

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-215539**DATE:** November 14, 1984**MATTER OF:** LW Planning Group**DIGEST:**

1. Protest that contracting agency improperly determined protester to be ineligible for award because protester had a conflict of interest is denied. Contracting agency reasonably determined, in accord with Federal Acquisition Regulation § 9.505-2(b), that, since protester had previously been awarded contract on a noncompetitive basis to prepare statement of work for present protested procurement, protester had conflict of interest and should be precluded from competing for contract to perform work required under same statement of work.
2. Firm that is ineligible to compete for award of contract due to conflict of interest is not an interested party to protest propriety of award of that contract to another firm.

LW Planning Group (LW) protests the United States Department of Agriculture's (Agriculture) award of a task order to Kidde Consultants, Inc. (Kidde), under an indefinite quantity contract requiring Kidde to provide architectural and engineering (A/E) services to Agriculture. The task order required Kidde to furnish all services necessary to revise the master plan for the National Arboretum. LW contends that the task order was improperly awarded to Kidde because Kidde's A/E contract with Agriculture is an illegal contract and because the services required under the task order are not A/E services and, therefore, should have been competitively procured. LW requests that our Office direct Agriculture either to properly compete this procurement or to award the contract to LW as the lowest priced available source. LW also requests reimbursement of its proposal preparation costs.

We deny the protest in part and dismiss the protest in part.

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The record shows that, in the latter part of 1983, discussions were held between LW and the Director of the National Arboretum concerning recent revisions to the National Arboretum's programs and facilities and how the National Arboretum's master plan would serve the requirements of those recent revisions. Subsequent to those discussions, LW submitted an unsolicited proposal to the National Arboretum under which LW, if awarded a contract, would give an overall evaluation of how to bring the Arboretum's master plan into conformance with proposed programs. In January 1984, Agriculture issued a purchase order to LW on a noncompetitive basis which, among other things, required LW to write a statement of work to be used to revise the National Arboretum's master plan. The statement of work was transmitted to the National Arboretum on February 23, 1984, and it set forth six tasks: (1) setting out goals and policies for Arboretum development; (2) setting out objectives and proposing implementation measures for the goals and policies; (3) structuring a preliminary land use and circulation plan for the Arboretum over a 10-year period; (4) preparing a profile of proposed Arboretum facilities; (5) preparing schematic sketches of the visual appearance of the redeveloped Arboretum in 1994-1995; and (6) presenting results of the first five tasks to the National Arboretum Advisory Council and others in October 1984. Along with the completed statement of work, LW gave the National Arboretum an unsolicited proposal for LW to accomplish the work set out in the statement of work for a total price of \$69,750.

Sometime after May 4, the contracting officer and other officials in the Facilities and Construction Management Branch of the Department of Agriculture reviewed the statement of work prepared by LW and LW's unsolicited proposal to perform the work required thereunder and decided that revision of the Arboretum's master plan required the services of an A/E firm. Since LW was not listed in Agriculture's files as an A/E firm, Agriculture officials determined that a sole-source award to LW could not be justified. Contracting agency officials also decided that LW had a conflict of interest since it had drafted the statement of work and, therefore, in accord with section 9.505-2(b)(1) of the Federal Acquisition Regulation (FAR) (to be codified at 48 C.F.R. § 9.505-2(b)(1)), LW was

not eligible for award of a contract to perform work required under that statement of work. Furthermore, Agriculture officials determined that the required services were properly within the scope of an A/E contract that Agriculture already had with Kidde. The Kidde contract, which was originally procured under competitive procedures set forth in the Brooks Act, 40 U.S.C. § 541, et seq. (1982), is an indefinite quantity contract which requires Kidde to perform work for Agriculture on an as-needed basis through the issuance of task orders.

In late May, a representative of Kidde contacted LW, indicated that Kidde had a task order contract with Agriculture, and stated that Kidde had been asked to submit a proposal to do the work set out in the statement of work that LW had prepared for Agriculture. After several discussions between the two firms, it was determined that LW and Kidde might develop a joint work or subcontract arrangement to do the work. Kidde requested that LW give it a proposal for certain portions of the work. The LW proposal was to be used as part of a proposal Kidde was going to submit to Agriculture for performing all work required under the statement of work. While Kidde was awaiting LW's proposal, Agriculture officials requested Kidde to prepare a proposal on the basis of Kidde performing all the work itself and to prepare a second proposal using LW as part of a joint effort when the proposal from LW was received by Kidde. Accordingly, Kidde submitted a proposal on May 29 (on the basis of Kidde performing alone) in the amount of \$101,824 plus certain cost plus items. In addition, Kidde submitted a proposal on June 4 (on the basis of a joint effort with LW) in the amount of \$148,263 plus certain cost plus items. After reviewing both proposals, Agriculture negotiated with Kidde and determined that Kidde would be awarded a task order to do all work without any work being done by LW for a total price not to exceed \$97,000. The task order was executed on June 8, and LW protested to our Office on June 11.

In its report on this protest, Agriculture advances three bases for not considering LW eligible for award: (1) LW had a conflict of interest and was precluded from award under the above-cited FAR provision; (2) LW was not an A/E firm and the work required was A/E in nature; and (3) the work to be done was within the scope of Kidde's

indefinite quantity A/E contract with Agriculture. Essentially, LW disputes all three grounds advanced by Agriculture and contends that either it should be awarded the contract on the basis of its unique knowledge of the statement of work and its lower price, or the requirement should be competitively procured.

The responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. N.D. Lea & Associates, Inc., B-208445, Feb. 1, 1983, 83-1 C.P.D. ¶ 110 (reconsidered and affirmed in N.D. Lea & Associates, Inc.--Reconsideration, B-208445.2, June 27, 1983, 83-2 C.P.D. ¶ 21).

Section 9.505-2(b) of the FAR specifically covers the present situation and directs that:

"(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system of services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system, or the services unless--

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

"(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in subparagraph (1) above.

"(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors." (Emphasis added.)

LW argues that this section of the FAR is not controlling because the FAR became effective on April 1, 1984, while both the original Kidde A/E contract and LW's contract to write the statement of work were awarded prior to April 1, 1984. LW also contends that the FAR provision was not intended for application to "such a minor procurement" as the present one. We do not agree with either argument. The dates of award of the original Kidde contract and the LW contract are irrelevant. What is relevant is the date the task order for the present protested requirement was executed--June 8, 1984. In fact, Agriculture reports that it did not even begin to evaluate how it would update the Arboretum's master plan until the Facilities and Construction Management Branch received the statement of work and LW's unsolicited proposal in May 1984. Moreover, Agriculture did not solicit a proposal from Kidde until May 21. Thus, all of the significant procurement actions took place after the effective date of the FAR. In these circumstances, we find that the FAR provision was applicable to the protested procurement actions. See, for example, Holmes & Narver Services, Inc., and Morrison-Knudsen Company, Inc., B-212191, Nov. 17, 1983, 83-2 C.P.D. ¶ 585 at 8; Enterprises Roofing Service, 55 Comp. Gen. 617 at 623 (1976), 76-1 C.P.D. ¶ 5 at 8. Furthermore, there is nothing in the FAR to support LW's argument that FAR § 9.505-2 should not be applied to "minor" procurements and, in any event, we do not agree that a \$100,000 procurement should be considered "minor."

Under the provisions of FAR § 9-505.2(b)(2), it is clear that a firm, such as LW, which drafts a statement of work might be in a position to favor its own capabilities, thereby gaining a competitive advantage in the procurement to do the work required by that statement of work. Thus, our Office cannot find unreasonable Agriculture's determination that LW had a conflict of interest and was ineligible under FAR § 9.505-2(b)(1) and -2(b)(2) for award of a contract to do the work required by the statement of work LW had written. See N.D. Lea & Associates, Inc., B-208445, supra, and cases cited therein. It is well settled that a contracting agency may impose a variety

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of restrictions, whether or not explicitly provided for in applicable procurement regulations, when the nature of the procurement dictates the use of such restrictions. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94; Gould, Inc., Advanced Technology Group, B-181448, Oct. 15, 1974, 74-2 C.P.D. ¶ 205. The record does not reflect whether the contract under which LW wrote the statement of work contained notice that LW would be precluded from award of any future contract to perform the work required under that statement of work because of a possible conflict of interest. We have held that a contracting agency may properly disqualify a firm because of an organizational conflict of interest even though prior notice was not given that firm in the earlier contract. See Acumenics Research and Technology, Inc., B-211575, supra. Where, as here, the agency determines that a firm has a conflict of interest by virtue of having contracted previously to write the statement of work and such situation is specifically covered by the applicable procurement regulation, we find the agency's determination that the protester was ineligible for award to be reasonable. Therefore, we will not overturn Agriculture's determination and this portion of the protest is denied.

Since we agree with Agriculture's determination that LW was not eligible for award of a contract to revise the National Arboretum's master plan and would not be eligible to compete for such contract even if Agriculture advertised it, we find that LW is not an "interested" party within the scope of our Bid Protest Procedures to protest the award of a task order for that work to Kidde. See N.D. Lea & Associates, Inc., B-208445, supra, and cases cited therein. Accordingly, we will not consider the remaining issues raised by LW nor its claims for proposal preparation costs.

We deny the protest in part and dismiss it in part.

Winston J. Jordan
 for Comptroller General
 of the United States