Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protest of	)	
	)	
Frequentis	)	Docket No. 02-ODRA-00231
	)	
Pursuant to Solicitation DTFA01-01-R-00022	)	

DECISION AND ORDER ON MOTION FOR DISQUALIFICATION OF COUNSEL

This matter currently is before the Office of Dispute Resolution for Acquisition ("ODRA") on the Request of the awardee/intervenor, Northrop Grumman Corporation ("Northrop"). Northrop seeks to disqualify counsel for the Protester, Frequentis, based on an alleged conflict of interest arising as a result of counsel's former representation of Denro, Inc. ("Denro"). Northrop currently owns Denro. The Agency Product Team has taken no position on the issue. Counsel for Frequentis and counsel for Northrop have requested that the ODRA decide this question.

After considering the submissions of the parties, the ODRA concludes that Northrop has failed to meet its burden of establishing that Rule 1.9 of the District of Columbia Rules of Professional Conduct requires the immediate disqualification of counsel from further representation of Frequentis in the Protest. For the reasons more fully discussed below, the ODRA denies the Request without prejudice.

I. Factual Background

On August 2, 2002, the ODRA received, via facsimile, a copy of a letter dated August 1, 2002, from counsel for Northrop to counsel for Frequentis. The August 2 facsimile cover sheet asserted that Northrop had identified a conflict of interest on the part of counsel for Frequentis. The cover sheet proposed a schedule for briefing the issue and indicated the parties had agreed the ODRA should review and make a determination regarding the

matter. In the attached August 1 letter ("Northrop August 1 Letter"), counsel for Northrop requested that counsel for Frequentis and its law firm withdraw, because of:

> A conflict of interest arising from you and your firm's former representation of Denro, Inc., the business unit currently owned by Northrop Grumman and which was awarded the AFSSVS Contract that is the subject of this Protest.

Northrop August 1 Letter at 1.

The Northrop August 1 Letter cited to Rule 1.9 of the District of Columbia Rules of Professional Conduct in support of its Request. The Rule provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

D.C. Bar Appx. A, Rule 1.9 (2001).

Counsel for Northrop addressed the following specific allegation in the Frequentis Protest:

> One of the contracts that N-G did not report (and/or that the FAA failed to investigate) was a major voice switching contract for the country of Sweden. That Contract, known as TALK, is clearly "of a similar nature and complexity to the AFSSVS effort."

Northrop August 1 Letter at 2. The Northrop August 1 Letter closed by noting that counsel for Frequentis had not sought Northrop's consent to the representation of Frequentis in the Protest and that, in any event, consent would not be given.

By letter of August 2, 2002 ("Frequentis August 2 Letter"), counsel for Frequentis responded, refusing to withdraw from the representation and asserting that Northrop's

argument was both factually and legally incorrect. The Frequentis August 2 Letter explained:

> I did in fact represent Denro over the years (1988–1998) in various government contract matters, including contracts for voice switches. As you know, Denro was sold to Litton (in 1998 or 1999) and then Litton was sold to Northrop-Grumman (in 2001).

Frequentis August 2 Letter at 1. Counsel for Frequentis admits in the letter:

> I probably did consult with Denro and write to the Swedish LFV on Denro's behalf (I do not have the November 24, 1998, letter to which you refer).

Id. at 1. Counsel goes on to state:

> The details of the TALK Contract, or the details of Litton's performance on that Contract, are not in issue. The only issue raised in the Protest is whether Litton's TALK Contract was terminated by the Swedish LFV.

Id. Counsel further indicates that the question of whether the TALK Contract was terminated "is a matter of public record." *Id.* at 2. According to counsel, Frequentis had taken over completion of the TALK Contract after the alleged termination of Northrop. Thus, counsel claims, Frequentis' awareness of the termination was not the result of the disclosure by counsel of any confidential Denro information. For these reasons, counsel urges, "this Protest is not by any standard, substantially related to any prior representation of Denro." *Id.* at 1-2.

On August 5, 2002, by agreement of the parties, Northrop made a supplemental filing ("Northrop August 5 Filing ") with the ODRA, further expanding on its August 1 letter. The Northrop August 5 Filing was supported, *inter alia*, by a declaration of a Denro employee; information concerning Denro's current operations; a copy of a facsimile transmission from Denro to counsel for Frequentis, dated November 18, 1998; and handwritten notes of a Denro employee.

The Northrop August 5 Filing takes issue with the assertion that the relevance of the TALK Contract is limited to whether the TALK Contract was terminated. Counsel for Northrop claims that Frequentis' "Protest allegations go well beyond the issue of whether there was a termination." August 5 Northrop Filing at 6. Finally, the Northrop August 5 Filing argues that both disqualification of the lawyer involved and the lawyer's firm are required under these circumstances. *Id.* at 8.

The ODRA, in a telephone conference held on August 5, 2002, directed that counsel for Frequentis have an opportunity to file a legal response to the Northrop August 5 Filing. The Frequentis response, filed with the ODRA on August 7, 2002 ("Frequentis August 7 Response"), notes:

> In its Protest, Frequentis simply alleges that the TALK Contract termination was not reported to the FAA and that if it had been, NG [Northrop] should have been eliminated from the competition. This is a typical protest allegation under these circumstances and it does not involve any client confidences. It is an allegation based on publicly-known facts and is otherwise premised upon an explicit requirement of the SIR.

Frequentis August 7 Response at 8. On August 8, 2002, the ODRA convened a telephone conference. During that telephone conference, counsel for Northrop, in response to a question from the ODRA Director, denied that a termination "for default or convenience" -- as those terms typically are used in American public contract law -- occurred with respect to the TALK Contract. Rather, according to Northrop's counsel, the Contract was ended by agreement of the parties and thus was not required by Solicitation Section L.16 to be reported in Northrop's Proposal. As noted above, Frequentis takes a different view, maintaining that, in fact, the TALK Contract had been terminated for default. At the conclusion of the telephone conference, the ODRA Director orally informed the parties that the Request would be denied without prejudice and that this written decision would follow.

II. Discussion

The courts take a cautious approach in considering requests for disqualification of counsel. Disqualification is viewed as a serious step because of its implications for the attorney involved and for a client's right to freely choose counsel. *Derrickson v. Derrickson*, 541 A. 2d 149; 1988 D.C. App. LEXIS 78, *citing Government of India v. Cook Industries, Inc*., 569 F.2d 737 (2d Cir. 1978).

The Court of Appeals for the District of Columbia has held that "[w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." *Derrickson, supra, citing Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*). In *Brown*, the D.C. Court of Appeals, explained:

> In determining whether private matters are "substantially related," the courts have examined both the facts and the legal issues involved. "Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation." *Westinghouse Electric Corp. v. Gulf Oil Corp*., 588 F.2d 221, 225 (7th Cir. 1978). If the factual contexts overlap, the court then has to determine "whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters." *Id.* Finally, if such information apparently was available to counsel in the prior representation, the court has to determine whether it "is relevant to the issues raised in the litigation pending against the former client." *Id.* If all three conditions are met, the matters will be substantially related and thus deemed the same for conflict-of-interest purposes, with doubts to "be resolved in favor of disqualification." *Id*.

The issue here revolves around counsel's prior representation of Denro, which is now owned by Northrop, in connection with what has been referred to as the "TALK"

Contract with the Government of Sweden. More specifically, counsel for Northrop has produced documents indicating that counsel for Frequentis represented Denro in connection with the TALK Contract. *See* Northrop August 5 Filing, Tab 4. [1]

In the instant case, Frequentis has alleged as a ground of protest that Northrop's TALK Contract was, in fact, terminated for default within the last three years. *See* Protest at 7. Frequentis argues that Northrop "should have been eliminated from the competition" because Northrop failed to identify the alleged default termination as part of its Proposal. *Id.* In this regard, Frequentis cites to Solicitation Section L.16, which provides:

> Offerors (proposing as Prime Contractors) shall also provide a list of all contracts of $5,000,000 or more that were ***terminated for default or convenience*** in the last three years and where such termination actions are still pending. The basis for the termination shall also be provided.

Solicitation Section L.16, page L-17 (emphasis added).

Under Solicitation Section M3.2.3, had such a termination been identified, the Product Team would have been required to evaluate whether the termination posed a risk to the current contract and whether any deficiency was beyond the control of the terminated party. The Product Team was required to complete such an evaluation as part of its past performance evaluation.

At present, the record is not sufficiently developed to permit the ODRA to reach a conclusion concerning: (1) the factual circumstances surrounding the ending of the TALK Contract; or (2) whether Northrop was legally required to divulge a termination of

[1] Northrop's allegations of conflict of interest also concern the Protest's reference to the past performance ratings of the awardee. In this regard, however, Northrop has failed to demonstrate the relevance to this Protest of any confidential Denro information that Frequentis' counsel may have gained in connection with his prior representation of Denro. The Product Team's assignment to Northrop of a "marginal" rating for past performance occurred long after counsel's representation of Denro had ended. The rating itself is a matter of record and is not being challenged by the Frequentis Protest. Rather, the Protest focuses on how the rating was utilized by the Product Team in conducting its evaluation and how it was utilized by the Source Selection Official ("SSO") as part of the final award decision.

that Contract in its Proposal.[2] The question of whether the TALK Contract was terminated "for default or convenience" within the meaning of Solicitation Section L.16 may be resolvable solely based on the plain language of the TALK Contract documents, without reference to any confidential information that may have been obtained by Frequentis counsel through his prior representation of Denro.[3]

For these reasons, Northrop's Request is denied without prejudice to its being renewed upon further development of the record.

/s/
Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition

August 13, 2002

[2] Without ruling on the point, the ODRA notes that, if in fact a termination as defined by Solicitation Section L.16 occurred, and if Northrop was required to identify that termination, but failed to do so, that failure could be viewed as giving Northrop a competitive advantage prejudicial to the other offerors.

[3] If, however, the TALK Contract documents are unclear, it may be necessary for the ODRA to examine extrinsic evidence of the circumstances surrounding the ending of the TALK Contract. In such a case, counsel's prior representation and involvement with the TALK Contract would be "substantially related" to the current matter and therefore present a conflict of interest.