



DEPARTMENT OF THE AIR FORCE

ARLINGTON, VA 22203-1613

JUL 20 2010

Office of the Deputy General Counsel

MEMORANDUM IN SUPPORT OF THE DEBARMENTS OF:

WILLIAM DAVID SCHROER
JON PAUL JAVELLANA
OPTIKEY, INC.
OPTIKEY, LLC
OPTIKEY SECURITY

On February 18, 2010, the Air Force proposed the debarments of William David Schroer ("Schroer"), Jon Paul Javellana ("Javellana"), Optikey, Inc. ("Inc."), Optikey, LLC ("LLC") and Optikey Security ("Security," and along with Inc. and LLC, "Optikey," and Optikey together with Schroer and Javellana, "Respondents") 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 April 20, 2010, Respondents, through Schroer, submitted an opposition to the proposed debarments containing arguments in opposition and a statement that "all invoices approved and paid by the Government under contract FA8717-08-C-0039 are to be properly resolved with payment against open accounts on or before 15 May 2010. Confirmation of this action will be forwarded to your office." In repeated correspondence since that time, Schroer has refused to indicate what would be paid, and has informed the Air Force about a rolling series of delays in providing the funds. The Air Force informed the Respondents, through Schroer, that the record would close on July 7, 2010.

All matters and arguments in opposition to the proposed debarments ("the Submission") on behalf of Respondents, and all information in the administrative record ("the Record"), have been read and carefully considered.

INFORMATION IN THE RECORD

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

1. Inc., LLC and Security are Nevada business entities engaged in research, development and marketing of optical sensors to the U.S. Government to be used for verification and authorization of personnel. Inc., LLC and Security operate out of the same mailing and physical locations, are run by the same executive, and are in the same line of business. They are, in effect, the same company, and Schroer has on several occasions commingled the finances of Inc. and LLC and each also does business as Security. For the purpose of clarity, this Memorandum will refer to Inc., LLC and Security collectively as "Optikey."
2. Schroer is the President of each Optikey entity, such that he is the alter ego of Optikey.

3. Javellana is the Vice President of Operations of Optikey and the program point of contact for, and the individual who submitted Optikey's proposal to, the Air Force Research Laboratory.

4. The State of Nevada lists Optikey as being in "Default" status for failure to meet obligations to the state.

5. Optikey engaged in a pattern and practice of submitting invoices to the Government for unallowable costs (e.g., health insurance costs for Schroer's children, who were not associated with Optikey and lobbying costs) and false costs that Optikey never actually paid (e.g., subcontract costs and vendor costs, among other items that Schroer admitted to the Defense Contract Audit Agency were never paid or could not substantiate). The unallowable, false and unsupported costs submitted to the Government total approximately \$95,000.

6. Neither Schroer nor Optikey have reimbursed the Government for the unallowable and/or false cost claims.

7. Schroer entered into a \$200,000 patent licensing agreement ("PLA") with the Air Force for access to certain optical sensor technology, and is significantly past due on a large portion of that amount, up to \$150,000.

8. Optikey has failed to perform in accordance with the requirements of contract number FA8718-08-C-039 ("R&D Contract"), including failure to submit reports regarding subcontractor progress, and failure to submit descriptions of technical research performed.

ANALYSIS

Respondents, through Schroer, raise ten points in opposition to the proposed debarment that generally may be grouped into five categories: (a) the PLA; (b) cost accounting discrepancies; (c) reimbursement issues; (d) Javellana's involvement; and, (e) Nevada corporate status.

(a) The PLA

Regarding the PLA, Respondents assert that they were neither required to pay the aforementioned \$200,000 associated with that agreement, nor were they required to use the patent to fulfill their contractual obligations to the Air Force. However, Respondents have failed to substantiate these claims. Firstly, Respondents cite to an unsigned, materially different version of the PLA, which would place a contingency on their duty to repay the \$200,000. The actual PLA provides for an unconditional promise to pay \$200,000 in licensing fees. In short, there is no contingency on Respondents' duty to pay the \$200,000, and by signing the PLA Schroer pledged to pay the sum of \$200,000 to the U.S. Treasury via four installments. Secondly, in contending that they were not required to use the patent to fulfill their contractual obligations, Respondents confuse the PLA with the R&D Contract. While the R&D Contract gave Respondents the option of using the patent for basic fundamental research without having to pay a license fee, it did *not* relieve Respondents from their continuing obligation to pay under

the PLA. In response to a modification submitted by Respondents, the Air Force informed Respondents in no uncertain terms that both the patent itself and the PLA were fully enforceable. Whatever other equitable defenses Respondents may have, at least some portion of the \$150,000 (if not the full amount) is outstanding and overdue.

(b) Cost Accounting Discrepancies

Respondents have further failed to present any evidence to support approximately \$95,000 worth of unallowable, false, and unsupported costs they submitted to the Government for payment. Without this evidence Respondents' opposition, and the allegations of DCAA ineptitude and Air Force maliciousness, are not supportable.

(c) Reimbursement Issues

The Submission also states that "all invoices approved and paid by the Government under contract FA8718-08-C-0039 will be properly resolved with payment in full for open accounts on or before 15 May 2010." Respondents have failed to provide any reimbursement and have given the Air Force no reason to believe that payment will be forthcoming.

(d) Javellana's Involvement

Respondents urge that Javellana was not a part of Optikey during the performance of the R&D Contract, and should therefore be excluded from this debarment proceeding. The evidence proves otherwise. Javellana is one of only two named corporate officers identified by Inc. as being involved with the R&D Contract. More specifically, page 16 of Inc.'s proposal for the R&D Contract effort identifies Javellana as "Vice President, Operations" of Inc. As a "principal employee," Javellana qualifies as an affiliate under FAR 9.403. Javellana is welcome to submit evidence to the contrary in the future.

(e) Nevada Corporate Status

Lastly, as for Optikey's Nevada corporate status, the Submission indicates that "all 2009 past due fees for the corporate registrations will be brought current on or before 15 May 2010." However, as of July 16, 2010, the corporate entities have all had their corporate charters "Revoked" by the State of Nevada.

FINDINGS

1. A preponderance of the evidence establishes that Optikey willfully failed to perform in accordance with the terms of one or more contracts. That evidence provides a basis for Optikey's debarment pursuant to FAR 9.406-2(b)(1)(i)(A).
2. A preponderance of the evidence establishes that Optikey has a history of failure to perform, or of unsatisfactory performance of, one or more contracts. That evidence provides a separate and independent basis for Optikey's debarment pursuant to FAR 9.406-2(b)(1)(i)(B).

3. The improper and fraudulent conduct of Optikey and Schroer is of so serious and compelling a nature that it affects their present responsibility to be U.S. Government contractors or subcontractors and provides a basis for Schroer's debarment and a separate and independent basis for Optikey's debarment pursuant to FAR 9.406-2(c).
4. Pursuant to FAR 9.406-5(a), the seriously improper conduct of Schroer may be imputed to Optikey because his seriously improper conduct occurred in connection with his performance of duties for or on behalf of Optikey. The imputation of Schroer's seriously improper conduct provides a separate basis for Optikey's debarment.
5. Pursuant to FAR 9.403, interlocking management or ownership, shared facilities and equipment, and common use of employees are "indicia of control" so as to make entities affiliates of each other. Schroer and each Optikey entity (Inc., LLC and Security) are affiliates of each other as evidenced by their interlocking management, ownership and use of shared facilities. The affiliation of Schroer and the Optikey entities (Inc., LLC and Security) provides a separate and independent basis for each of their debarments pursuant to FAR 9.406-1(b).
6. Pursuant to FAR 9.403, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other. Javellana and Inc. are affiliates of each other because, as Inc.'s "Vice President of Operations" and a "principal employee," Javellana controlled or had the power to control Inc. The affiliation of Javellana and Inc. provides a basis for Javellana's debarment, and a separate and independent basis for Inc.'s debarment pursuant to FAR 9.406-1(b).
7. Pursuant to FAR 9.406-5(b), the seriously improper conduct of Optikey is imputed to Schroer and Javellana because as officers, directors, shareholders, partners, employees or other persons associated with Optikey, Schroer and Javellana knew or had reason to know of Optikey's seriously improper conduct. The imputation of Optikey's seriously improper conduct provides a basis for Javellana's debarment and a separate and independent basis for Schroer's debarment.

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, Schroer, Javellana, Inc., LLC, and Security are debarred for a period of three years from February 18, 2010, the date Respondents were proposed for debarment. The debarments shall terminate on February 17, 2013.


STEVEN A. SHAW
Deputy General Counsel
(Contractor Responsibility)