



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:

THOMAS M. SOBEY

On April 15, 2010, the Air Force proposed the debarment of Thomas M. Sobey ("Sobey") 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 May 27, 2010, Sobey submitted an 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 to the Air Force 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 potentially inappropriate communications during the procurement on Champion's behalf.

ANALYSIS

In the PFD Submission Sobey makes three assertions in opposition to his proposed debarment. The first is in regard to Sobey's transmittal of the ITEC and IGE on March 10, 2008, and April 15, 2008, respectively. While Sobey admits that communicating source selection information to Smith was "unwise and misguided," he rejects the suggestion that he did so to secure employment with Champion, and justifies his doing so on the grounds that in helping Champion secure the REP services contract he was enabling the Air Force to save significant sums of money on electricity expenditures. Ultimately, however, Sobey's motivations are irrelevant, and the fact remains that he inappropriately provided AETC source selection

information to a bidder. Sobey's asserted justification that he was not empowered with contract awarding authority is similarly irrelevant and neither excuses nor justifies his actions.

Sobey's second assertion is that he was not hired by Champion in exchange for his providing the ITEC and IGE. Sobey insists that the aforementioned email that he sent to Smith on April 22, 2008, was merely to convey his compensation expectations and nothing more. While this email, in isolation, is not per se evidence of misconduct, its language, in conjunction with Sobey's transmittal of source selection information to Champion, and the timing of such a transmittal, at the very least suggests that Sobey was unethically exchanging sensitive government information for promises of future employment and specific earnings. The PFD Submission fails to demonstrate that the circumstances were otherwise.

Lastly, Sobey proposes a series of mitigating factors against his debarment, to wit:

- *Sobey asserts that he does not qualify as a "contractor", and that the mitigating factors outlined in FAR 9.406-1(a) must be modified accordingly.*
Sobey does qualify as a "contractor" as, per Federal Acquisition Regulation (FAR) 9.403, Sobey "[c]onducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor." Thus, there is no need to adjust the mitigating factors.
- *Sobey argues that his debarment is not necessary to protect the integrity of the Air Force's procurement efforts, and highlights his extensive experience in the electric power industry.*
A review of Sobey's employment history does not negate the fact that he provided source selection information to Smith, and that he appeared to be doing so with the intention that he would be rewarded with future Champion employment. It is precisely this kind of misconduct against which the Air Force must protect itself and, under these circumstances, debarment would provide such protection.
- *Sobey insists that he warned Champion that, by undergoing ownership changes and creating new documents, it had violated a section of the REP Services RFP which prohibited Champion from entering "into any Enabling Document that constrained its ability to solicit and contract with any generation source or meet any requirement in Section C." Sobey urges the Air Force to consider this action as a mitigating factor.*
Sobey's actions in this regard fail to mitigate his misconduct under FAR 9.406-1(a), as Sobey confined his efforts to internal notification only.

- Sobey further alleges that Champion's treatment of him changed following the aforementioned warning he issued to the company, and that the resulting hostility of his work environment was such that it should qualify as an additional mitigating factor. As evidence of this hostility Sobey cites Champion's unsuccessful protesting of his claim for unemployment benefits, asserting that this protest was nothing more than a means of "shutting him up as a potential whistleblower by discrediting him and diverting attention from its own conduct."

Sobey fails to offer any information indicating that Champion's treatment of him, including its protesting his claim for unemployment benefits, was connected to his opinions on the potential RFP violation. Thus, as with the other arguments, this assertion fails to mitigate Sobey's misconduct under FAR 9.406-1.

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

FINDINGS

The improper conduct of Sobey 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, Sobey is debarred for a period of three years from April 15, 2010, the date on which Sobey was proposed for debarment. The debarment shall terminate on April 14, 2013.



STEVEN A. SHAW
Deputy General Counsel
(Contractor Responsibility)