



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Asia Resource Partners K.K.

File: B-400552

Date: November 5, 2008

Michael Hertz for the protester.

Maj. LaChandra C. Richardson, Department of the Air Force, for the agency.

Paul N. Wengert, Esq., Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that agency acted improperly when it excluded offeror from competition for contracts at the base where the wife of the offeror's president serves as a contracting officer is denied because the agency decision was a reasonable attempt to avoid the appearance of impropriety.

DECISION

Asia Resource Partners K.K., of Tokyo, Japan, protests its exclusion from competition by the Department of the Air Force under request for proposals (RFP) No. FA5270-08-R-0015 for operation and maintenance of a liquid propane gas (LPG) distribution system, and RFP No. FA5270-08-R-0047 for fuel storage tank maintenance. The protester argues that the Air Force has improperly concluded that the firm's participation in these procurements creates an appearance of impropriety, and that excluding the firm from these competitions is unreasonable.

We deny the protest.

This protest relates to two solicitations issued by the 18th Contracting Squadron, Kadena Air Base, Japan. It raises the question of whether a contracting agency may properly exclude from consideration proposals submitted by an offeror whose top executive is married to an agency procurement official within the same contracting organization, on the basis that an award to that offeror would create the appearance of impropriety. For the reasons explained below, we believe that the Federal Acquisition Regulation (FAR) authorizes the actions taken here, and that the Air Force reasonably exercised this authority.

BACKGROUND

Michael Hertz is the president, chief executive officer, and majority shareholder of the protester, Asia Resource Partners K.K.¹ (ARP). ARP asserts that it is a private Japanese company that is not owned or controlled by any federal employee, and does not employ any current government employees. Protest at 2.

The Air Force issued the LPG system maintenance RFP (-0015) on June 26, seeking proposals to operate and maintain an LPG distribution system at Kadena Air Base. On July 2, the Air Force contracting officer (CO) for the LPG system maintenance RFP convened a pre-proposal conference. During this conference, the CO met Mr. Hertz, the president and chief executive officer of ARP.

A short time later, the CO realized that Mr. Hertz is the spouse of another Air Force CO at Kadena Air Base. Specifically, Mr. Hertz's wife is a CO within the infrastructure and acquisition group (known as LGCC) within the 18th Contracting Squadron at Kadena Air Base. The procurements at issue here were being conducted by a different group at the base, the base support acquisition group (known as LGCA). While both acquisition groups are located at the base, the two groups are housed in different buildings, but have computer access to a shared set of files and databases, which includes nonpublic information relating to the RFPs at issue. Agency Report (AR) at 5.

On July 15, the commander of the 18th Contracting Squadron gave ARP oral notice that any proposals that the firm submitted for procurements conducted at Kadena Air Base would not be considered for award, due to the appearance of impropriety arising from the fact that Mr. Hertz is married to a CO at the base. That afternoon, Mr. Hertz sent an e-mail to the commander, arguing that computer security measures could be put in place to address any ethical concerns about this situation. In particular, Mr. Hertz contends that the Air Force could restrict his wife's access to electronic files related to procurements involving his company. In Mr. Hertz's view, these measures should be sufficient to satisfy Department of Defense policies regarding the situation. AR, attach. 3, E-mail from Michael Hertz to 18th Contracting Squadron Commander, July 15, 2008, at 1. ARP submitted additional arguments to the commander on July 16. On July 18, ARP submitted a timely proposal under the LPG maintenance RFP.

On the same day, July 18, the Air Force also issued the fuel tank maintenance RFP (-0047). ARP submitted a timely proposal under that RFP by the July 25 closing date.

¹ The designation "K.K." indicates ARP's status as a kabushiki kaisha, which is a type of business corporation, established under Japanese corporate law. According to documentation from ARP, Mr. Hertz is a "51% Shareholder, through Okinawa Biodiesel K.K." Protest attach. 3, ARP KK Corporate Overview, at 2.

On August 1, the Air Force awarded the fuel tank maintenance contract to another offeror.

On August 18, the Air Force notified ARP that its proposal under the LPG maintenance RFP (-0015) “was not considered for award because it would give the appearance of favoritism or preferential treatment, thus creating the appearance of impropriety.” Request for Dismissal, attach. 5, Letter from Air Force Flight Chief to ARP, Aug. 18, 2008, at 1. The following day, on August 19, the Air Force notified ARP that its proposal under the fuel tank maintenance RFP (-0047) had not been considered for the same reasons. Request for Dismissal, attach. 5, Letter from Air Force Flight Chief to ARP, Aug. 19, 2008, at 1.

After ARP unsuccessfully protested to the Air Force, it filed this protest with our Office.

DISCUSSION

ARP argues that its proposals were improperly rejected. In support of its contentions, ARP argues that Mr. Hertz’s wife works in a different building from the CO for these two procurements, and that she has had no role in either procurement.² ARP also argues that any appearance of impropriety could be mitigated using computer security measures to restrict access to electronic files relating to these two procurements.

The Air Force responds that it has an obligation, reiterated in the FAR, “to avoid strictly any conflict of interest or even the appearance of a conflict of interest,” in the conduct of agency procurements. FAR § 3.101-1. Consistent with this, the Air Force also notes that the FAR prohibits an agency from knowingly awarding a contract to a federal employee or a firm owned or controlled by a federal employee (except in circumstances not applicable here). FAR § 3.601(a). Finally, the Air Force notes that Mr. Hertz’s ownership of ARP is imputed to his wife, an Air Force CO at the same base.

The Air Force argues that the appearance of impropriety arises here not only because Mr. Hertz’s wife is an Air Force CO, but also because she had access to shared computer storage drives and databases “that contain significant nonpublic information on prospective and current acquisitions.” AR at 5. And the Air Force

² ARP asserts that it has no intention to compete for contracting opportunities conducted by LGCC, which is the organizational branch in which Mr. Hertz’s wife works. Protester’s Comments at 3. It therefore appears that ARP would concede that an appearance of impropriety is possible in some circumstances, but disputes the extent to which the Air Force has construed the circumstances that could give rise to the problem.

contends that, even after award, the administration of the contracts could continue to create an appearance of favoritism, based on presumed collegial relationships between COs within the 18th Contracting Squadron. As a result, and because these procurements were already underway when the Air Force learned of the connection between ARP and an Air Force CO at the same base, the agency contends that the only way to avoid the appearance of impropriety at this juncture is to exclude ARP from both procurements.

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. Accordingly, an agency can reasonably reject a proposal to avoid even the appearance of an impropriety. KAR Contracting, LLC, B-310454, B-310537, Dec. 19, 2007, 2007 CPD ¶ 226 at 4. We 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 apparent conflict of interest or appearance of impropriety. Id. at 4-5.

In our view, the actions taken by the Air Force here were based on facts, and were reasonable.³ Even though ARP argues that the record does not suggest that the firm obtained any nonpublic information or other advantage, or expected to benefit from favoritism in these procurements, and even though Mr. Hertz's wife works in a different building, and in a different contracting office at the base, we believe that the Air Force reasonably concluded that this situation created an appearance of impropriety.⁴

The protest is denied.

Gary L. Kepplinger
General Counsel

³ Even if, as ARP argues, a point paper obtained by Mr. Hertz from the Air Force ethics office implies that his firm was not prohibited from competing for these contracts, we note that the point paper focused on the application of government conflict of interest laws and regulations (specifically, 18 U.S.C. § 208 and 5 C.F.R. § 2635.402). It did not address or resolve the Air Force's obligations under the FAR to avoid even the appearance of a conflict of interest.

⁴ We express no view on whether it will be feasible for the Air Force and ARP to avoid or to mitigate the potential for the appearance of impropriety in any future procurements, only that, in our view, the agency's actions here were reasonable.