



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Applied Resources Corporation--Reconsideration

File: B-249258.2

Date: February 26, 1993

Matthew S. Colello for the protester,
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Request for reconsideration of decision holding that contracting officer properly disqualified protester from the competition where the record showed a likelihood that a conflict of interest existed--because the spouse of the protester's president was the contracting officer's supervisor, who had access to the government estimate for the procurement--is denied where protester fails to show that the decision was erroneous in fact or law. Protester's argument that other agency employees should have alerted the contracting officer's supervisor to the possible conflict does not show that the supervisor was relieved of the primary responsibility to identify and avoid even the appearance of a conflict of interest.

DECISION

Applied Resources Corporation (ARC) requests reconsideration of our decision in Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272. In that decision, we denied ARC's protest of the Department of the Army's exclusion of the firm from consideration for award under invitation for bids (IFB) No. DAAA21-92-B-0001, for Stinger missile warhead body assemblies. The contracting officer disqualified ARC because she found that there was a likelihood that a conflict of interest existed because the spouse of ARC's president was the contracting officer's supervisor, who had access to the government estimate for the procurement.

We deny the request for reconsideration.

The solicitation was issued by the Army's Armament Research, Engineering, and Development Center for the provision of 1,266 Stinger missile warhead body assemblies,¹ with an option for an additional 4,626 units. The Independent Government Cost Estimate (IGCE) for the basic and option quantities was \$916,804. The record showed that on the May 11 bid opening day ARC was the apparent low bidder with a bid of \$893,941; ARC's bid was signed by its president, Matthew Colello. After bids were opened, the contracting specialist informed the contracting officer that Matthew Colello was the husband of Valerie Colello, the Branch Chief of the Weapons and Armament Systems Division and the contracting officer's own supervisor. The contracting officer stated that although she did not suspect any impropriety on the part of either Matthew Colello or Valerie Colello, she was concerned about an appearance of a conflict of interest. As a result, she sought advice from the procurement attorney, who referred the matter to the agency's ethics counselor.

The ethics counselor found that while Ms. Colello disqualified herself from participation in the subject procurement on May 13,² prior to that time she conducted a status review with the contracting officer on the requirement and thus had access to the IGCE for the basic quantity. The ethics counselor also discovered that Ms. Colello failed to list ARC and other assets, if any, of her husband on the DD Form 1555, "Confidential Statement of Affiliations and Financial Interests." This form requires that government employees such as Ms. Colello report the interests of a spouse as if those interests were the government employee's. Based upon his findings, on May 15, the ethics counselor recommended that ARC not be considered for award of the subject solicitation. Following the ethics counselor's recommendation, the contracting officer informed ARC that it was ineligible for award; this protest followed.

As we stated in our prior decision, an agency may take action to exclude a firm from the competition where there is a likelihood that a conflict of interest existed, as well as some basis for determining that the conflict warrants the exclusion of that firm. See NKE Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291.

¹The solicitation originally called for a basic quantity of 1,251 units; an amendment issued on April 24 increased the basic quantity to 1,266 units.

²Ms. Colello was on leave on both May 11, the bid opening date, and May 12.

We found that Ms. Colello had the responsibility to assist the agency in avoiding the appearance of favoritism or preferential treatment, see Marc Indus., B-246528 et al., Mar. 10, 1992, 92-1 CPD ¶ 273, and that several of her actions prevented her from meeting that responsibility. She first failed to disclose her financial interest in ARC on the disclosure form provided for that purpose and thus denied the agency the opportunity to modify her duties so as to avoid the appearance of favoritism or preferential treatment; this failure created a likelihood of a conflict of interest. She further failed to disqualify herself, prior to bid opening, from any participation in this procurement in which ARC was the low bidder, and thus obtained access to the IGCE for the basic quantity. This failure to disqualify herself earlier in the process also created a likelihood of a conflict of interest between Ms. Colello's financial interest in ARC's successful pursuit of a contract and her responsibilities as the contracting officer's supervisor. We finally concluded that Ms. Colello's access to the IGCE warranted the exclusion of ARC from participation in the solicitation.

In its request for reconsideration, ARC primarily asserts that Ms. Colello's supervisors and other co-workers were at fault because they failed both to find an error in her filings of the financial disclosure form and to inform her of ARC's participation in the procurement, especially in light of the fact that, the protester asserts, Ms. Colello's co-workers knew Matthew Colello and also knew of his relationship with Ms. Colello. ARC appears to argue that since Ms. Colello's failure to meet her responsibility to avoid the appearance of favoritism or preferential treatment may have resulted in part from the failure of other agency employees to meet their respective responsibilities, we should have found ARC eligible to participate in this procurement.

It is undisputed that a financial interest, by the terms of the financial disclosure form, existed between ARC and Ms. Colello.³ Ms. Colello and her branch chief evidently misinterpreted the instructions on the financial disclosure form, resulting in her nondisclosure of this financial interest between herself and ARC. While we found that this misinterpretation was apparently made in good faith, we stated that her failure to make this disclosure of her financial interest in ARC created a likelihood of a conflict of interest, since the nondisclosure prevented the agency

³The instructions state that "[t]he interests of a spouse, minor child and any member of your household shall be reported in the same manner as if they were your own interests."

from modifying her duties so as to avoid the appearance of favoritism or preferential treatment. See id. The fact that her co-workers may have shared in her error of misinterpretation does not remove the likelihood of a conflict of interest that existed as a result of the nondisclosure. Had she disclosed her financial interest in ARC, as required, her duties could have been modified to preclude the possibility of her involvement with a procurement that ARC might be interested in, thereby avoiding the appearance of favoritism or preferential treatment. In fact, had her duties been modified, it is possible that Ms. Colello would not have been put in the position of having to disqualify herself at all, much less at an earlier stage of this procurement. If, as the protester alleges, and the record seems to indicate, other agency employees were aware of the relationship between Matthew Colello and Valerie Colello, their failure to inform Ms. Colello of ARC's interest in the procurement does not mitigate Ms. Colello's failure to fulfill her responsibility to avoid the appearance of favoritism or preferential treatment, nor does it eliminate the direct conflict of interest between Ms. Colello's undisclosed financial interest in ARC and her responsibilities as the contracting officer's supervisor.

As to whether the conflict warranted the exclusion of ARC from participation in the procurement, we found that Ms. Colello's access to the IGCE for the basic quantity warranted ARC's exclusion because, if ARC had access to the IGCE, it could adjust its bid accordingly. For the first time, ARC now argues that the figure to which Ms. Colello had access was not the IGCE, but rather the amount assigned to the program. This argument is contrary to ARC's comments made during our consideration of the protest, wherein it did not dispute the agency's contention that that figure was the IGCE, but merely asserted that any access to the IGCE would not have provided it an unfair competitive advantage. If ARC believed that the figure on the status sheet was not the IGCE, it could have raised this argument earlier. Where a party raises on reconsideration an argument that it could have but did not raise at the time of the protest, the argument does not provide a basis for reconsideration. Marine Indus., Ltd.--Recon., B-225722.2, June 24, 1987, 87-1 CPD ¶ 627.

ARC finally argues that the agency's performance of a pre-award survey on September 10, and its subsequent recommendation of ARC for contract award, indicates that the agency reconsidered its position on ARC's exclusion from the procurement. We disagree, as a justification for a pre-award survey is to reduce the amount of time required to ultimately award a contract. T. Warehouse Corp., B-217111, June 27, 1985, 85-1 CPD ¶ 731. Had our Office found in favor of ARC, the agency could have awarded the contract to

ARC; a completed pre-award survey would have reduced the amount of time required to make that award, especially in light of the fact that award had already been delayed pending the resolution of ARC's protest. We have no basis to object to the agency's action in conducting the pre-award survey since, at the time the survey was conducted, there was a possibility that ARC would receive the award. See Pyrotechnics Indus., Inc., B-221886, June 2, 1986, 86-1 CPD ¶ 505.

The request for reconsideration is denied.



for James F. Hinchman
General Counsel