and management capability, which would be substantially more important than the remaining evaluation factor, which was price.

The agency received eight proposals on August 23, conducted discussions, determined the competitive range and on November 8, received a best and final offer from each of the five offerors remaining in the competitive range. On December 10, 1990, the agency notified NES, the incumbent contractor, that it had awarded a contract to Urgent Care as the "low responsive, responsible bidder," contrary to the solicitation provisions that called for a cost/technical tradeoff to determine the most advantageous proposal.

As a result of a protest that NES filed with our Office concerning the award decision, the agency terminated the award to Urgent Care and conducted a cost/technical tradeoff, which resulted in the selection and the award of contract No. DABT02-91-C-0014 to NES on March 29, 1991. On April 8, our Office received a protest from Urgent Care, alleging among other things, a conflict of interest on the part of the Chief of the hospital's department of Primary Care and Community Medicine (PCCM), a member of the U.S. Army Medical Corps, who was engaged to be married to a physician on NES' staff. Urgent Care alleged that the PCCM Chief had attempted to cover up quality deficiencies in the contractor's prior contract performance.<sup>1/</sup>

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<sup>1/</sup> Urgent Care alleged that in its GAO protest, NES demonstrated familiarity with proprietary information in Urgent Care's proposal and that NES therefore must have filed a false certificate of procurement integrity. Urgent Care also

(continued...)

The agency subsequently conducted an internal investigation, regarding "allegations of disclosure of proprietary and source selection information, illegal organizational conflict of interest, and violations of rules against acceptance of gratuities" by two agency staff physicians--the PCCM Chief and the agency's Deputy Commander for Clinical Services (DCCS). The agency also instructed the investigating officer to address the issue of whether the two Army staff physicians, while employed by the agency, also were employed by NES to work on the firm's prior contract with the agency. As evidence of this allegation, an agency employee supplied a typed list submitted by NES, which listed points of contact under the prior contract and which included the PCCM Chief and the DCCS.

The investigating officer made three findings. First, he found that a Dr. Leach, employed by Urgent Care after leaving the Army, had, while employed by the agency, modified the solicitation statement of work to add a position to which Urgent Care planned to appoint him. The investigating officer also found that the DCCS, a member of the evaluation team, had a close personal friendship with a director of Urgent Care and had, in fact, authorized Dr. Leach's modifications to the statement of work.

Regarding NES, the investigating officer confirmed that the PCCM Chief and the NES staff physician were engaged, but found that the agency had known of the resulting conflict of interest previously and had resolved it by removing the PCCM Chief from any involvement with the procurement.<sup>2/</sup> The investigating officer specifically concluded that there was no evidence to support other allegations about NES. Although the PCCM Chief was in a position to "possibly temporarily circumvent peer review of quality assurance issues," there were in fact sufficient insulating layers of review to prevent the PCCM Chief from distorting quality reports to favor her fiancée's employer; nor did the PCCM Chief participate in drafting the solicitation or evaluating proposals or have access to information regarding the proposals or the

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1/ (...continued)

alleged the conflict of interest and contended that the PCCM Chief's acceptance of sexual favors from an NES employee constituted acceptance of a gratuity. The protest also raised six legal issues relating to discussions and the evaluation process.

2/ The investigating officer also discovered that at times in the past, Urgent Care employed the PCCM Chief to work at a local hospital. This employment was unrelated to activities of the agency.

evaluation. He also noted that both the PCCM Chief and the DCCS had executed sworn affidavits denying that they were ever employed by NES; he found no indication that NES had included their names on the typed list as an indication that NES employed them. Beyond the bare fact that NES had provided their names as points of contact under the prior contract, which was consistent with their duties as government employees overseeing contract performance, the investigator found no evidence that NES had employed the two agency physicians.

Even though the investigating officer had not confirmed any allegation regarding NES other than the admitted relationship between the PCCM chief and an NES staff physician, he concluded that:

" . . . In view of the professional relationships of Drs. Leach and [the PCCM Chief] to Urgent Care Systems and the numerous personal friendships involving staff of Ft. McClellan and members of NES and Urgent Care Systems, I would recommend that the contract be reopened . . . ."

The agency ethics counselor reviewed the investigative report and indicated his concurrence:

" . . . in the investigative officer's findings that apparent conflicts of interest exist or existed during the course of the procurement action. Not only is an actual conflict of interest in violation of [regulations], but so is an apparent conflict of interest. In my opinion, the charges, counter-charges allegations [sic] and findings are so pervasive that the Contracting Officer should cancel the procurement action in order to protect the integrity of the acquisition system . . . ."

The counselor noted the friendship of the DCCS and the Urgent Care director, as well as Dr. Leach's role in rewriting the statement of work. He concluded:

" . . . when an officer is engaged to a contract employee whose work she reviews for Quality Assurance (QA); and when an officer is 'moon-lighting' with a Patient Care Provider (that she reviews for QA) [3/] and that company later bids on Emergency Room Contract; I find at the very least, an apparent conflict of interest if not an actual.

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3/ Urgent Care provides physicians under a separate contract for the outpatient clinic at NACH.

Such conduct creates at a minimum, an appearance of impropriety and, adversely affects public confidence.[sic]"

Noting that both Urgent Care and NES had raised conflict of interest issues in the course of the procurement, the counselor believed, without enumerating the evidence to support his conclusion, that sufficient evidence existed to substantiate their claim of conflict of interest. He not only recommended reopening the competition but recommended excluding NES and Urgent Care from further participation in the solicitation. The contracting officer accepted this recommendation, and these protests followed.

NES argues that there was no apparent conflict of interest justifying its disqualification, that the personal relationship between its employee and the agency employee would not create such a conflict unless the agency can show a nexus between the PCCM Chief and the procurement, and that the agency's internal investigation found no evidence that the employee had any involvement with the procurement. NES asserts that although the agency was apparently aware of the engagement between its physician and the NES employee, NES was not; furthermore, the agency found no evidence of actual wrongdoing under the prior contract. NES argues that to the extent that the agency believes that there is an apparent or potential conflict of interest, it could reassign the PCCM Chief; in any event, NES offers to withdraw the PCCM Chief's fiancée from working under the contract to avoid any future appearance of impropriety.

In response to these arguments, the agency concedes that, standing alone, the relationship between its physician and the NES staff member would not give rise to an appearance of a conflict of interest because the Army doctor had no role in the development of the performance work statement or evaluation of proposals. Nevertheless, the agency argues that whether or not NES ever employed the PCCM Chief and the DCCS, the list containing their names creates an appearance of conflict and that the contracting officer could reasonably disqualify NES based on that appearance regardless of sworn testimony or any evidence that could be submitted to show that no actual conflict existed. The agency states that the allegations of impropriety, whether or not substantiated, "cloud [NES's] involvement in the procurement process to such an extent that any reasonable person could conclude that a conflict of interest exists."

Our Office generally does not review an agency's decision to terminate a contract for the convenience of the government, except where the agency bases that decision upon a determination that the initial contract award was improper. See

Rexon Technology Corp. et al., B-243446.2 et al., Sept. 20, 1991, 91-2 CPD ¶ \_\_\_\_. An agency has broad discretion to terminate a contract for convenience and reopen discussions. Thus, where an agency concludes that there was an impropriety in the procurement process such that termination of the award and reopening of the discussions is necessary, it need only show that the impropriety or conflict, if it occurred, might have affected the award decision.

In meeting their responsibility under FAR § 1.602 to safeguard the government's interests, contracting officers may go further by imposing a variety of restrictions not explicitly provided for in applicable regulations, including disqualification of an offeror from the competition, where the needs of the agency dictate the use of such restrictions. Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990). Thus, where an agency learns after award of an apparent conflict of interest or appearance of impropriety affecting the award process, it may terminate the contract and exclude the awardee and other offerors from further participation in the procurement. See Naddaf Int'l Trading Co., B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ 316.

An agency may take action to exclude an offeror where the record contains evidence that there was a likelihood that an actual impropriety or conflict of interest existed, as well as some basis for determining that the impropriety or conflict warrants the exclusion of that offeror. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638. The determination that an impropriety is likely to have occurred must be based on facts and not mere innuendo or suspicion. Laser Power Technologies, Inc., B-233369 et al., Mar. 13, 1989, 89-1 CPD ¶ 267. As discussed below, we find that the agency here had no reasonable basis to disqualify NES, since there was no showing, beyond innuendo and suspicion, of an impropriety or conflict, which either affected the integrity of the award process or otherwise warranted the exclusion of NES. Contracting officers also have broad discretion to cancel an award and reopen discussions--without disqualifying one or more offerors--to protect the integrity of the procurement process by, for example, implementing procedures to address apparent conflicts of interest. Since such measures were taken with respect to an apparent conflict of interest of NES during the procurement, we do not believe a recompetition is warranted in this case.

Other than confirming the PCCM Chief's relationship with the NES employee under the prior contract, the investigation did not substantiate any of the allegations raised against the protester, NES. The investigator found no evidence that the



relationship had any effect on the conduct of the protested procurement. In a memorandum provided to the investigator, the hospital commander reported that, because of her engagement to the NES employee, the PCCM Chief was not involved in the procurement. The investigator confirmed that the PCCM Chief had no role in the process. Further, to the extent that the agency believes that its staff physician may have acted improperly in administration of the previous contract, a belief not substantiated by the agency's investigation, the record shows that the agency knew of and approved the PCCM Chief's continued performance of quality management duties under the contract, while NES neither knew of nor approved of her relationship with its staff physician.

The investigating officer expressly concluded that the allegation that NES had employed agency personnel, who were involved in the administration of its ongoing contract, was unfounded. We agree with NES and the investigating officer that the typed list submitted by NES, which is nothing more than a list of names, addresses, and telephone numbers with no explanatory material, contains no evidence of wrongdoing on its face.

Urgent Care had asserted, in its April 8 protest to our Office, that the PCCM Chief falsely documented the quality of NES' performance as incumbent contractor, thereby inflating the incumbent's technical score and giving the incumbent an unfair competitive advantage. While the investigating officer did not specifically address this point in his report, our review of the record indicates that Urgent Care's assertion is unfounded.

In selecting NES, apart from the factor of price, the agency considered two factors--technical excellence (comprehension of specification requirements, general management-government furnished property, quality control, and malpractice insurance) and management capability (organization and staffing, offeror's experience in type work, and evaluation of compensation plan for professional employees). For the technical subfactor of quality control, as reflected in the questionnaires used by evaluators, the evaluation was based upon the offerors' documented description of their quality control programs and an explanation of the reporting relationship of quality control personnel and the interaction with supervisory personnel to assure that the requirements of the contract were met; for the management subfactor of experience, evaluators looked only at whether the offeror demonstrated a general background in service contracts of a similar size and scope, whether that experience was associated with management of a contract with a governmental entity and whether the offeror's general experience related to the requirements in the performance work statement. None of the evaluation factors or

subfactors called for evaluation of the quality of the contractor's performance under its prior contract, and our examination of the evaluators' comments reveals no evidence that any of the evaluators departed from these guidelines or that any of the evaluators commented on NES' prior performance record in the course of their evaluations. There is no evidence to support Urgent Care's contention that the quality of NES' prior performance as the incumbent had any role in NES' technical rating.

In order to exclude a firm from a procurement, the determination that an impropriety is likely to have occurred or that a conflict of interest is likely to have existed must be based upon hard facts, rather than suspicion and innuendo. CACI, Inc.--Federal v. United States, 719 F.2d 1567 (Fed Cir. 1983). The recommendations of the ethics counselor show that the agency action in disqualifying NES was based on the perception created by the number of allegations rather than the likelihood that any particular allegation was true.<sup>4/</sup> Thus, we find no basis on this record for disqualification of NES from participation in the procurement. With respect to cancelling the award and reopening discussions, the contracting officer clearly has broad discretion to do so when necessary to protect the integrity of the procurement process. In this case, however, there is no suggestion that termination of the award to NES would serve to cure any perceived impropriety or address an apparent conflict of interest. The agency previously addressed the apparent conflict stemming from the relationship between the PCCM Chief and her fiancée--the PCCM Chief played no role in preparing the statement of work or in any other aspect of this procurement. If, as we conclude, there are insufficient grounds for disqualifying NES from participation in the procurement, the record does not contain an alternative basis for the termination of NES' award.


We sustain the protest of NES and recommend that the Army rescind the termination of the NES contract. Since we sustain the protest, we find NES entitled to its cost of pursuing this protest including reasonable attorneys' fees. NES should submit its claim for costs directly to the agency.

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<sup>4/</sup> We note also that while Army personnel regulations provide that an "appearance of impropriety" is sufficient to take disciplinary action against Army personnel, the procurement regulations do not establish the agency's right to disqualify a private contractor for a mere appearance of impropriety where there is evidence to convince a reasonable person that no impropriety actually occurred.



Because the award to NES was proper, Urgent Care, Inc. is not an interested party to protest its own disqualification under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991). The firm would not be in line for award even if its protest were sustained. We therefore dismiss Urgent Care's protest

*for*   
Comptroller General  
of the United States