

Konovitz

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DECISION



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

FILE: B-217556

DATE: April 29, 1985

MATTER OF: Nelson Erection Company, Inc.

DIGEST:

Protest that contracting agency improperly determined protester to be ineligible for award because the protester had a conflict of interest is denied. Contracting agency reasonably determined that, since protester essentially prepared statement of work for the protested procurement, protester had a conflict of interest and should be precluded from performing the work required under the statement.

Nelson Erection Company, Inc. (Nelson), the low bidder, under invitation for bids (IFB) No. DAHA03-85-B-0001 protests the Department of the Army (Army) determination that the firm is ineligible for award because of a conflict of interest.

We deny the protest.

The Army reports that it issued a purchase order to an architect-engineer (A/E) firm which, among other things, required that firm to prepare the present IFB statement of work for the repair of a hangar door. The record shows that the A/E firm, after receiving Army approval, hired Nelson to assist it in its preparation of the statement of work. Nelson prepared an inspection report on the door, which, in part, outlined the specific door repairs needed, described door repair methods and listed the materials to be used in making the repairs. This portion of Nelson's report was incorporated by the A/E firm into the IFB as the statement of work.

The Army determined that, since Nelson assisted the A/E firm in preparing the statement of work, it had a conflict of interest and should be precluded from performing the work required under that statement. The Army based its

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determination upon the provision contained in Federal Acquisition Regulation (FAR) § 9.505-2(b)(1), 48 C.F.R. § 9.505-2(b)(1) (1984), which, except in circumstances not applicable here, provides:

"If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-- or provides material leading directly, predictably without delay to such a statement--that contractor may not supply the system . . . or the services"

Nelson responds that the Army erroneously determined that the firm has a conflict of interest. Nelson explains that the firm in preparing the report had no incentive to favor any particular repair method and that the parts needed to repair the door as specified in the statement of work are available to any bidder desiring to purchase them. Nelson thus maintains that the firm does not have a competitive advantage over other bidders in this procurement and should be awarded the contract.

In any event, Nelson argues that the provision at FAR § 9.505-2(b)(1) is inapplicable here because Nelson did not contract directly with the government to prepare the statement of work.

While the above-cited FAR provision does not explicitly address the situation here (where a consultant to the government prime contractor assists that contractor in preparing the statement of work), we have held that a contracting agency may impose a variety of restrictions, whether or not explicitly provided for in applicable procurement regulations, when the nature of the procurement dictates the use of such restrictions. LW Planning Group, B-215539, Nov. 14, 1984, 84-2 C.P.D. ¶ 531; Acumenics, Research and Technology, Inc., B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94. In this regard, we also have held that the responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be precluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. LW Planning Group, B-215539, supra; 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).

We conclude that the Army's decision to preclude Nelson from performing the work required under the statement of work was reasonable. Since Nelson had recommended specific door repair methods and the parts to be used in making the repairs and provided repair cost estimates while assisting the prime contractor in its preparation of the statement of work, we agree with the Army's finding that Nelson was in a position to favor its own capabilities. In this regard, the record shows that Nelson was aware that its work was preliminary to the preparation of an IFB and that it planned to submit a bid under this IFB.

The Army's concern of a conflict of interest here is also confirmed by the fact that Nelson's bid price under the initial IFB 1/ issued for the door repairs was identical to the government's cost estimate for the repairs which Nelson prepared. The resolicitation of this requirement under the present IFB did not result in Nelson altering its price significantly and Nelson's position as low bidder was unchanged. We thus find reasonable the Army's belief that, since Nelson was involved in preparing the IFB specifications, it had the opportunity to recommend repair methods which were most cost effective for that firm.

Nelson also complains that the Army improperly failed to notify Nelson that, if it assisted the A/E firm in preparing information to be used in the statement of work, it might be ineligible for award to perform the work under that statement due to a possible conflict of interest. However, we have held that a contracting agency may properly disqualify a firm because of a conflict of interest even though prior notice was not given the firm in the earlier contract. LW Planning Group, B-215539, supra.

Harry R. Van Cleve
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General Counsel

1/ That IFB was cancelled because the only bid other than Nelson's was considered unreasonably high.