



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Applied Resources Corporation

File: B-249258

Date: October 22, 1992

Matthew S. Colello for the protester.
Richard Couch, Esq., and Benjamin Halperin, Esq., Department of the Army, for the agency.
Tania L. Calhoun and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer properly protected integrity of the procurement system by disqualifying from the competition a firm where the record showed a likelihood that a conflict of interest existed; spouse of firm's president was the contracting officer's supervisor who had access to the government estimate for the procurement because she failed to disqualify herself until after bid opening in addition to her omission of her relationship with the firm on her financial disclosure form.

DECISION

Applied Resources Corporation (ARC) protests the exclusion of its bid from consideration for award under invitation for bids (IFB) No. DAAA21-92-B-0001, issued by the Department of the Army, Armament Research, Engineering, and Development Center, for Stinger missile warhead body assemblies. ARC contends that the Army's decision to exclude it from consideration for award on the ground that there was a conflict of interest lacked a sufficient basis.

We deny the protest.

On April 6, 1992, the agency issued the solicitation for 1,251 Stinger missile warhead body assemblies, with an option for an additional 4,626 units. On April 24, an amendment was issued to increase the basic quantity to 1,266 units. ARC had previously requested, from the contract specialist, a copy of the solicitation on the basis of a synopsis published in the March 13 issue of the Commerce Business Daily (CBD).

The agency received seven bids on the bid opening date of May 11; ARC was the apparent low bidder with a bid of \$893,941. The Independent Government Cost Estimate (IGCE) was \$916,804 for the basic and option quantities. After bids were opened, the contracting specialist informed the contracting officer that ARC's bid was signed by Matthew Colello as president of ARC; the contracting officer verified 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 states that though 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 reviewed the situation and conducted oral interviews of the parties. He found that while Ms. Colello disqualified herself from participation in the subject procurement on May 13,¹ 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.

The protester argues that Ms. Colello had previously filed all required disclosure forms in accordance with the guidance provided by her supervisor. ARC also argues that because Ms. Colello disqualified herself from supervision of the solicitation on May 13, the day after she learned ARC was the apparent low bidder, there is no actual impropriety or conflict of interest. Both Matthew and Valerie Colello state that she was unaware of ARC's request for a bid package, since that request went through the contract specialist, and that she was further unaware of ARC's submission of a bid until her husband so informed her on May 12.

¹Ms. Colello was on leave on both May 11, the bid opening date, and May 12.

In response to these arguments, the agency contends that, by the terms of the instructions to DD Form 1555, a financial interest exists between ARC and Ms. Colello, the immediate supervisor of the contracting officer for this solicitation.² Further, the agency asserts that this undisclosed financial interest resulted in an actual conflict of interest because Ms. Colello failed to disqualify herself from the procurement action after ARC expressed interest in bidding on it, and because she had access to the IGCE during the bid preparation period.

In meeting their responsibility under Federal Acquisition Regulation (FAR) § 1.602 to safeguard the government's interests, contracting officers may impose a variety of restrictions not explicitly provided for in applicable regulations, including disqualification of firms from the competition, where the needs of the agency dictate the use of such restrictions. NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291; Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, recon. denied, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435.

An agency may take action to exclude a firm from the competition where there was 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., supra. In order to exclude a firm from a procurement, the determination that a conflict of interest is likely to have existed must be based on facts, rather than mere innuendo and suspicion. See Laser Power Techns., Inc., B-233369 et al., Mar. 13, 1989, 89-1 CPD ¶ 267. As discussed below, we find that the recommendations of the ethics counselor show that the agency action in disqualifying ARC was a reasonable one based on facts.

The protester does not dispute the agency's assertion that a financial interest, by the terms of the financial disclosure form, exists between ARC and Ms. Colello. As to the reason for the nondisclosure, Ms. Colello states that, when she married Matthew Colello in 1989, she sought clarification from her branch chief as to the completion of DD Form 1555. The agency concedes that both she and her branch chief evidently misinterpreted the instructions as not pertaining to her, and she completed the form based on that erroneous interpretation for the years 1989 through 1991. This

²The 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."

misinterpretation was apparently made in good faith; however, the purpose of including such information is to determine whether the employee's duties should be modified or adjusted in order to preclude actual or apparent conflicts of interest. Her failure to disclose her relationship with ARC on the disclosure form provided for that purpose denied the agency the opportunity to modify her duties so as to avoid the appearance of favoritism or preferential treatment, see Marc Indus., B-246528 et al., Mar. 10, 1992, 92-1 CPD ¶ 273, and thus created a likelihood of a conflict of interest.

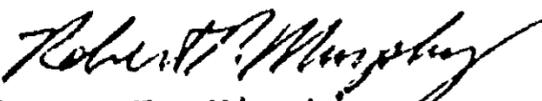
Ms. Colello states that she did not disqualify herself from participation in the procurement prior to May 13 because she was unaware of ARC's interest therein until after bid opening. Irrespective of the truth of this statement, there is no question that Ms. Colello had a financial interest in ARC's successful pursuit of a contract that directly conflicted with her responsibilities as the contracting officer's supervisor.³ Ms. Colello also states that the extent of her involvement with the procurement was to conduct status meetings with the contracting officer to review milestone dates up to contract award. The contracting officer reports that data sheets are prepared and updated for these reviews which indicate the item, estimated cost, whether the action is competitive or a sole-source, and current status within the procurement process. The contracting officer states that ARC's interest in the procurement was never mentioned in these status reviews; however, the record shows that Valerie Colello had access to the April 29 status sheet which listed the IGCE for the basic quantity required by the procurement. While the protester argues that Valerie Colello's access to that IGCE is insignificant since this was a sealed bid solicitation, had ARC known the IGCE prior to bid opening it could have adjusted its bid accordingly.

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., supra. She failed to disclose her financial interest in ARC and failed to disqualify herself from any participation in this solicitation, creating a conflict of interest. Ms. Colello's access

³We note that, irrespective of Ms. Colello's own knowledge, her husband represents that "the complete management of the procurement office was aware that I was the President/CEO of ARC", and his firm submitted a bid (signed by Mr. Colello) on the prior requirement for this item in 1990 and had requested (by letter signed by Mr. Colello) the solicitation in this case.

to the IGCE warranted the exclusion of ARC from participation in the solicitation.

The protest is denied.


for James F. Hinchman
General Counsel