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**Comptroller General
of the United States**

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

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Decision

Matter of: Kola Nut Travel, Inc.

File: B-296090.2; B-296090.3

Date: June 17, 2005

Bryant S. Banes, Esq., for the protester.

Josephine L. Ursini, Esq., for Ravenel Brothers, Inc., an intervenor.

Major Frank A. March, Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's assertion that awardees are part of a "conglomerate" and should not qualify as small businesses constitutes a challenge to the size status of the awardees, an issue that is not for consideration by GAO.
 2. Where awardees' consultant will earn a fee based on profits earned during the awardees' performance of the contract, and there is no evidence of improper influence on government officials regarding the contract award decisions, the agreement between the awardees and the consultant does not violate the statutory and regulatory limitations on contingent fees.
 3. Agency's evaluation of protester's proposed approach is reasonable where contemporaneous evaluation documents explain the basis for agency concerns and protester offers no substantive rebuttal of those concerns.
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DECISION

Kola Nut Travel, Inc. protests the Department of the Army's award of contracts to Ravenel Brothers, Inc. and AirTrak Travel for travel management and related services under request for proposals (RFP) Nos. W91-QUZ-04-R-0003 and W91-QUZ-04-R-0007. Kola Nut maintains that the contract awards reflect an improper contingent fee agreement between the awardees and a consultant, and that the agency improperly evaluated Kola Nut's proposal.

We deny the protest.

BACKGROUND

The Army published the two solicitations at issue here in February 2004, seeking proposals to provide travel management and related services for Department of Defense (DOD) travelers whose duty stations are within several specified travel areas. RFP No. W91-QUZ-04-R-0007 sought travel services for military entrance processing station (MEPS) locations, and is referred to in the decision as the MEPS solicitation; RFP No. W91-QUZ-04-R-0003 sought travel services for non-MEPS locations, and we refer to it as the non-MEPS solicitation. Agency Report (AR) at 2.¹ Both solicitations contemplated separate contract awards for each of the specified travel areas; accordingly, the agency performed separate evaluations and source selection decisions with regard to each area. AR at 2-3. All travel areas under both solicitations were set aside for small businesses, and offerors were permitted to submit proposals for any or all areas. Kola Nut's protest challenges the agency's contract awards to Ravenel for travel areas 73 and 91 under the non-MEPS solicitation, and to AirTrak for travel area 100 under the MEPS solicitation.

Both solicitations provided that proposals would be evaluated on the basis of the following factors, listed in descending order of importance: technical,² price,³ and performance risk.

With regard to proposed price, the solicitation recognized that travel service contractors may receive airline commissions, as well as utilization fees from global

¹ There are six travel areas, incorporating 67 locations, under the MEPS solicitation, and 25 travel areas, incorporating 61 locations, under the non-MEPS solicitation.

² With regard to the technical evaluation factor, both solicitations provided that the agency would consider the following: understanding the requirements; feasibility of approach; and completeness. AR at 3-5. Overall, the language used to describe the evaluations the agency would perform under the two solicitations was very similar. However, under the solicitation for non-MEPS locations, the solicitation specifically provided that the agency's evaluation would include an assessment of the offeror's proposed approach to "servicing unique needs of multiple customers from a central location." AR, Vol. 4, Tab 3, at 161. This language did not appear in the solicitation for MEPS locations. See AR, Vol. 1, Tab 3, at 162.

³ Offerors were required to propose fixed transaction fees, point-of-sale fees, and fixed prices for certain required reports. AR, Vol. 1, Tab 3, at 163-64; AR, Vol. 4, Tab 3, at 162-63. Section M.4.3 of the solicitations provided, "The proposed fees will be evaluated as outlined herein," thereafter stating that the proposed fees and prices "will be multiplied by the [estimated quantity provided for each line item] to arrive at the overall total estimated contract value . . ." AR, Vol. 1, Tab 3, at 163-64; AR, Vol. 4, Tab 3, at 163-64.

distribution system (GDS) providers,⁴ but recognized that some uncertainty existed regarding the future receipt of such commissions and fees.⁵ In this regard, the solicitations contained the following clauses:

G.17 CESSATION OR REDUCTION OF AIRLINE COMMISSIONS

G.17.1 Where Contractors are receiving Airline Commissions, these commissions shall be factored by the Travel Agencies into their proposed fixed price transaction fees identified in their proposal.

G.17.2 If after contract award, and during the period of performance of the contract, the payment of commissions are reduced or suspended by the Airlines, the contractor will be entitled to an equitable price adjustment.

....

G.21 CESSATION OR REDUCTION OF GDS UTILIZATION FEES

G.21.1 GDS utilization fees are currently being paid by the GDS providers (SABRE, WORLDSPAN, APOLLO/GALILEO and AMADEUS) to Commercial Travel Agencies. Receipt of these fees have been factored by the Travel Agencies into their proposed fixed price transaction fees identified in the contract.

G.21.2 If after contract award, and during the period of performance of the contract, the payment of GDS fees are reduced or suspended by the GDS provider, the Contractor will be entitled to an equitable price adjustment.

AR, Vol. 1, Tab 3, at 119-20; AR Vol. 4, Tab 3, at 119-20.

⁴ A GDS is defined as an “[o]n-line, transaction processing system with access to computer-based carrier reservation systems capable of providing lowest cost fare evaluations, reservations, ticketing, related travel, and accessorial services.” AR, Vol.1, Tab 10, at 5.

⁵ The issue of whether such fees and commissions are likely to continue in the travel industry has been a subject of controversy before our Office for several years. See, e.g., CW Gov’t Travel, Inc. d/b/a/ Carlson Wagonlit Travel; American Express Travel Related Services Co., Inc., B-283408, B-283408.2, Nov. 17, 1999, 99-2 CPD ¶ 89 (protests asserting that solicitation incorporating commission-based pricing of travel services was contrary to customary commercial practice).

On or before the specified closing dates, proposals were submitted for the travel areas at issue by several offerors including Kola Nut, Ravenel, and Air Trak. Both Ravenel’s and AirTrak’s proposals offered prices that were considerably lower than the prices proposed by Kola Nut. In this regard, Ravenel’s and AirTrak’s proposals advised the agency that they were associated with a group of travel agencies who, with the common assistance of a consultant, Mr. Alvin Chisik,⁶ had negotiated higher commissions and utilization fees from the airlines and GDS providers based on the consolidated higher volume of business that the group of companies is expected to provide to the airlines and GDS providers.

The agency evaluated the proposals under each of the stated evaluation factors with the following results:

Travel Area 73

	Ravenel	Kola Nut
Technical	Good	Acceptable
Price	\$421,910	[deleted]
Performance Risk	Very Low	Very Low

Travel Area 91

	Ravenel	Kola Nut
Technical	Good	Acceptable
Price	\$1,014,479	[deleted]
Performance Risk	Very Low	Very Low

Travel Area 100

	AirTrak	Kola Nut
Technical	Good	Acceptable
Price	\$471,693	[deleted]
Performance Risk	Moderate	Moderate

AR at 7-9.

Based on the evaluations summarized above, the agency awarded contracts to Ravenel for travel areas 73 and 91 pursuant to the non-MEPS solicitation, and to AirTrak for travel area 100 pursuant to the MEPS solicitation. By letter dated March 28, Kola Nut filed this protest with our Office.

⁶ Kola Nut describes Mr. Chisik as “the Society of Government Travel Professionals 2003 Person of the Year.” Protest at 3.

DISCUSSION

Kola Nut first challenges the awards on the basis that the awardees' lower evaluated prices allegedly reflect various improprieties, complaining that the lower proposed rates constitute rates of a "conglomerate." In this regard, Kola Nut asserts that there is an agency bias against what Kola Nut characterizes as "true" small businesses. Protest at 1-2, 4.

We view these assertions of Kola Nut as, in essence, a challenge to the size status of the awardees, an issue that is not for consideration by our Office. Specifically, as we have previously advised Kola Nut, the Small Business Act, 15 U.S.C. § 637(b)(6), gives the Small Business Administration, not our Office, conclusive authority to determine matters of small business size status for federal procurements.⁷ Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2005); Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3. Accordingly, to the extent Kola Nut is challenging the size status of the awardees, the protest is dismissed.

Next, Kola Nut complains that Mr. Chisik earns a "contingent fee" of 49 percent of the profit realized under the awardees' performance of the contracts at issue and maintains that these "contingent fee" arrangements are "clearly improper" due to the statutory limitation on contingent fees. 10 U.S.C. § 2306(b) (2000).

Section 2306(b) of title 10, United States Code, places certain limitations on obtaining contracts under "contingent fee" arrangements. However, the purpose of this limitation, as implemented by Federal Acquisition Regulation (FAR) subpart 3.4, is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system. Puma Industrial Consulting v. Daal Assocs., Inc., 808 F.2d 89 (2d Cir. 1987); Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981); E&R, Inc.--Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 3-4; Howard Johnson Lodge--Recon., B-244302, Mar. 24, 1992, 92-1 CPD ¶ 305. We have

⁷ On March 14, Kola Nut submitted a protest to our Office challenging the agency's award for another travel area to another awardee, similarly complaining that the awardee was part of a group of companies who, by virtue of their common association with Mr. Chisik, should not qualify as small businesses. We dismissed that protest on the basis that our Office's bid protest jurisdiction does not extend to review of size determinations. Kola Nut Travel, Inc., B-296090, Mar. 16, 2005. By letter dated March 16, 2005, Kola Nut sought "reconsideration" of that dismissal, arguing for the first time that the awardee's agreement with Mr. Chisik represented a prohibited contingent fee arrangement. As discussed above, we do not view the awardees' agreement with Mr. Chisik as constituting a violation of the statutory and regulatory limitations regarding contingent fees. Accordingly, Kola Nut's request for reconsideration is denied.

held that the prohibition applies only to situations where an agent agrees “to solicit or obtain” a contract from a procuring agency. Bertsch Constr., B-253526, Aug. 25, 1993, 93-2 CPD ¶ 122. The fact that an agent’s fee is contingent upon the contractor’s successful performance of the contract, or even upon receiving the contract award, is not sufficient, by itself, to bring a fee agreement under the contingent fee prohibition; rather, the regulation contemplates a specific demonstration that an agent is retained for the express purpose of contacting government officials, where such contact poses a threat of the exertion of improper influence to obtain government contracts. Convention Mktg. Servs., B-245660.3, B-246175, Feb. 4, 1992, 92-1 CPD ¶ 144.

Here, Mr. Chisik’s fee agreement, as described by the protester, provides Mr. Chisik a fee which is calculated as a portion of the profit resulting from the awardees’ performance of the contract—not in exchange for the awardees’ receipt of contract awards. Protest at 3. Further, the record is devoid of any evidence that the challenged awards reflect any improper influence on government officials. To the contrary, as discussed in more detail below, the record indicates that the agency’s source selection decisions were based solely on the agency’s evaluation of offerors’ proposals against the stated evaluation factors—including the second most important factor, price. Accordingly, Kola Nut’s assertion that the contracts incorporate a prohibited contingent fee agreement is without merit.

Kola Nut next maintains that the agency misevaluated its proposal with regard to the non-MEPS solicitation for travel areas 73 and 91, complaining that “Kola Nut was downgraded on its technical factor based solely upon performance from a central office.” Protest at 2. Kola Nut notes that its proposal was rated as “acceptable, with no noteworthy strengths” under the technical factor, but maintains that it should not have been downgraded with regard to performance from a central office, and thus maintains that the rating should have been higher.

As noted above, the solicitation for the non-MEPS locations specifically advised offerors that the agency would consider an offeror’s technical approach to “servicing the unique needs of multiple customers from a central location.” AR, Vol. 4, Tab 3, at 61. The record also indicates that the agency specifically sought information from Kola Nut regarding this matter, but that Kola Nut’s response did not alleviate the agency’s concern. Specifically, the agency’s contemporaneous documentation supporting its evaluation of Kola Nut’s proposal under the technical evaluation factor states:

Offeror’s entire discussion illustrates Offeror still interprets this subfactor to apply to travelers (individual or groups) departing the same origin and arriving at the same destination via shared transportation (e.g., the same flight or same train). Offeror appears not to understand that this subfactor actually pertains to having capability to service multiple travelers many of whom may have differing travel

needs from a central location (e.g., a singular staffed office or a central call center). Multiple travelers departing same origin/arriving same destination via shared transportation likely would be a purely random event and be the exception rather than the rule.

AR, Vol. 7, Tab 52, at 5.

In its comments responding to the agency report, Kola Nut continues to assert that its proposal adequately addressed its approach to servicing multiple customers from a central location, but fails to respond in any way to the specific agency concerns discussed above. On this record, we find no basis to question the agency's evaluation of Kola Nut's proposed technical approach as merely "acceptable."⁸

Finally, in pursuing this protest, Kola Nut has raised various other allegations, including the assertion that the agency failed to adequately consider the risk associated with the awardees' proposals. We have considered all of Kola Nut's assertions and find no basis for sustaining its protest.⁹

The protest is denied.

Anthony H. Gamboa
General Counsel

⁸ Kola Nut also complains that the agency's evaluation of proposals under the two solicitations was inconsistent in that the agency's evaluation of Kola Nut's proposal in response to the MEPS solicitation did not reflect the above-quoted criticism. Kola Nut Comments on Agency Report (May 8, 2005), at 1. We do not view Kola Nut's assertion of inconsistency as constituting a valid basis for protest. As discussed above, the non-MEPS solicitation specifically advised offerors that proposals would be assessed with regard to "servicing unique needs of multiple customers from a central location," AR, Vol. 4, Tab 3, at 161; the MEPS solicitation did not. (It appears that this difference in the solicitation provisions reflects the agency's expectation that travelers from MEPS locations are more likely to travel via shared transportation than travelers from non-MEPS locations.) Thus, there is no basis to question the consistency of the agency's evaluation in this regard.

⁹ To the extent Kola Nut is challenging the solicitation provisions contained in section G.17 and G.21, quoted above, its protest is not timely filed. 4 C.F.R. § 21.2(a)(1). Similarly, to the extent Kola Nut is suggesting that offerors' evaluated prices should have been calculated in a manner other than that specified in section M.4.3 of the solicitation, quoted above, its protest is not timely filed. Id.