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United States General Accounting Office
Washington, DC 20548

November 30, 2001

The Honorable John Warner
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Susan Collins
The Honorable Ernest Hollings
The Honorable Daniel Inouye
The Honorable Frank Murkowski
United States Senate

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Subject: National World War II Memorial: Construction Contractor Selection

This letter responds to your request that we review the procedures used by the General Services Administration (GSA) in awarding the contract on behalf of the American Battle Monuments Commission (ABMC) to build the National World War II (WWII) Memorial on the Mall in Washington, D.C. Specifically, you wanted to know whether GSA followed proper procedures in awarding the construction contract to a joint venture whose majority participant is owned by a U.S. company whose parent, a German-based company, was recently convicted of an antitrust violation.

On June 7, 2001, GSA awarded a \$56-million contract to build the WWII Memorial to the Tompkins/Grunley-Walsh Joint Venture. Tompkins, the majority participant in the joint venture, is owned by J.A. Jones Construction Company, which is owned by J.A. Jones, Inc., a U. S. subsidiary of Philipp Holzmann AG, a German-based company.¹ In August 2000, Holzmann pled guilty in the United States to a criminal antitrust violation for bid rigging on U.S. Agency for International Development (USAID) construction projects in Egypt and was fined \$30 million.

¹ As of June 1, 2001, Tompkins' name was changed from Charles H. Tompkins Company to J.A. Jones/Tompkins Builders, Inc. Tompkins is based in Washington, D.C., and Jones in Charlotte, North Carolina. The minority participant in the joint venture awarded the contract is a joint venture between the Grunley Construction Co., Inc., and the William V. Walsh Construction Co., Inc., both of Rockville, Maryland.

To respond to your request, we met with the GSA contracting officer for the WWII Memorial construction procurement and GSA legal staff, reviewed pertinent procurement documents in the GSA file regarding the contract award, and reviewed the Federal Acquisition Regulation (FAR). We compared the FAR requirements to what action the contracting officer took to determine if proper procedures were followed. We also reviewed documentation in the contract file relating to Holzmann's antitrust violation, including the plea agreement and remedial action taken; Standard and Poor's information regarding ownership and affiliation of Holzmann's subsidiaries; USAID's determination of J.A. Jones, Inc.'s eligibility to receive USAID contracts; and the agreement between the Department of Defense (DOD) and Holzmann and J.A. Jones, Inc., that restricts Holzmann's control over J. A. Jones, Inc.'s management. We did our audit work from August to October 2001 in accordance with generally accepted government auditing standards.

Results in Brief

Before awarding the WWII Memorial construction contract in June 2001 to the Tompkins/Grunley-Walsh Joint Venture, the GSA contracting officer was aware of Holzmann's antitrust conviction and took it into account during her determination of the prospective contractor's responsibility. The GSA contracting officer followed applicable procedures in determining that the awardee was a responsible prospective contractor and her determination was supported by both the information she told us she considered as well as the documents in the GSA contract file.

The determination of a prospective contractor's responsibility is a judgment made by the contracting officer. In making a responsibility determination, the FAR requires agency contracting officers to obtain information sufficient to be satisfied that a prospective contractor meets the applicable general responsibility standards specified in the FAR. The general standards that the FAR requires contracting officers to consider include such factors as whether the prospective contractor has a satisfactory performance record, adequate financial resources, and a satisfactory record of integrity and business ethics. The FAR also requires contracting officers to check that the prospective contractor is not on the list of contractors suspended or debarred from receiving government contracts.

In determining that the joint venture was a responsible prospective contractor, the GSA contracting officer documented in the contract file her consideration that (1) the joint venture met the FAR requirements for a responsible prospective contractor, which included having a satisfactory performance record, the ability to obtain the necessary resources to perform the contract, and having a satisfactory record of business ethics and integrity; (2) neither Tompkins (or the other joint venture participants) nor Tompkins' parent firm had been debarred, suspended, or proposed for debarment from federal government contracts following Holzmann's antitrust conviction (and there was no indication that Tompkins had participated in

Holzmann's misconduct); and (3) Holzmann did not exercise management control over Tompkins. She said she also took into account that the awardee was not Holzmann but a joint venture of Washington, D.C., area construction firms, the majority participant of which is owned by a Holzmann U. S. subsidiary.

In considering Holzmann's antitrust conviction in her responsibility determination, the GSA contracting officer said that she obtained information she deemed to be sufficient to determine that the FAR responsibility standards were met. She used supporting information that another GSA contracting officer had used in awarding a contract to a joint venture formed by J.A. Jones Construction Company (Tompkins' parent firm) for another construction project about 2 weeks before the award of the WWII Memorial construction contract. As documented in the contract file, this material included the remedial and compliance actions taken by Holzmann and Jones to help ensure that no future antitrust violation would occur and a formal management separation of the German corporate parent from its U.S. subsidiaries for U.S. government contracts. The contracting officer also took into account USAID's May 2001 written statement that J.A. Jones Construction Company was a responsible contractor and could continue to do business with USAID.

We asked GSA and USAID to review a draft of this report. GSA had no comments and the Legal Counsel for USAID's Inspector General said the draft was factually correct.

WWII Memorial Construction Procurement

In July 1998, GSA and ABMC entered into a Memorandum of Understanding, whereby GSA would award and manage the construction contract for the WWII Memorial. GSA issued a request for proposals (RFP) for construction in September 2000 and received proposals in November 2000. Between November 2000 and June 2001, GSA and ABMC evaluated the proposals, allowed the competitors to make oral presentations, amended the RFP, obtained revised proposals, evaluated those revised proposals, and made the final source selection decision. The proposal from the Tompkins/Grunley-Walsh Joint Venture was determined to represent the "best value" to the government on the basis of a variety of factors, including technical/management, past performance, understanding of the services required, and price.

On June 7, 2001, GSA awarded the contract to the Tompkins/Grunley-Walsh Joint Venture, of which Tompkins was the majority participant. As shown in table 1, a U. S. subsidiary of Holzmann owns Tompkins.

Table 1: Relationship Between Philipp Holzmann and J.A. Jones, Inc., and Its Subsidiaries

Philipp Holzmann and J.A. Jones, Inc., Relationship
Philipp Holzmann Aktiengesellschaft (AG) (A German-based firm that owns 100 percent of the voting stock of J.A. Jones, Inc., and has 2 of the 12 members on J.A. Jones, Inc., Board of Directors)
J.A. Jones, Inc. (A U. S. holding company that is a subsidiary of Holzmann and owns J.A. Jones Construction Company)
J.A. Jones Construction Company (A wholly owned subsidiary of J.A. Jones, Inc., and owner of J.A. Jones/Tompkins Builders, Inc.)
J.A. Jones/Tompkins Builders, Inc. (A wholly owned subsidiary of J.A. Jones Construction Company and the majority participant in the joint venture that was awarded the WWII Memorial construction contract)

Source: J.A. Jones, Inc., and Holzmann's 2000 *Annual Reviews*; GSA; and information from Philipp Holzmann, J.A. Jones, Inc., and Standard & Poor's Web sites on the Internet.

Holzmann has owned J.A. Jones, Inc., since 1979. J.A. Jones, Inc., owns J.A. Jones Construction Company, which was established in 1890. J.A. Jones Construction Company has owned Tompkins since 1961. Tompkins was established in the District of Columbia in 1911.

According to the contracting officer, in May 2001, she learned from another GSA contracting officer that Holzmann had pled guilty to a criminal antitrust violation in August 2000 for conspiring to suppress and eliminate competition by rigging bids between 1988 and 1995 on USAID-funded construction projects in Egypt. Holzmann's U.S. subsidiary, J.A. Jones Construction Company, was a minority participant in the joint venture that was the contractor for those projects.

Requirements for Determining Contractor Responsibility

Under the FAR, government contracts may be awarded to responsible prospective contractors only.² The determination of responsibility is a judgment made by the contracting officer. No award can be made unless the contracting officer first makes an affirmative determination of responsibility.

²By statute, federal agencies are required to award contracts to "responsible" sources, 41 U.S.C. 253b. The statutory "responsibility" requirement, including the definition of "responsible source" at 41 U.S.C. 403(7), has been implemented in FAR part 9, Contractor Qualifications.

To be determined responsible, a prospective contractor must meet the general standards specified in FAR section 9.104, including having a satisfactory record of integrity and business ethics, a satisfactory performance record, and the ability to obtain the financial resources necessary to perform the contract. Other standards specified by the FAR include having the necessary organization, skills, facilities, and equipment and the ability to comply with the contract's delivery or performance schedule. In determining responsibility, the FAR advises contracting officers that affiliated firms are normally considered separate entities. However, the FAR further advises that the contracting officer shall consider the affiliate's integrity when it may adversely affect the prospective contractor's responsibility.

A prospective contractor must also not have been debarred, suspended, proposed for debarment, or be otherwise declared ineligible for government contracts in order to be determined responsible. Contractors in any of these categories are excluded from receiving contracts and are placed on the *List of Parties Excluded From Federal Procurement and Nonprocurement Programs* maintained by GSA for use by contracting officers governmentwide. A contractor can be debarred, suspended, or proposed for debarment for a number of reasons, including conviction for antitrust violations such as bid rigging and other violations of law concerning the award and performance of government contracts. However, the existence of a cause for debarment or suspension does not necessarily require that the contractor be debarred or suspended. In making a debarment or suspension decision, the government is required by the FAR to consider the seriousness of the contractor's conduct as well as whether the contractor has cooperated with the government's investigation, agreed to pay for all criminal liability, implemented remedial measures, and instituted new or revised review and control procedures and ethics training programs.

In determining a prospective contractor's responsibility, the contracting officer is required to possess or obtain information sufficient to be satisfied that the applicable general responsibility standards specified in the FAR are met. In addition, contracting officers are advised to support their determinations by using information sources such as the government's *List of Parties Excluded From Federal Procurement and Nonprocurement Programs*; records and experience data, including verifiable knowledge from other contracting offices; the prospective contractor; and other pertinent government agencies.

Contractor Responsibility Determination for the World War II Memorial Construction Contract

Before awarding the WWII Memorial construction contract in June 2001 to the Tompkins/Grunley-Walsh Joint Venture, the GSA contracting officer was aware of Holzmann's antitrust conviction and took it into account during her determination of the prospective contractor's responsibility. The GSA contracting officer followed

applicable procedures in determining that the awardee was a responsible prospective contractor and her determination was supported by both the information she told us she considered, as well as the documents in the GSA contract file.

The GSA contracting officer made a responsibility determination on June 7, 2001, which was documented in writing and stated that the Tompkins/Grunley-Walsh Joint Venture met the general standards of responsibility set forth in FAR section 9.104. Information in the contract file and reflected in the contracting officer's written determination addressed the general standards specified in the FAR that are a prerequisite for determining that a prospective contractor is responsible. The contracting officer also said in her written determination that a review of the information specifically pertaining to Holzmann's conviction did not support a nonresponsibility determination regarding the Tompkins/Grunley-Walsh Joint Venture and its ability to construct the National WWII Memorial.

The contracting officer said that in May 2001 (about 1 month before award of the contract), she heard about Holzmann's antitrust conviction from another GSA contracting officer. The other contracting officer was determining whether J.A. Jones Construction Company (Tompkins' parent company) was a responsible prospective contractor for participation in a joint venture being considered for award of a construction contract for the new U.S. Courthouse in Seattle, WA (an estimated \$150-million project).

The contracting officer said that when she became aware of Holzmann's antitrust conviction, she verified that none of the participants of the Tompkins/Grunley-Walsh Joint Venture were debarred, suspended, or proposed for debarment from U.S. government contracts by checking the *List of Parties Excluded From Federal Procurement and Nonprocurement Programs*—as documented in the contract file. In addition, Tompkins' parent, J.A. Jones Construction Company, had not been determined ineligible to receive USAID contracts as a result of Holzmann's misconduct, according to a May 17, 2001, statement from staff of USAID's Inspector General.³ The contracting officer also used the supporting information used by the other GSA contracting officer who made an affirmative responsibility determination in May 2001 for the joint venture formed by J.A. Jones Construction Company (Tompkins' parent firm) for the Seattle Courthouse construction contract.

According to the contracting officer for the WWII Memorial and as documented in the contract file, Tompkins' parent firm, J.A. Jones Construction Company, had taken compliance measures (through J.A. Jones, Inc.) and separated its management from Holzmann's. She further noted that Tompkins itself, a local Washington, D.C., construction firm, also apparently had no involvement with Holzmann's misconduct with the USAID projects in Egypt, and as shown in table 1, is even further removed from Holzmann than is J.A. Jones Construction Company.

³ Holzmann itself had not been suspended or debarred from government contracts by USAID because of corrective actions that it agreed to undertake.

The contracting officer said she determined that Holzmann exercised no management control over Tompkins because Holzmann does not make up the majority of Tompkins' parent firm's Board of Directors and shares neither common facilities nor employees with Tompkins. Regardless of the affiliation between Holzmann and its U.S. subsidiaries, the contracting officer said that she reviewed material relating to Holzmann's antitrust conviction that the contracting officer for the Seattle Courthouse project used to support an affirmative determination of responsibility for J.A. Jones Construction Company (Tompkins' parent firm) following Holzmann's conviction. A review of the information documented in the contract file showed the following:

- A compliance plan that USAID approved on August 28, 2000, permitted J.A. Jones, Inc., to continue participating in USAID projects. The compliance plan is a formal agreement between USAID, J.A. Jones, Inc., and Holzmann regarding eligibility to bid on and perform USAID contracts. To satisfy USAID that Holzmann and J.A. Jones, Inc., were prepared to take necessary steps to demonstrate their responsibility as government contractors and "to ensure they are observing the highest standards of ethical government contracting," Holzmann and J.A. Jones, Inc., agreed, among other things, to implement the following:
 - a formal separation ("firewall") between J.A. Jones, Inc., and Holzmann for purposes of day-to-day management of U.S. government contracts to help ensure that Holzmann has no involvement in decisionmaking by J.A. Jones, Inc., and its subsidiaries regarding bidding and pricing of contracts;
 - internal audit procedures and corporate policies for deterring, detecting, investigating, and reporting wrongdoing in the companies' government contracting business, using compliance with U.S. antitrust law as the standard;
 - training to ensure that personnel from both companies are aware of applicable laws, regulations, and standards of business conduct regarding competing for and performing government contracts and the consequences of any violations; and
 - the use of an employee ethical conduct manual with guidelines for maintaining procurement integrity, compliance with the antitrust laws, and avoiding fraud and other abuses in government contracting.
- An agreement among Holzmann; J.A. Jones, Inc.; and the Department of Defense restricted Holzmann's access to classified information and ability to control or influence the business or management of J.A. Jones, Inc., in connection with the performance of certain U.S. government contracts involving classified information. This "Special Security Agreement" also required that the Chairman of J.A. Jones, Inc.'s corporate board, as well as its principal officers, must be resident citizens of the United States who are eligible to possess security clearances.

USAID determined that these measures were acceptable to the government and justified the continued eligibility of J.A. Jones Construction Company to bid on and

receive USAID contracts. The contracting officer said it was significant that the agency whose contracts were affected by Holzmänn's misconduct did not propose Holzmänn for debarment and that J.A. Jones Construction Company was not implicated in the misconduct by the related Justice Department investigation.

In addition, included in the contract file was a May 15, 2001, letter from the President of J.A. Jones Construction Company to the contracting officer for the Seattle courthouse project addressing the same concerns about the involvement of J.A. Jones Construction Company in the Egyptian USAID projects. In this letter, J.A. Jones Construction Company maintained that it had no knowledge of, or participation in, any improper activities being investigated. The firm offered to provide GSA with any further information needed to demonstrate the company's lack of involvement with any of the wrongdoing that was the subject of the Justice Department investigation and its ethical qualification to continue its long history of work for GSA.⁴

The GSA contracting officer for the Seattle courthouse project determined that the joint venture formed by J.A. Jones Construction Company for that project was a responsible prospective contractor and awarded it the contract for the Seattle courthouse on May 23, 2001. This determination involving Jones' responsibility occurred about 2 weeks before award of the WWII Memorial construction contract to the Tompkins/Grunley-Walsh Joint Venture. As shown in table 1, J.A. Jones Construction Company is more closely related to Holzmänn than is Tompkins. According to the contracting officer for the WWII Memorial, there was thus even less basis to question whether Holzmänn's misconduct could adversely affect the responsibility of the Tompkins/Grunley-Walsh Joint Venture.

Based on the above statements to us by the contracting officer and the documents we reviewed in the contract file, we believe the GSA contracting officer followed applicable procedures in determining that the Tompkins/Grunley-Walsh Joint Venture was a responsible prospective contractor for construction of the WWII Memorial, notwithstanding the recent antitrust conviction of the German company whose U.S. subsidiary owns the majority participant in the joint venture awarded the contract. In awarding the contract, the contracting officer appears to have properly considered relevant information pertaining to the FAR standards of responsibility, including information involving Tompkins' parent firm that addresses Holzmänn's antitrust conviction. Specifically, she said that she relied on supporting information used by another GSA contracting officer in his responsibility determination that included a review of the activities of Holzmänn and its U.S. subsidiaries (including Tompkins' parent firm) in response to Holzmänn's antitrust conviction, such as remedial and compliance measures and management separation.

⁴ The contracting officer for the WWII Memorial said she did not merely rely on Jones' assertion that it had been exonerated by the Justice Department; she also reviewed the actual plea agreement between the Justice Department and Holzmänn. The agreement, as documented in the contract file, provides that upon Holzmänn's guilty plea, and subject to any cooperation requested by the government from Holzmänn or its subsidiaries, the United States would bring no further criminal charges related to the matter against Holzmänn or its subsidiaries (which includes Jones).

Accordingly, in awarding the construction contract for the WWII Memorial, GSA was aware of—and took into account—Holzmann's recent antitrust conviction. GSA followed applicable procedures in determining that the joint venture awardee, the majority participant of which is owned by Holzmann's U.S. subsidiary, was a responsible prospective contractor. The contracting officer's consideration of information concerning Tompkins' parent firm did not support a nonresponsibility determination regarding the Tompkins/Grunley-Walsh Joint Venture and its ability to construct the WWII Memorial.

Agency Comments

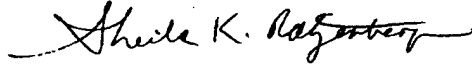
We provided copies of a draft of this letter for comment to the Administrator of GSA and USAID's Office of Inspector General Legal Counsel. On November 21, 2001, GSA's liaison for our work said by E-mail that GSA had reviewed the report and had no comments. On November 23, 2001, the Legal Counsel for USAID's Inspector General stated orally that the draft was factually correct.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this letter until 30 days after the date of this letter. At that time, we will send copies to the Chairman, Senate Committee on Armed Services; Chairman and Ranking Minority Member, Senate Committee on Governmental Affairs; the Chairman and Ranking Minority Member, House Committee on Government Reform; the Chairman and Ranking Minority Member, Senate Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia; the Chairman and Ranking Minority Member, House Subcommittee on Technology and Procurement Policy; the Chairman and Ranking Minority Member, House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations; the Director of the Office of Management and Budget; and the Administrator of GSA. The letter will also be available on GAO's home page at www.gao.gov.

If you have any questions regarding this letter, please contact John Baldwin or Bernard L. Ungar on (202) 512-8387 or Sheila K. Ratzenberger on (202) 512-8244. Key contributors to this assignment were Adam Vodraska and Lucy Hall.



Bernard L. Ungar
Director, Physical Infrastructure Issues



Sheila K. Ratzenberger
Managing Associate General Counsel