



DEPARTMENT OF THE AIR FORCE

ARLINGTON, VA 22203-1613

OCT 14 2010

Office of the Deputy General Counsel

MEMORANDUM IN SUPPORT OF THE DEBARMENT OF:

MIKEL SMITH

On April 15, 2010, the Air Force proposed the debarment of Mikel Smith ("Smith") from Government contracting and from directly or indirectly receiving the benefits of federal assistance programs. The actions were initiated pursuant to Federal Acquisition Regulation (FAR) Subpart 9.4.

By correspondence dated July 16, 2010, Smith submitted information and materials in opposition to the proposed debarment ("the PFD Submission").

I have carefully read and considered the PFD Submission, and all information in the administrative record ("the Record").

INFORMATION IN THE RECORD

Information in the record establishes by a preponderance of the evidence that at all times relevant here:

1. Mikel Smith was Senior Vice President and Chief Operating Officer of Champion Energy Services, LLC (Champion), a retail provider of electricity services headquartered in Houston, Texas.
2. Thomas Sobey was a non-governmental advisor to the Air Force Air Education and Training Command (AETC) during the procurement that led to the award of Contract No. FA3002-08-D-0026 for Retail Electric Provider ("REP") Services to Champion. Sobey was later hired by Champion as its Director of Industrial Services.
3. During the course of the REP Services procurement, Sobey improperly provided Smith with source selection sensitive information. Smith received the information from Sobey and passed it on, on more than one occasion, to Champion's proposal team to be used in preparing Champion's proposal. Following award of the contract to Champion, Smith was instrumental in arranging for Sobey to be hired by Champion to oversee its government business.

The REP Services Procurement

4. On March 10, 2008, following the pre-proposal conference, Sobey sent an e-mail to Smith attaching the Individual Technical Evaluation Checklist (ITEC) for the REP Services procurement. Sobey had e-mailed the document to his home e-mail account from his government office and then sent the document to Smith from his home e-mail account with a note stating: "You do NOT have this."

5. On April 15, 2008, after the initial proposals had been submitted on the REP Services procurement and before Champion was due to submit its responses to evaluation notices, Sobey e-mailed Smith a copy of the Independent Government Estimate (IGE), which constitutes the government's best estimate of what the requested services will cost. Sobey informed Smith that the IGE created a band of evaluated prices from \$XX million to \$XX million, but that Champion's price was much lower. Sobey stated that the Air Force pricing person did not understand the business and that it could be detrimental to Champion if it remained significantly below the bottom number in the range. Smith passed this e-mail on to the proposal team that was preparing the responses to evaluation notices.

6. In response to the evaluation notices, Champion increased its proposed price. This increase was attributed, at least in part, to the need for prices to include general and administrative expense (G&A) and overhead that the company had originally thought could be passed through at cost.

7. On April 17, 2008, Smith e-mailed Sobey at Sobey's home e-mail account to tell him that Champion was still working on its responses to the evaluation notices. Sobey responded: "If you are happy I am also. The TDSP estimate is only good for two bases. Laughlin would be double that amount. Suggest showing two values." Smith forwarded Sobey's response to a member of the Champion proposal team as an FYI.

8. On April 22, 2008, Sobey e-mailed Smith and asked for a confirmation that "my broker agreement" is "still in effect" and that he would receive "1.0 mill per kWh for all electricity used by the AF at the three bases and the City of San Angelo. That should provide the long term security I desire should the near term bring any dramatic changes."

9. April 24, 2008 was Sobey's last day of service with AETC. On May 28, 2008, AETC announced that the contract was awarded to Champion.

Sobey's Employment by Champion

10. Smith introduced Sobey to Champion's new President, Robert Doty (Doty). Smith advised Doty that Sobey was familiar with government contracting rules and also with the Texas energy market, was available, and was a good fit for Champion's needs. Sobey was hired as Champion's Director of Industrial Services on June 16, 2008.

11. In a meeting attended by Doty on May 12, 2009, Sobey stated that he should have been given a long term employment contract and that he had been involved in potentially inappropriate communications with Champion during the procurement process. This statement prompted Champion to undertake an investigation and disclose the results of the investigation to the Government.

12. Champion revealed Sobey and Smith's April 17, 2008 and April 22, 2008 communications in its supplemental disclosure on December 24, 2009.

Current Action

13. Both Sobey and Smith responded to show cause letters sent by the Air Force Suspending and Debarring Official.

14. Smith stated in his show cause submission that the ITEC did not appear to be useful information or any different from what was publicly available, and that he had not solicited the IGE but did send it on to Champion's proposal staff, who compared it to the company's responses to evaluation notices. He stated that he was not familiar with government contracting rules and regulations and that in Champion's business it was fairly typical for there to be interaction among Champion's origination personnel, the customer, and the broker. Mr. Smith also supplied affidavits of good character.

15. Smith admits that he received source selection information in the form of the IGE and passed it on to Champion's proposal team. Smith failed to disclose in his submission other improper communications from Sobey which he passed on to Champion's proposal team, including Sobey's April 17 response from home e-mail in which Sobey counseled Smith to propose two different values, one value for Laughlin and a different value for the other two bases. Further, Smith failed to disclose that he and Sobey were discussing Sobey's future compensation while Sobey was still employed as a non-governmental advisor to AETC for the procurement.

16. Sobey stated in his show cause submission that the ITEC contained no information that was not otherwise available and that he sent the information to Smith because Smith had not been able to attend the pre-bid conference that day. Sobey stated that he never communicated any information to Smith that was not available to all participants and that the information communicated did not give Champion a competitive advantage.

17. Sobey's show cause submission is directly contradicted by the evidence in the record: Sobey's home e-mail message "you do NOT have this" with respect to the ITEC, Sobey's transmission of the IGE and advice to Smith on showing different values for Laughlin and the other two bases, Sobey's message seeking to confirm his compensation from Champion while still serving as advisor to AETC, and Sobey's statement to Robert Doty that he had been involved in inappropriate communications during the procurement on Champion's behalf.

ANALYSIS

The PFD Submission makes no new arguments regarding Smith's receipt of the ITEC and does not deny that Smith previously admitted to receiving the IGE from Sobey and passing it on to Champion's proposal team. Nor does the PFD Submission deny that Champion increased its REP proposal price subsequent to its reviewing the IGE. Thus, for the purpose of this analysis, it remains the case that Smith accepted sensitive source selection information from Sobey and forwarded a portion of this information to his proposal team, which ultimately increased Champion's REP proposal price.

The PFD Submission focuses primarily on the April 17, 2008 and June 22, 2008 communications between Sobey and Smith, communications which Smith conspicuously failed to mention in his show cause letter submission, and which were only revealed by Champion in its supplemental disclosure. Of critical importance is the fact that the PFD submission fails to defend or rationalize Smith's unwillingness to mention these communications in his response to the show cause letter. Regarding the April 17, 2008 communication, Smith asserts that he emailed with Sobey at Sobey's request, and in response to questions provided by Sobey. Smith further asserts that this communication had no impact on Champion's final submission. There are four reasons why Smith's response fails to adequately refute the evidence establishing that his communications with Sobey on April 17, 2008 were inappropriate:

- First, Smith provides no evidence that the communication commenced at Sobey's request. In fact, Smith makes no effort to counter the Air Force's contention that Smith emailed Sobey *first*.
- Second, regardless of whether Sobey solicited the communication from Smith on April 17, 2008, the interaction qualified as an inappropriate interaction between an AETC non-governmental advisor and a Champion executive. Even if Sobey did solicit an email from Smith, the appropriate action would have been for Smith to either refuse to respond, or respond with an email protesting and prohibiting further communication. Notably, Smith did neither.
- Third, that Sobey's emails had no impact on Champion's proposal preparation is irrelevant; it is the communication that is at issue, rather than the result.
- Fourth, Smith does not deny that he forwarded Sobey's email to the Champion proposal team as an "FYI." Besides casting doubt on his assertion that Sobey's email was irrelevant, Smith's forwarding of Sobey's email only further enhanced the impropriety of his actions, by broadening the scope of participation in an already inappropriate communication.

The PFD Submission is similarly ineffective in its discussion of the April 22, 2008 email from Sobey to Smith. Smith obliquely downplays the quid pro quo that appeared to exist between himself and Sobey by asserting that, "[w]hat we could offer Tom Sobey at time of award was a chance to meet Rob Doty and interview as an employee with bonus potential to make as much or more than what he was looking for, but dependent on his work and the success of the overall Champion business and dollars that would be attributable to the discretionary bonus pool. Tom Sobey was informed that he had to be interviewed by Rob Doty and approved by the board as an employee prior to hire." As with his response regarding the April 17, 2008 email, Smith fails to appreciate that precisely what he discussed with Sobey regarding his future employment with Champion is largely irrelevant. More important to this proceeding is that Smith inappropriately discussed career opportunities at all with a non-governmental advisor to AETC, and that he failed to reference this discussion in his response to the Air Force's show cause letter. Ultimately, Smith has not provided a valid defense to either of these claims and, in doing so he demonstrates an obvious lack of present responsibility.

The last element of the PFD Submission is a description of Smith's recent efforts to acquire Federal Acquisition Regulation (FAR) training and emails discussing Champion ethics training, which can be read in conjunction with the "Champion Energy Services Code of Ethical Business Conduct" and the "Code of Business Conduct and Ethics for the United States Government and State Government Marketplace" provided to Champion employees for their signature. While the Air Force supports Smith's effort to expand his knowledge of government contracting, given the rather blatant nature of the anti-competitive impact of Smith's conduct with Sobey, the Air Force remains concerned about Smith's integrity, not his knowledge. Information on Champion's ethics training events is also of little use, as are the aforementioned codes of conduct, except for supporting the proposition that Smith violated not only the norms of federal acquisition but, in addition, the Champion internal policies and procedures. The "Code of Business Conduct and Ethics for the United States Government and State Government Marketplace" explicitly stipulates on its third page that, "[f]ederal law also prohibits [] CHAMPION competing for the award of a Government contract or subcontract from knowingly obtaining, and current or former Government employees from knowingly disclosing, 'source selection information.' ..."

In consideration of the foregoing analysis, Smith has failed to demonstrate his present responsibility.

FINDINGS

The improper conduct of Smith is of so serious or compelling a nature that it affects his present responsibility to be a Government contractor or subcontractor and provides a basis for his debarment pursuant to FAR 9.406-2(c).

DECISION

Pursuant to the authority granted by FAR Subpart 9.4, Defense FAR Supplement, subpart 209.4, and 32 C.F.R., Section 25, and based on the evidence contained in the administrative record and findings herein, Smith is debarred for a period of three years from April 15, 2010, the date on which Smith was proposed for debarment. The debarment shall terminate on April 14, 2013.


STEVEN A. SHAW
Deputy General Counsel
(Contractor Responsibility)