Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lawlor Corporation--Reconsideration

File: B-241945.2

Date: March 28, 1991

Paul W. Losordo, Esq., for the protester.
John B. Tieder, Jr., Esq., Watt, Tieder, Killian & Hoffar, for Stateside Builders, Inc., an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that apparent low bidder on a construction contract should be disqualified since it is an affiliate of the designer is timely filed under the Bid Protest Regulations, where the protest is filed within 10 days of when the protester first reasonably became aware of low bidder's affiliation.

2. Agency may only waive the proscription contained in Federal Acquisition Regulation § 36.209 against a design firm or its affiliates contracting to construct a project it designed where there is a reasonable basis for concluding that an overriding governmental interest exists or that no purpose would be served by the application of the restriction in the procurement. Where a particular building design process minimized any potential competitive advantage, the contracting officer could determine a waiver is justified.

DECISION

Lawlor Corporation protests the proposed award of a contract to Stateside Builders, Inc., under invitation for bids (IFB) No. DACA33-90-B-0084, issued by the U.S. Army Corps of Engineers for the renovation of a building at Fort Devens, Massachusetts, and for the construction of an addition to the building. Lawlor claims that Stateside, the apparent low bidder, is ineligible for award since it is an affiliate of the project designer, Carlson Associates, Inc.

We deny the protest.

Lawlor's initial protest was filed with our Office on November 2, 1990, more than 3 months after the July 17 bid opening. On November 5, 1990, we dismissed the protest as untimely since it appeared to have been filed more than 10 working days after the protester knew, or should have known, the basis for its protest. See 4 C.F.R. § 21.2(a)(2) (1990).

On November 15, Lawlor requested reconsideration of the dismissal. In an affidavit accompanying the reconsideration request, Lawlor's president attested that its protest resulted from an anonymous telephone tip "on or about October 29," which Lawlor confirmed on the following day. Since no award has been made, and since there is nothing in the record that indicates Lawlor knew or should have known at any earlier date that Stateside was an affiliate of the designer, we now consider the protest to be timely filed under our Bid Protest Regulations. See Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198; Price Bros. Co., B-235473, June 9, 1989, 89-1 CPD ¶ 549.

This construction project was designed by two architectural and engineering (A-E) firms: Anderson & Nichols & Co., Inc., and Carlson. Anderson reportedly performed approximately 75 percent of the design work; Carlson performed the balance. The Carlson contract specifically stated that: "[t]he A-E or any of his subsidiaries, affiliates and associates shall not participate in the construction of the project designed hereunder."

Sixteen bids were submitted on this IFB by the July 17, 1990, bid opening. Stateside was the low bidder at $12,221,000, while Lawlor's bid was second low at $12,580,400. Both were substantially below the government estimate. The contracting officer became aware that Stateside and Carlson are affiliates because both are subsidiaries of SAE Engineering Construction Co., Inc.

Federal Acquisition Regulation (FAR) § 36.209 provides:

> "No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the head of the agency or authorized representative."

This regulation and its predecessors were promulgated pursuant to general authorities governing federal agency procurements, rather than legislation specifically addressing conflicts of interest. The prohibition is obviously intended to prevent the apparent competitive advantage in seeking a construction contract that would flow to an A-E firm (or its affiliates)

that has prepared the specifications. Army Federal Acquisition Regulation Supplement § 36.209 (September 1990) delegates to the Head of the Contracting Activity the authority to approve an award of a construction contract to the designer of the project, with the authority to redelegate to the Principal Assistant Responsible for Contracting (PARC).

On July 27, upon being apprised that it was considered an affiliate of Carlson (and thus fell under the FAR § 36.209 proscription), Stateside requested a waiver pursuant to that regulation. On August 2, the contracting officer recommended that the waiver be granted to Stateside because, among other reasons, he believed that the coordinated use of two independent A-E firms in the design process, and during construction if optional construction oversight portions of the A-E contracts are exercised, eliminated any actual or potential advantage or conflict of interest for Stateside. On August 8, 1990, the PARC granted the requested waiver. Lawlor argues that this determination was an abuse of discretion.

As discussed above, FAR § 36.209 provides procuring agencies the authority to waive the proscription against design firms (or their affiliates) contracting to build projects they have designed. Where a procurement decision such as the waiver in this case is committed by statute or regulation to the discretion of agency officials, our Office will not make an independent determination of the matter. Rather, we will review the agency's explanation to ensure that it is reasonable and consistent with applicable statutes and regulations. See, e.g., Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

The strict prohibition in FAR § 36.209 was evidently designed to eliminate the advantages that an A-E firm would have in the competition for the construction of a project that it designed. Since the regulation writers envisioned a need for waiving the prohibition, they contemplated the possibility of governmental interests that would override the purpose of FAR § 36.209. In our view, one such interest would be where the government could not obtain necessary construction services at a reasonable price from another responsible and otherwise eligible contractor. Our role is to determine if the procurement record reflects a reasonable basis to conclude that an overriding governmental interest exists or that no

purpose would be served by the application of the prohibition in this case.1/

Among other reasons, the contracting officer asserted that this particular building design process minimized any potential competitive advantage to Stateside, such that no purpose would be served by the application of the prohibition. Carlson did approximately 25 percent of the work--designing the renovation of a building for which another firm designed an addition. The contracting officer's August 2 memorandum recommending a waiver stated:

> "Procedures were employed during the design to insure compatibility of the combined renovation and annex for Building 2602. Coordination meetings were held between the New England Division and the two independent A-E firms during the design process to minimize conflicts and ensure compatibility of the architectural, mechanical, and electric components and systems being incorporated into the two designs. To ensure that the quality workmanship would be maintained, identical building components including windows, doors, blinds, lighting, flooring, and fixtures were specified which required continuous interfacing by both A-E's. Carlson Associates was provided with well defined as-builts of Building 2602, which was completed in 1988, to facilitate their renovation design and minimize the probability of uncovering unforeseen building conditions. The New England Division reviewed all design submittals and determined that the final set of advertised documents accurately depicted the work required for the construction contract."

Similarly, the memorandum concludes that if Carlson provides oversight of the renovation construction, the presence of another A-E firm examining the related construction of an

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1/ The waiver process established in FAR § 36.209 is in addition to the general authority of agency heads and their designees to deviate from the FAR under section 1.403. Properly authorized class deviations that are consistent with the procurement statutes are not subject to objection by our Office. See Diverco, Inc., B-241978, Mar. 12, 1991, CPD ¶ ___. The authority at issue here is similar to the authority of agency heads and their designees to waive an organizational conflict of interest provision in FAR subpart 9.5 where "its application in a particular situation would not be in the Government's interest." Those waivers are subject to a test of reasonableness. ICF, Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ ___.

addition and governmental review of Carlson's work will provide necessary safeguards.

Reasonable persons could differ regarding the extent to which the advantage Carlson might have gained for its affiliate was reduced by having to closely coordinate with another A-E firm such matters as selection of architectural, mechanical, and electrical systems. Clearly, however, any possible advantage was less than would have been the case if Carlson had been responsible for all or even the majority of the design work. In our view, the judgment of the agency that the possible advantage accruing to Carlson was small enough to warrant a waiver under FAR § 36.209 has enough of a reasonable basis that we will not object.

Lawlor also argues that since Carlson's design contract expressly prohibits it (and its affiliates) from participating in the construction of the designed projects, the Corps has legally agreed to "forego such discretion it has to grant ad hoc waivers" of this proscription. We disagree. The referenced provision in Carlson's contract merely implements the general FAR proscription against designers bidding on construction projects they designed; it does not preclude the agency from waiving this proscription. Thus, we deny the protest.

Robert P. Murphy
for James F. Hinchman
General Counsel