

Pietrovi to
145370



Comptroller General
of the United States

Washington, D.C. 20048

Decision

Matter of: KSR, Inc.
File: B-250160
Date: January 13, 1993

Monica Sterling for the protester.
Captain Gerald E. Kohns and Gregory A. Lund, Esq.,
Department of the Army, for the agency.
Guy R. Pietrovi to, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Procuring agency properly rejected the bid of a firm, whose president is a government employee, where the agency reasonably concluded that the government employee, as president, substantially controlled the firm's business.

DECISION

KSR, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DABT63-92-B-0028, issued by the Department of the Army, for the design and development of instructional courses for reserve components at Fort Huachuca, Arizona. The Army rejected KSR's bid because it found that KSR was substantially controlled by a government employee.

We deny the protest.

KSR, an Arizona corporation owned by five equal shareholders, one of which is a government employee at Fort Huachuca, was recently formed to seek and perform government contracts and subcontracts. The government employee/shareholder is also KSR's president.¹ Prior to incorporation, the government employee obtained advice from Fort Huachuca's Judge Advocate General (JAG) office regarding the formation of KSR and the seeking of government contracts. Fort Huachuca's JAG office informed the government employee that Federal Acquisition Regulation (FAR) § 3.601(a) (FAC 90-2) prohibited the award of government contracts to businesses substantially owned or controlled by government employees. Apparently based upon this advice, the

¹The government employee/president's spouse is also employed by the agency's directorate of contracting at Fort Huachuca.

government employee obtained only a 20 percent ownership interest in KSR. KSR did not inform the JAG office that the government employee/ shareholder would be the corporation's president.

The Army received seven bids at bid opening, including KSR's low bid, which was signed by the government employee as president of the corporation. The contracting officer rejected KSR's bid under FAR § 3.601(a) because she determined that the government employee, as president of the bidder, had substantial control over the corporation.

Under FAR § 3.601, a contract may not be awarded to a business substantially owned or controlled by a government employee, except where, pursuant to FAR § 3.602, an agency official not below the head of the contracting activity finds that there is a "most compelling reason to do so, such as when the [g]overnment's needs cannot reasonably be otherwise met." This prohibition is intended to avoid any conflict of interest that might arise between an employee's interests and government duties, and to avoid the appearance, much less the fact, of favoritism or preferential treatment. FAR § 3.601(a); Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629.

KSR argues that its president does not substantially control the business, but that the "title of 'president' is administrative only and carries no special authority." This argument is misplaced since the agency is not required to establish with certainty that the government employee had a substantially controlling interest; rather, the agency need only have a reasonable basis to believe that the government employee had such control. See Marc Indus., B-246528 et al., Mar. 10, 1992, 92-1 CPD ¶ 273. Here, the designation of the government employee as president of this closely-held corporation, the preparation of KSR's bid by the government employee, as president, and the fact that all of the agency's dealings with KSR were with the government employee provided the reasonable factual basis for the contracting officer's belief that the government employee had a substantially controlling interest.²

KSR also asserts that the agency is estopped from rejecting KSR's bid because the JAG office informed KSR that a 20 percent ownership interest by the government employee would not constitute substantial ownership or control.

²The agency's concerns that the president may exercise substantial control over the firm's business have been seemingly confirmed by the fact that it is KSR's president who has pursued the protests filed with the agency and with our Office.

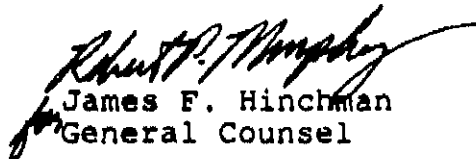
However, KSR's bid was not rejected on the basis of the government employee's stock ownership interest but on the basis of that employee's substantial control as president of the firm. As KSR admits, the government employee's role as president of the firm was not disclosed or discussed with the agency.

KSR also argues that it is entitled to an exception to the general prohibition because there is a compelling reason to award the contract to KSR. Specifically, KSR states:

"Protester is composed of individuals with immediate firsthand/technical experience and background in the work to be done. Contract to be awarded involves the development of Reserve Component instruction to be presented to a specific Reserve Component student population by a specific Reserve Component training unit. Protester is composed of individuals who have trained that specific Reserve Component student population while part of the specific Reserve Component training unit in question. None of the other bidders have that experience."

Under FAR § 3.602, an agency may grant an exception to the general proscription against the award of a contract to a business substantially owned or controlled by a government employee where the agency finds that a "most compelling reason" exists (i.e., where the agency's needs could otherwise not be met). Where a procurement decision, such as the exception here, is committed by statute or regulation to the discretion of agency officials, we will not make an independent determination of the matter; rather, we review the agency's explanation to ensure that it is reasonable and consistent with applicable statutes and regulations. See, e.g., Lawlor Corp.--Recon., 70 Comp. Gen. 374 (1991), 91-1 CPD ¶ 335. Here, the protester has presented no evidence that would provide us with any basis to question the agency's refusal to grant KSR an exception to the general prohibition against awarding government contracts to businesses substantially owned or controlled by government employees. While KSR argues that only it has "immediate" contract experience (apparently acquired by reason of its president's government employment), the fact is that the Army received six other responsive, responsible bids that would meet the agency's needs.

The protest is denied.


James F. Hinchman
General Counsel