



Comptroller General
of the United States
Washington, D.C. 20548

1245293

Decision

Matter of: Applied Resources Corporation--Second
Reconsideration

File: B-249258.4

Date: March 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

Second request for reconsideration is denied where protester fails to show that prior decision contains either error of fact or law or information not previously considered that warrants its reversal or modification.

DECISION

Applied Resources Corporation (ARC) has filed a second request for reconsideration of our decision in Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272, in which we denied its 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 of a conflict of interest.

We deny the request for reconsideration.

ARC was the apparent low bidder under this solicitation, with a total bid for the basic and option quantities of \$893,941; the Independent Government Cost Estimate (IGCE) was \$916,804. ARC's bid was signed by its president, Matthew Colello. After bids were opened, the contracting officer learned 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. Since the contracting officer was concerned about the appearance of a conflict of interest, the matter was referred to the agency's ethics counselor.

The ethics counselor found that Ms. Colello, who disqualified herself from participation in the subject procurement after bid opening, had access to the IGCE for the basic quantity that was written on a pre-bid opening status sheet. She also 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. Following the ethics counselor's recommendation, the contracting officer informed ARC that it was ineligible for award; ARC's protest followed.

In our original decision, we stated that 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 NKF 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. 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 her failure to disqualify herself from any participation in this procurement in which ARC was the low bidder, along with her failure to disclose her financial interest in ARC on the financial disclosure form, prevented her from meeting that responsibility and created a likelihood of a conflict of interest. We concluded that Ms. Colello's access to the IGCE warranted the exclusion of ARC from participation in the solicitation.

On November 12, 1992, the protester filed a request that we reconsider our decision, arguing that the figure on the status sheet was not the IGCE, but rather the amount assigned to the program, and that our decision was inconsistent with the agency's conduct of a pre-award survey prior to the issuance of our decision.¹ In our denial of the

¹In its first request for reconsideration, ARC also argued that Ms. Colello's co-workers had failed both to inform her of ARC's participation in the procurement and to find an error in her filings of the financial disclosure form. We found that any such failures did not mitigate Ms. Colello's failure to fulfill her responsibility to avoid the appearance of favoritism or preferential treatment, nor did they eliminate the direct conflict of interest between Ms. Colello's undisclosed financial interest in ARC and her responsibilities as the contracting officer's supervisor. In its second request for reconsideration, ARC does not raise this issue; consequently, we do not consider it.

request for reconsideration, we stated that ARC, in its comments made during our consideration of the protest, did not dispute the agency's contention that the figure was the IGCE; our decision noted that if ARC believed that the figure on the status sheet was not the IGCE, it could have raised this argument earlier. With regard to the pre-award survey, we stated that we had no basis to object to the agency's action in conducting the pre-award survey since one of the justifications 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, and, 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, 86-2 CPD ¶ 505.

To obtain reversal or modification of a decision, the protesting party must convincingly show either that our prior decision contains errors of fact or law or present information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a) (1992); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496.

In again requesting reconsideration, the protester asserts that it was impossible for AKC to argue that the figure on the status sheet was not the IGCE in the initial protest because the Army did not release the information contained on that sheet until after ARC's initial protest was submitted to our Office.

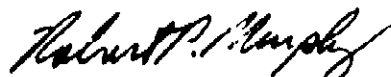
As we stated in our first reconsideration, where a party raises on reconsideration an argument that it could have but did not raise at the time of the protest, the argument does not provide a basis for reconsideration. Marine Indus., Ltd.--Recon., B-225722.2, June 24, 1987, 87-1 CPD ¶ 627. By protest, we do not mean the protest alone, but any submissions made during the pendency of the protest, including the comments on the agency report. ARC concedes, and the record clearly shows, that its argument that the figure on the status sheet was not the IGCE is based on information provided to it in the agency report. Since ARC had the opportunity to raise this issue in its comments submitted in response to that report and did not do so,² we properly determined that the issue was not a basis for reconsideration. Failure to make all arguments available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions

²ARC's comments merely stated that the IGCE was not of significance in the evaluation process, and "[s]ince this solicitation was an IFB, the IGCE is obviously of no value in that the low bidder is the instant winner."

based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

ARC also argues that our denial of its first request for reconsideration failed to address its request for reimbursement for the costs it incurred in connection with the pre-award survey conducted by the agency on September 10, prior to the issuance of our original decision. Neither ARC's request for reconsideration nor any document submitted during our consideration of the initial protest requested "cost reimbursement" for expenses incurred as a result of the pre-award survey. In its request for reconsideration, ARC merely argued that the pre-award survey indicated that the agency had reconsidered its position on ARC's exclusion from the procurement. While ARC did state that the pre-award survey cost it "time and dollars," it concluded by simply stating that our Office should investigate "pre-contract activities." Further, because the record did not show that the agency's actions were unreasonable, there was no basis upon which to find ARC entitled to the costs it incurred in participating in the pre-award survey. See Joseph L. DeClerk and Assocs., Inc., B-220142, Nov. 19, 1985, 85-2 CPD ¶ 567.

The request for reconsideration is denied.



James F. Hinchman
General Counsel