DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186723 DATE: December 6, 1976

MATTER OF: Riggins & Williamson Machine Co., Inc.

DIGEST:

1. Protest against cancellation of initial solicitation and subsequent resolicitation without small business set-aside is untimely and not for consideration under GAO Bid Protest Procedures when filed after closing date for receipt of initial proposals under revised solicitation.

2. Allegations that former agency employee acting as consultant dispersed information which was not available to all offerors or otherwise attempted to secure unfair competitive advantage for his client is not supported by record.

3. Record does not support allegations that offeror's proposed employment of agency employee as foreman unfairly influenced evaluation process or that appearance of this agency employee while on annual leave at offeror's oral presentation gave offeror unfair competitive advantage.

4. Allegations of contractor's misuse of Government time and materials involve questions of contract administration which is for resolution by contracting agency.

Riggins & Williamson Machine Co., Inc. (R&W) protests alleged improprieties in the procurement of rigging and hauling support services by the National Aeronautics and Space Administration (NASA), Langley Research Center (LRC) under request for proposals (RFP) 1-104-5700.0047-A. Specifically, R&W protests the cancellation of RFP 1-104-5700.0047, issued as a small business set-aside, and the subsequent resolicitation under the instant solicitation without a small business set-aside, the allegedly illegal participation of two former NASA employees on behalf of the contract awardee and the alleged use of Government time and material by the awardee in the preparation of its proposal and for the solicitation of political contributions.

On June 15, 1976, R&W filed a protest against cancellation of the initial RFP and the resolicitation of offers without a

small business set-aside. NASA contends that the decision to resolicit was made because of unreasonable prices received under the initial solicitation and, in this connection, to permit the agency to avail itself of the benefits of a Department of Labor ruling allowing offerors to propose the rigging work at Service Contract Act rates, rather than the higher Davis-Bacon Act rates. The decision to drop the small business set-aside on resolicitation was allegedly made to increase competition.

R&W, which had submitted a proposal under the initial solicitation, also submitted an offer under the revised solicitation. Following receipt of proposals on May 13, a competitive range was established which included R&W and the eventual awardee, Metro Contract Services (Metro). (Metro had not submitted a proposal under the initial solicitation.) Following discussions with both firms, NASA selected Metro on June 4. On June 8, R&W was given a debriefing. A protest letter dated June 10, 1976, was filed with our Office on June 15, 1976. Award was made to Metro on July 1, 1976, notwithstanding the protest, in order to assure continuity of the services.

Our Bid Protest Procedures require that protests alleging solicitation defects which are apparent prior to the closing date for receipt of initial proposals, shall be filed prior to the date for receipt of initial proposals. 4 C.F.R. § 20.2(b)(1) (1976). In NYTEK Electronics, B-182071, February 6, 1975, 75-1 CPD 85, we held that a protest against a resolicitation filed after the closing date for receipt of proposals under the second solicitation, was untimely and not for consideration. In the instant case, R&W not only refrained from protesting prior to receipt of initial proposals under the second solicitation, it participated without objection under the resolicitation through the point of final selection. In support of the timeliness of its protest, R&W contends that its basis for protesting only became apparent after it learned that the estimated award price under the second solicitation was higher than the Government estimate and only slightly less than estimated award price under the first solicitation, thereby revealing the fallacy of the Government's rationale for the resolicitation. However, the hindsight which is essential to the protester's position was not available to the contracting officer when he made the decision to resolicit. If R&W doubted the wisdom of the resolicitation, the proper time to question it was prior to the receipt of proposals, when remedial action could have been taken, if warranted. Since R&W did not protest until after the entire

negotiation process had been concluded, its protest against the decision to resolicit without the small business set-aside is untimely and will not be considered further.

R&W next contends that two former NASA employees improperly participated in this procurement on behalf of Metro Contract Services.

The record indicates that one of these was the Chief in the Procurement Division, Office of Management Operations, Langley Research Center, until his retirement from NASA on June 27, 1975. He was briefly rehired as a retired annuitant between August 1 and November 27, 1975. Following termination of his employment at NASA, and after inquiring as to the propriety of such a proposed relationship with the Chief Counsel, LRC, the retiree acted as a consultant for Metro in May 1976. In this capacity, he was paid a fee to review Metro's proposal to determine if it was responsive to the instant RFP. Having retired from NASA prior to the issuance of the RFP, we note that this individual could have had no knowledge regarding the proposal of any of Metro's competitors. Furthermore, as to the retiree's association with the procurement itself, NASA states:

> "[He] did not participate in the drafting of either solicitation, nor did he participate in any way in the procurement as an officer or employee of NASA."

The protester contends that the individual in question acted in violation of 18 U.S.C. §§ 205 and 207. Both are criminal statutes, and their interpretation and enforcement are primarily matters for the Department of Justice. However, we do not believe the record reflects a sufficient basis to question the validity of the procurement in terms of the alleged violations of the statutory provisions. Initially, we note that 18 U.S.C. § 205, which prohibits conflicts of interest by current Government employees, is inapplicable since the retiree did not commence his consulting relationship with Metro until several months after he terminated his Government employment.

It also appears that 18 U.S.C. § 207 is not applicable. That statute makes it illegal for a former employee to act as agent or attorney for anyone other than the United States in connection with matters formerly participated in by the employee or within the official responsibilities of the employee. There is no evidence to indicate that the retiree represented Metro or was otherwise authorized to act on that company's behalf.

The protester contends that the retiree contacted members of the Source Evaluation Board (SEB) in an effort to solicit favorable treatment and inside information for Metro, and that he influenced the evaluation process in violation of NASA Procurement Regulation 1.113-2 (1975 ed.) which prohibits organizational conflicts of interest. This contention is based on an allegation that the retiree made improper contact with members of the SEB. The record indicates that he contacted the Chairman of the SEB on May 21, 1976, regarding the status of the evaluation and again on May 24, 1976, to determine whether a competitive range had been established. We are advised that on neither occasion was he given any information which was not available to Metro's competitors. Nor does the record support the protester's charge that Metro was given favorable treatment as a result of the retiree's association with that firm. In fact the SEB Chairman states that while he was advised by the retiree of his interest in the procurement on behalf of one of the competitors, the Chairman states that he was not advised nor was he aware that Metro was the competitor until after the selection had been announced and the protest filed. We have also examined the "Standards of Conduct for NASA Employees," 14 C.F.R. 1207 (1976) and find no evidence of impropriety in the retiree's relationship with Metro in the instant case.

The protester also contends that a conflict of interest was created when Metro proposed a current NASA employee as its foreman. This individual was employed by NASA at Johnson Space Center (JSC), Houston, Texas, to monitor the performance of rigging and hauling contractors. Metro was never the rigging and hauling contractor at JSC. While on annual leave from JSC, he attended Metro's oral presentation at Langley Research Center on May 27, 1976, to answer any questions regarding his background and experience. The record indicates that Metro's decision to substitute him for the foreman proposed in its initial submission resulted in a higher score for that company. Following the award to Metro, the NASA employee in question left his position at JSC to act as foreman at LRC. The protester charges that this former employee's participation was in violation of 18 U.S.C. § 205 and 207. Again we note that both sections require, inter alia, that an employee act as attorney or agent for someone other than the United States. We think it is clear that by stating his credentials at the oral discussions, the subject individual was not acting as agent or attorney for Metro. Furthermore, the prohibition of section 207 is inapplicable since the individual

was no longer connected with LRC prior to the award to Metro and could not have participated, directly or indirectly, in matters related to the instant contract.

Independent of the alleged criminal conflicts of interest, we find no breach of the "Standards of Conduct for NASA Employees," supra. There is nothing to suggest that the evaluation process was improperly influenced by the NASA employee's appearance as a proposed employee of Metro, only that his professional credentials justified a favorable adjustment in Metro's score.

Consequently, neither the consulting services performed by the NASA retiree nor the proposed and actual employment of the former JSC employee by Metro, created a conflict of interest.

Finally, R&W contends that Metro prepared its proposal for the instant solicitation on Government time and using materials to which it had access under an existing contract with NASA at LRC. The protester also contends that Metro used Government time and materials under another contract to solicit political contributions for its political action committee. Neither of these allegations relate to the legality of the award process, which it is the function of our Office to consider. Both involve matters of contract administration which are properly for resolution by the contracting agency. Columbia Loose-Leaf Corporation, B-184665, September 12, 1975, 75-2 CPD 147. In this regard, we are advised by the agency that these charges have been investigated and that the evidence shows that Metro's time for proposal preparation was charged to a different cost center and not to its other contract at LRC. As for the political contributions, NASA states that Metro did solicit voluntary contributions for a newly created "Concerned Citizens Political Action Committee" at a year-end performance review meeting with its employees held at the Center. However, Metro has indicated to NASA that it will no longer use these performance review meetings to discuss the Committee and that all future committee notices will be disseminated by mail.

The protest is denied.

Deputy Comptroller General
of the United States