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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: KAR Contracting, LLC

File: B-310454; B-310537

Date: December 19, 2007

Kenneth A. Reynolds, KAR Contracting, LLC; and Dwight J. Staples, Esq., and Gail Henderson-Staples, Esq., Henderson, Henderson & Staples, for the protester. Phillipa L. Anderson, Esq., Kenneth MacKenzie, Esq., and Charlna Quarles, Esq., Department of Veterans Affairs, for the agency. Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging an agency's decision that the protester is ineligible for the award of two construction projects are denied where the agency reasonably concluded that these awards would create the appearance of an impropriety because of the protester's founder's role in both projects while a government employee, including serving as the contracting officer's technical representative, and participating in the preparation of construction drawings.

DECISION

KAR Contracting, LLC protests the rejection of its bids under two solicitations to perform construction work at the Department of Veterans Affairs (VA) Medical Center in Huntington, West Virginia. One bid was submitted in response to invitation for bids (IFB) No. VA-249-07-IB-0085, for replacement of the roof on "Building One" at the VA's Huntington Medical Center; the second was submitted in response to IFB No. VA-249-07-IB-0107, for work on the Center's water reservoir and pump house.

These protests involve a single issue--whether the VA's contracting officer (CO) reasonably rejected two bids submitted by a recently retired employee of the VA Medical Center. For these bids--as opposed to two other bids where the protester received awards--the CO concluded that the former employee's involvement with the same projects during his government service was too significant to permit award to his newly-formed company without creating the appearance of an impropriety. For the reasons set forth below, we agree.

We deny the protests.

BACKGROUND

Both of these solicitations were issued by the VA on August 1, 2007. Twelve days earlier, on July 20, Mr. Kenneth Reynolds retired from his job at the VA's Huntington Medical Center, where he had worked for more than 21 years. For the 15 years prior to his retirement, Mr. Reynolds had been employed as an engineering technician at the Medical Center, where, among other duties, he was identified as a Project Manager reporting to the Chief of the Facility and Plant Management Service (hereinafter, the "Facilities Chief"). Mr. Reynolds explains that he left his VA job "to pursue owning and operating an SDVOSB (small disabled-veteran-owned business) contracting company, KAR Contracting, LLC." Protester's Comments, Nov. 7, 2007, at 2.

Bid opening for the roof replacement project (IFB -0085) took place on September 5; bid opening for the work on the water reservoir and pump house (IFB -0107) took place 2 days later, on September 7. On both projects, KAR was ultimately found to be the low bidder.¹

The CO explains that KAR submitted with both of its bids a copy of a letter to Mr. Reynolds from the VA Regional Counsel, dated July 20, which had been provided upon his retirement. The CO also states that Mr. Reynolds indicated that the letter "allowed him to bid on the VA [Medical Center] contracts." CO's Statement, Oct. 25, 2007, at 1.² The letter, in general, provides an explanation of the post-employment restrictions applicable to former government employees codified at 18 U.S.C. § 207.³ AR, exh. 5.

In light of concerns about whether the newly-founded company owned by Mr. Reynolds could appropriately perform these contracts—and given Mr. Reynolds'

¹ For the roof replacement project five bids were received. The apparent low bid was rejected for reasons not relevant to this dispute (bid bond issues), and the bid submitted by KAR became the lowest responsive bid. For the water reservoir project, KAR submitted the only bid. Agency Report (AR), exhs. 3 & 4.

² The CO's Statement, while signed, is undated, but was provided to our Office on October 25.

³ In broad terms, 18 U.S.C. § 207(a)(1) imposes criminal penalties on former government employees for representing "any other person" before a federal agency in connection with a "particular matter . . . in which the [former employee] participated personally and substantially . . . and [] which involved a specific party or specific parties at the time of such participation." In contrast, § 207(a)(2) imposes a 2-year bar under parallel facts for matters under a former employee's "official responsibility," during the final year of federal service (i.e., even where the employee was not personally and substantially involved).

representation to the CO that the letter advised that it could--the CO contacted the Facilities Chief for advice. The Facilities Chief, who was Mr. Reynolds' supervisor at the time of Reynolds' retirement, was asked by the CO to certify that "Ken Reynolds would be eligible for award" of these projects. AR, exhs. 6 and 7. In response, the Facilities Chief advised the CO that Mr. Reynolds had been involved in both projects, and therefore he was seeking clarification from the VA's Office of Regional Counsel. On September 19, in a letter addressed to the Facilities Chief, a VA attorney provided a 3-page analysis of the situation with the following conclusion:

Based on the foregoing, pursuant to either Section 207(a) or 207(b), it is my opinion that Mr. Reynolds is ineligible for any projects that were assigned to him while he was employed as an Engineering Technician at the Huntington VAMC.

AR, exh. 8, at 3.⁴

Upon receipt of this letter, the Facilities Chief prepared a statement for the CO advising that Mr. Reynolds (and KAR Contracting) was ineligible for award of either of these contracts. AR, exhs. 9 and 10. Two days later, in a letter to KAR, the CO advised

We are unable to accept your bids on these two solicitations. Acceptance would violate post-Government employment restrictions as outlined in the enclosed Office of Regional Counsel . . . letter dated September 19, 2007.

AR, exh. 11, Letter from CO to KAR, at 1.

These protests followed.

DISCUSSION

KAR argues that the CO abused her discretion when she excluded KAR's bids from consideration because her decision was based on faulty legal reasoning by the VA's attorney. In addition, KAR argues that agency officials are biased against him.

The basic requirements and procedures for procurements conducted using sealed bids are set forth in the Federal Acquisition Regulation (FAR) at part 14. Within this scheme, subpart 14.404-2 governs the rejection of individual bids, and FAR § 14.402-2(h) requires the rejection of any bid received from a person or concern that has been suspended, debarred, proposed for debarment, or declared ineligible for

⁴ Since the letter does not elsewhere mention or explain the application of § 207(b), we infer that the intended references were to §§ 207(a)(1) and 207(a)(2), which were the subject of the analysis of the letter.

award. The record here shows that, after consultation with counsel, the Facilities Chief provided the CO with a determination that KAR was ineligible for these awards.

Once the agency concluded that KAR was ineligible for award, it rejected KAR's bids. While the analysis set forth below is drawn largely from cases involving negotiated procurements, the same rules apply to procurements conducted using sealed bids: an agency can reasonably reject a bid to avoid even the appearance of an impropriety. See Revet Env't & Analytical Labs., Inc., B-221002.2, B-221003.2, July 24, 1986, 86-2 CPD ¶ 102 at 4.

An agency's decision to exclude an offeror⁵ from a competition in order to remedy a problem related to the integrity of a particular procurement requires a balancing of competing interests set forth in the FAR. On the one hand, contracting officers are granted wide latitude in their business judgments to safeguard the interests of the United States in its contractual relationships. FAR § 1.602-2; IGIT, Inc., B-271823, Aug. 1, 1996, 96-2 CPD ¶ 51 at 3; Compliance Corp.-Recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435 at 4. On the other hand, the same section of the FAR requires contracting officers to ensure impartial, fair, and equitable treatment of all contractors. FAR § 1.602-2(b); KMPG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272 at 8, aff'd, Agency for Int'l Dev.; Dev. Alternatives, Inc.-Recon., B-251902.4, B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201 at 7.

It has long been the case that where there is an apparent conflict of interest, an agency may exclude an offeror from a procurement to protect the integrity of the federal procurement system, even if no actual impropriety can be shown, provided that the agency's determination is based on fact and not mere innuendo and suspicion. See, e.g., Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 10; Electronic Design, Inc., B-279662.5, May 25, 1999, 99-1 CPD ¶ 103 at 6; IGIT, Inc., *supra*; KPMG Peat Marwick, *supra*; Compliance Corp.-Recon., *supra*; MDT Corp., B-236903, Jan. 22, 1990, 90-1 CPD ¶ 81 at 3. Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 8, aff'd, Brown Assocs. Mgmt. Servs., Inc.-Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 at 3; Laser Power Techs., Inc., B-233369, B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 at 7.

In those cases where an agency has decided to exclude an offeror (or bidder) from a competition, we will review the record to determine whether the agency had a reasonable basis for its decision in the face of an allegation, or indication, of an

⁵ As stated above, since most recent decisions interpreting conflict of interest requirements have involved negotiated procurements, rather than procurements using sealed bids, we will describe those cases using the term offeror, rather than bidder.

apparent conflict of interest or appearance of impropriety. See Lucent Techs. World Servs., Inc., supra; IGIT, supra; KPMG Peat Marwick, supra; Naddaf Int'l Trading Co., B-238768.2, B-238768.3, Oct. 19, 1990, 90-2 CPD ¶ 316 at 5; Holmes & Narver, Inc., B-239469, Sept. 14, 1990, 90-2 CPD ¶ 210 at 10 (all involving an agency decision to exclude an offeror); see also Friends of the Waterfront, Inc., B-225378, Jan. 6, 1987, 87-1 CPD ¶ 16 at 2; Revet Env't & Analytical Labs., Inc., supra (involving an agency decision to exclude a bidder).

During this protest, KAR has raised detailed challenges to the legal memorandum provided by the VA attorney, including assertions that certain portions of the analysis are flawed, and do not accurately interpret the regulations implementing this criminal statute. We need not take a position on KAR's challenges to the VA's analysis of a criminal statute to reach our conclusion here; 18 U.S.C. § 207 is a criminal statute whose interpretation and enforcement is a matter for the Department of Justice, not our Office. Science Pump Corp., B-255737, Mar. 25, 1994, 94-1 CPD ¶ 246 at 5 n.3.

In our view, the restrictions of 18 U.S.C. § 207 do not set the outer boundaries for a CO's reasonable exercise of discretion about whether the award of a contract will create the appearance of impropriety. Specifically, even if KAR can argue that the facts here would not support a criminal conviction for violation of the post-employment restrictions, that would not mean there was no reasonable basis for concluding that KAR was ineligible for award.

Our review of the record shows a CO, and other officials, questioning whether it was appropriate to award construction work for the Medical Center to a recently retired employee who had been listed as the CO's technical representative (COTR) on the very projects on which he was bidding. The record supports this concern: Mr. Reynolds was assigned as the COTR on both of these projects. As recently as June 7—just 3 months before he would be the low bidder for the water reservoir and pump house project—the project tracking log includes Mr. Reynolds' initials ("KR") on the log's indication that the project design had reached the 50 percent completion point. On the roof replacement project, where he was also the COTR, the project design had reached the 75 percent completion milestone.

In addition to the listing as COTR, the VA officials noted that engineering technicians prepare drawings for various construction projects to be performed at the Medical Center. The concern about the appearance of a conflict created by this situation led the CO to inquire of the Facilities Chief whether award to KAR was appropriate. When the Facilities Chief was unsure, he sought advice from an agency attorney. While we recognize that the concern here was ultimately described as a concern that award to KAR would violate the post-employment restrictions applicable to former government employees, we think there is ample support in this record to conclude that the CO's actions here reflected concern about the appearance of an impropriety created by the award of these contracts to a recently retired employee's newly-formed company. Where we find support for such conclusions in the record, we are

less concerned about whether the CO selected the correct legal label to describe those concerns than we are about whether the exercise of discretion was supported by the facts.⁶ See Lucent Techs. World Servs. Inc., *supra*, at 4-9; cf. Battelle Mem. Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 6-8 (recognizing that the FAR's organizational conflict of interest regulations, by their terms, do not apply to government officials, but looking to those regulations as instructive about the situations COs should take steps to avoid, neutralize, or mitigate).

During this protest, KAR has argued that Mr. Reynolds did not prepare many of the drawings here (in some instances, KAR explains that Mr. Reynolds only copied drawings prepared years earlier), and KAR has submitted a statement from another engineer buttressing his assertions. As stated above, we think the record here supports the agency's conclusion that government employees involved in projects this close to design completion, and designated as technical participants in the upcoming procurement, can reasonably be excluded from competitions when they leave government service and, soon thereafter, attempt to win contracts for the same projects they worked on while in the government.⁷

KAR pointed out during this protest that it had received two other awards from the VA's Huntington Medical Center since Mr. Reynolds' retirement. We asked the agency to explain its rationale for these other awards, given the position taken here.

In response, the Facilities Chief submitted a sworn declaration explaining that the differing conclusions were due to a different level of involvement by Mr. Reynolds, as reflected in documents the agency calls "blue sheets." These so-called "blue sheets" listed the status of all approved construction projects for the Huntington VA Medical Center. In the two projects under challenge here, the agency explains that

⁶ Specifically, we reach our conclusion that the decision to exclude KAR was reasonable even accepting KAR's allegations that there were flaws in the legal analysis of the post employment restriction statute performed by the agency attorney.

⁷ With respect to his role as the COTR, KAR does not dispute that Mr. Reynolds had been listed as the COTR on these projects, but contends that he did not have official responsibility for them (because others did) and because the projects did not become "particular matters" under the rubric of 18 U.S.C. § 207 until release of the solicitations on August 1–12 days after his retirement. As stated above, we will not parse the application of this criminal statute to this situation. We think the CO could reasonably conclude that Mr. Reynolds's involvement in preparing the design documents for these projects—even if he was supervised by others with more authority for the projects than him, and even if others did more of the design work than he did—created the appearance of an impropriety. We also recognize that at some point prior to the release of a solicitation, an agency must identify the people who will have technical responsibilities in the upcoming procurement.

Mr. Reynolds was identified as the COTR, and the project design had reached, or passed, the 50 percent design completion point. While Mr. Reynolds was also listed as the COTR for one of the projects where he was allowed to receive an award--involving site preparation for R/F equipment--the design of the project was still listed as 0 percent completed because equipment plan drawings had not yet been received from the equipment vendor. Declaration of VA Medical Center Facilities Chief, Nov. 30, 2007, at 1-2. In our view, while Mr. Reynolds argues that the "blue sheets" are sometimes inaccurate, we think the agency could reasonably rely on these contemporaneously prepared worksheets to inform its decisions about which projects might be appropriate for award to KAR, and which projects might more appropriately be withheld.

As a final matter, we turn to KAR's complaint that certain of the officials at the Huntington Medical Center are biased against him. We note that not only has KAR provided no evidence to support these claims, but the evidence provided by the agency supports a conclusion that these allegations are not credible. As stated above, where KAR was the low bidder on a project that had not proceeded very far towards completion of the design work, he received award. Where, as here, a decision to exclude a contractor is limited to a specific situation, and there is no indication that KAR will be ineligible for the award of contracts in the future, we are less concerned about allegations of ongoing bias. See, e.g., Naddaf Int'l Trading Co., B-238768, B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ 316 at 6.

In short, the record here reflects that KAR's founder had a role in the development of the requirements for these projects, and that he held this role until shortly before issuance of the solicitations. When KAR then submitted the lowest responsive bids as of the bid openings on September 5 and 7, the CO decided that KAR would not be eligible for these awards. On these facts--and in particular, the very brief time between the involvement of KAR's founder and bid opening--we conclude that the CO reasonably excluded KAR's bids for these projects.

The protests are denied.

Gary L. Kepplinger
General Counsel