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

FILE: B-218106 **DATE:** May 23, 1985

MATTER OF: Ernaco, Inc.

DIGEST:

1. An agency did not abuse its discretion when it refused to consider a proposal by a company whose president and owner was employed as an intermittent consultant by the contracting activity at the time the initial proposal was submitted.

2. GAO will not award proposal preparation costs and attorney's fees where it does not make a determination that a solicitation, proposed award or award does not comply with statute or regulation.

Ernaco, Inc. (Ernaco), has protested the Environmental Protection Agency's (EPA) refusal to consider its proposal for the evaluation of data concerning aspects of the carcinogenicity of selected chemicals. Ernaco's proposal was submitted in response to EPA solicitation DU-84-B121 issued on July 5, 1984.

Best and Final offers were due on November 13, 1984. On January 14, 1985, EPA informed Ernaco's president, founder and principal stockholder, Dr. Muriel Lippman, that further consideration could not be given to Ernaco's proposal because a conflict of interest existed. The conflict of interest arose because Dr. Lippman was a special government employee when she submitted Ernaco's initial proposal on August 1, 1984, and, accordingly, an award to Ernaco was precluded by 18 U.S.C. § 205 (1982) and Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1984).

Ernaco argues that Dr. Lippman is not a special government employee; that even if she were a special government employee, her employment was terminated prior to submitting the initial proposal; and that even if Dr. Lippman were a special government employee at the time she submitted her proposal, neither 18 U.S.C. § 205, 18 U.S.C. § 207 nor 48 C.F.R. § 3.601 precludes the award of a contract to Ernaco.

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The protest and claim for proposal preparation costs and attorney's fees are denied.

Initially, we note that EPA's and Ernaco's dispute over the applicability of section 205 and 207 of title 18 of the United States Code covers matters not within the purview of our bid protest regulations as those provisions involve the enforcement of criminal laws. Western Engineering and Sales Co., B-205464, Sept. 27, 1982, 82-2 C.P.D. ¶ 277. The scope of our review here, therefore, is limited to whether the applicable procurement regulations prohibit Ernaco from receiving a contract from EPA because of Dr. Lippman's service as a consultant with EPA.

Subpart 3.6 of the FAR governs contracts with government employees or organizations owned or controlled by them as follows:

> **"3.601 Policy**
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> "Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees."

The question that first must be resolved is whether Dr. Lippman was an "employee" within the meaning of the above provision.

Dr. Lippman is a scientist whose work as a consultant for EPA involved carcinogen research. She was a consultant to the Carcinogen Assessment Group, which initiated this procurement. Ernaco contends that she exercised independent judgment, worked outside of Agency premises and Agency control and, otherwise, her conduct and work were independent of Agency supervision.

Ernaco states that Dr. Lippman was not a government employee, that she was not appointed as a civil servant and that she did not receive retirement benefits or other

indicia of federal civil service employment. Ernaco also states that Dr. Lippman acted independently and was not subject to the supervision of a federal officer or employee while engaged in the duties of her position.

EPA argues that Dr. Lippman was an employee of the federal government duly appointed under 5 U.S.C. § 3109 (1982), providing for the employment of experts and consultants.

The Office of Personnel Management has set out guidance for federal agencies concerning the appointment under 5 U.S.C. § 3109 of experts and consultants in chapter 304 of the Federal Personnel Manual (FPM), January 22, 1982. Chapter 304 of the FPM describes a consultant as a person who serves primarily as an adviser to an officer or instrumentality of the government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities. A consultant provides views or opinions on problems or questions presented by the agency, but neither performs nor supervises performance of operating functions. Subchapter 1-2.(1) of Ch. 304 of the FPM.

Ordinarily, when an agency appoints a consultant to provide advisory services the agency creates an employee--employer relationship governed by chapter 304. FPM Ch. 304, subch. 1-4. The FPM states that an employee-employer relationship exists when a person meets the definition of employee in 5 U.S.C. § 2105, to wit, that the person must be (1) appointed or employed in the civil service by a federal officer or employee performing in an official capacity; (2) engaged in the performance of a federal function under authority of law or an Executive act, and (3) supervised and directed by a federal official or employee. FPM Ch. 304, subch. 1-4.

In the case of Dr. Lippman, a Standard Form 50, Notification of Personnel Action, showing her employment as a consultant, was processed on October 21, 1983, with an expiration date of October 20, 1984. To support this appointment, Dr. Lippman filled out and signed a statement of employment and financial interest applicable to individuals appointed as special government employees. Prior to this, when she initially received her first appointment as a consultant to EPA, Dr. Lippman signed appointment affidavits applicable to federal employees in which (among other things) she agreed not to strike against the government while an employee of the government. Although Ernaco argues

that Dr. Lippman believed she had a contract with the government by which she was to perform consultant duties, the procurement procedures for obtaining an independent contract for services were not followed and no independent contract was ever entered into between Dr. Lippman and the government.

As Ernaco admits, Dr. Lippman was clearly engaged in the performance of a federal function under authority of law while she worked as a consultant, thus meeting the second criterion above. With regard to the third criterion relating to the degree of supervision and direction of the employee by a federal official, we have recognized that this requirement is a relative standard that takes into account the extent to which the duties of a particular position are susceptible of supervision. Consultant Services - T. C. Associates, B-193035, Apr. 12, 1979, 79-1 C.P.D. ¶ 260. Thus, an employee with specialized skills involving a high degree of expertise or independent judgment requires less supervision and direction than an employee performing less routine tasks. That Dr. Lippman performed her EPA-assigned tasks independently does not mean that EPA did not exercise the requisite supervision and direction over her as was required for her position. Rather, as stated above, the FPM contemplates that the consultant employee is an adviser who provides views or opinions on problems or questions presented by the agency but the consultant employee is not considered as or is expected to perform in the manner of a regular operational employee. Subchapter 1-2 (1) of Ch. 304 of the FPM.

Although Dr. Lippman did not receive benefits normally granted federal employees, this does not show that Dr. Lippman was not an employee. As subchapters 1-6 and 1-7 of chapter 304 of the FPM make clear, consultants who are appointed to a position and who are employees of the government are not entitled to many of the benefits to which regular federal employees are entitled. We find, therefore, that Dr. Lippman was an employee of the federal government by virtue of her appointment and she was not an independent contractor.

Ernaco contends further, however, that even if Dr. Lippman were found to be an employee, she in effect terminated her employment on July 10, 1984, because that was the last date she accepted work from EPA. Apparently, Dr. Lippman did not accept any more work from EPA because, in her words, she did not want to "jeopardize" Ernaco's chance of receiving a contract from EPA under this solicitation.

As indicated above, Dr. Lippman's appointment ran from October 21, 1983, to October 20, 1984. At no time did she resign from her position under that appointment. Dr. Lippman refused to accept a subsequent apppointment but up to October 20, 1984, she continued in her position. The fact that she did not accept any work after July 10 is of no consequence to her employment status. The mere failure to perform an assignment would not nullify her status as a consultant to the government. The very terms of her appointment showed that she did not work a regular schedule, but rather she worked an intermittent schedule not to exceed 130 working days in a year. Until the government took action to remove Dr. Lippman or until she took action by tendering her resignation, she continued, until the expiration of the appointment on October 20, 1984, to be an employee.

The next question is whether Dr. Lippman's status as an employee at the time Ernaco submitted its initial proposal prohibited Ernaco from contracting with the government.

Contracts between the government and its employees are not expressly prohibited by statute except where the employee acts for both the government and the contractor in a particular transaction or where the service to be rendered is such as could be required of the contractor in his capacity as a government employee. 18 U.S.C. § 208 (1982); Hugh Maher, B-187841, Mar. 23, 1977, 77-1 C.P.D. ¶ 204. However, it has long been recognized that such contracts are undesirable because, among other reasons, they invite criticism as to alleged favoritism and possible fraud and that they should be authorized only in exceptional cases where the government cannot reasonably be otherwise supplied. 27 Comp. Gen. 735 (1984); Capital Aero, Inc., 55 Comp. Gen. 295 (1975), 75-2 C.P.D. ¶ 201; Burgos & Associates, Inc., 59 Comp. Gen. 273 (1980), 80-1 C.P.D. ¶ 155. The fact that a service would be more expensive if not obtained from an employee of the government does not by itself provide support for a determination that the service cannot reasonably be obtained from other sources. 55 Comp. Gen. 681 (1976). Moreover, in Valiant Security Agency, B-205087.2 Dec. 28, 1981, 81-2 C.P.D. ¶ 501, we explained the depth of the policy against the government contracting with its own employees as follows:

> "The policy is intended to avoid even the appearance, much less the fact, of favoritism or preferential treatment by the government towards a firm competing for a Government contract: Therefore it is to be strictly applied."

Ernaco points out that EPA concedes that Dr. Lippman did not participate personally in the formulation and issuance of this solicitation. As discussed previously, Dr. Lippman was a consultant to the Carcinogen Assessment Group.

The responsibility for determining whether a firm has a conflict of interest and to what extent the firm should be excluded from competition rests with the procuring activity and we will overturn such a determination only when it is shown to be unreasonable. Culp/Werner/Culp, B-212318, Dec. 23, 1983, 84-1 C.P.D. ¶ 17. On the basis of the facts before us, particularly that Dr. Lippman was employed by the very activity which was to award the contract, we conclude that EPA's determination that an award to Ernaco was inconsistent with subpart 3.6 of the FAR was reasonable. We recognize however, that there may be a question as to whether FAR 3.601 is meant to apply to Government consultants who are not employed by the specific contracting activity concerned. Accordingly, by a copy of our decision today, we are referring this issue to the Director, FAR Secretariat, for consideration.

Ernaco finally contends that even if this Office rules that Ernaco was properly excluded on this solicitation, it should still receive proposal preparation costs and attorney's fees because Dr. Lippman detrimentally relied upon EPA representations and submitted a contract proposal because of such erroneous representations. EPA denies that it initially improperly advised Dr. Lippman that she would be eligible for award. Whether EPA misled Dr. Lippman or not is immaterial, however, as our Bid Protest Regulations only provide for the award of attorney's fees and bid and proposal preparation costs where we have determined that a solicitation, proposed award, or award does not comply with statute or regulation. 4 C.F.R. 21.6(d) (1985). Since we made no such finding here, Ernaco's request is denied.

Ernaco's protest and claim are denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel