



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ressler Associates, Inc.

File: B-244110

Date: September 9, 1991

Gerald M. Ressler for the protester,
Om P. Bahethi, Ph.D., for Science Systems and Applications,
Inc., an interested party.
Don G. Bush, National Aeronautics and Space Administration,
for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Agency's exclusion of protester from competition due to organizational conflict of interest was reasonable where protester prepared portions of statement of work without contracting officer's knowledge and thus had unfair competitive advantage; Federal Acquisition Regulation provides that a contractor that prepared a statement of work for services may not supply those services absent circumstances not applicable here.
2. Where protester properly was disqualified from competition based on organizational conflict of interest, agency's failure to afford protester opportunity to respond to organizational conflict of interest determination before disqualifying it was mere procedural defect that did not affect propriety of disqualification.

DECISION

Ressler Associates, Inc. protests its exclusion from the competition under request for proposals (RFP) No. 5-45850-268, issued by the National Aeronautics and Space Administration (NASA) for scientific and engineering support in the design, development and testing of remote sensors and sensor systems. Ressler principally alleges that the agency improperly determined that an organizational conflict of interest existed.

We deny the protest.

The RFP, issued on November 20, 1990, contemplated the award of a 5-year follow-on contract for development and design services currently being performed by Ressler. Of the 206 firms solicited, only Ressler and 3 other firms submitted proposals by the January 18, 1991, due date. Proposals were evaluated by a technical evaluation panel, which determined that only Ressler's proposal was technically acceptable.

Shortly before the evaluation was completed, NASA's Office of Inspector General (OIG) was informed of possible improprieties in the procurement process. In the course of its ensuing investigation, OIG learned that the contracting officer's technical representative (COTR) responsible for drafting the RFP statement of work had asked Ressler to prepare a description of its personnel and descriptions of tasks it performed under its current contract. Unbeknownst to the contracting officer, the documents Ressler prepared ultimately became the statement of work in the current RFP. Upon learning of the OIG's findings, the contracting officer determined that Ressler had been afforded an unfair competitive advantage since it had the opportunity to write the statement of work to favor its own capabilities. The contracting officer was also concerned that Ressler's statement of work was overly restrictive, as evidenced by the limited response to the solicitation and the fact that only Ressler's proposal was found technically acceptable when evaluated against the statement of work. NASA contracting officials therefore determined that Ressler should be disqualified from the competition based on an organizational conflict of interest, and notified Ressler to that effect on May 6. Since NASA was then left without any acceptable proposals, it canceled the RFP on the same date. Ressler filed this protest on May 17.

Ressler acknowledges that the Federal Acquisition Regulation (FAR) generally prohibits a contractor that prepared or assisted in preparing a statement of work for a procurement for services from supplying those services, and does not dispute that it prepared task descriptions which ultimately became the statement of work. Ressler's protest is founded on its view that it is not at fault here because it was directed by the COTR to write the task descriptions for the work statement and that, in any case, it is exempt from the FAR prohibition against conflicts under an exception for contractors that performed development and design work.

Under the FAR, an organizational conflict of interest exists when a firm has an unfair competitive advantage because of other activities or relationships with other persons. FAR § 9.501. The contracting officer is responsible for identifying and resolving conflicts based on the particular facts of the procurement and, in doing so, must exercise "common sense,

good judgment and sound discretion." FAR § 9.505. The FAR expressly directs the contracting officer to withhold a contract award when a conflict cannot be avoided or mitigated. FAR § 9.504(e). Our Office will overturn a contracting officer's determination regarding a conflict of interest only if it is shown to be unreasonable. ICF Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124.

NASA reasonably determined that Ressler had an organizational conflict of interest that resulted in an unfair competitive advantage and warranted Ressler's exclusion from the competition. As noted above, the COTR instructed Ressler to prepare task descriptions for the statement of work without the contracting officer's knowledge or approval, even though the COTR was aware that Ressler planned to compete for the follow-on contract. To have awarded a contract to Ressler under these circumstances would have been to ignore exactly the type of conflict of interest that the FAR provisions are intended to prevent. In this regard, FAR § 9.505-2(b) generally prohibits contractors that helped to prepare a statement of work for services from competing for a contract to provide those services, since a contractor that participated in the preparation of the work statement would be in a position to favor its own capabilities. That Ressler was not aware that it could be disqualified based on an improper conflict when it undertook to prepare the work statement is immaterial, see LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531; Ressler's participation nonetheless clearly was improper because the firm was put in a position to give itself an improper advantage in the competition. The outcome of the competition--Ressler's was the only proposal rated technically acceptable--certainly lends credence to the conclusion that a competitive advantage did in fact result.

Ressler contends that it did not have an unfair competitive advantage, and that the FAR organizational conflict of interest provisions therefore do not apply here. Ressler's argument is based on its assertion that it is a development and design contractor, and that the FAR does not view the competitive advantages accruing to development and design contractors as unfair. Ressler cites in this regard FAR § 9.505-2(a)(3), which provides that no prohibition should be imposed on development and design contractors because their competitive advantage is an unavoidable one.

Ressler's position is untenable. The cited FAR exception for development and design contractors clearly does not apply here. The language of the provision--"if a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services . . . that contractor may not supply the system, major components of the system or services unless . . . it has participated in the

development and design work"--plainly contemplates the situation where a firm wishes to compete for a contract for a system or services based on that firm's earlier development and design work. See FAR § 9.505-2(b). The competitive advantages afforded the contractor in such situations are not prohibited as unfair because they are both unavoidable and advantageous to the government; for example, such firms have typically done the most advanced work in the field, and can start production (i.e., implementation of their development and design work) earlier and more knowledgeably than firms that did not participate in the development process. See FAR § 9.505-2(a)(3). Here, the contract is for more of the same development and design services Ressler is currently performing, and the competitive advantage Ressler obtained was due to its participation in preparing the statement of work, not its performance of a prior contract. Thus, the improper advantage in issue had nothing to do with the rationale underlying the exception, and thus was not covered by it.

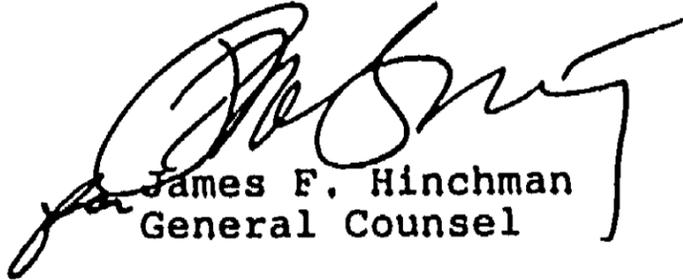
We conclude that the contracting officer reasonably determined that events had conferred upon Ressler an unfair competitive advantage, and that this improper advantage could only be alleviated by rejecting Ressler's proposal and conducting a new competition (including Ressler) based on a properly drawn statement of work. See R. W. Beck & Assocs., B-218457, July 19, 1985, 85-2 CPD ¶ 60.

Ressler argues that the agency improperly disqualified it from the competition without the prior notification and opportunity to respond required by FAR § 9.504(e). Since, based on the foregoing, the agency properly disqualified Ressler, Ressler was not prejudiced by the agency's alleged failure to follow the FAR procedures; any such failure amounts to a procedural deficiency that does not affect the propriety of Ressler's disqualification. See Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520.

Ressler argues that, in order to implement a restriction not specifically provided for in the FAR, NASA was required to obtain a formal waiver under FAR § 9.503. This argument is without merit, since the referenced waiver requirement is not applicable here. The purpose of the waiver procedure is to allow an agency to bypass the FAR restrictions and make award to a firm that has an organizational conflict of interest if

it is in the government's best interest to do so. See, e.g., Bendix Field Eng'g Corp., B-232501, Dec. 30, 1988, 88-2 CPD ¶ 642; The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464. No waiver is required where, as here, the agency wishes to place restrictions on a contractor based on a conflict.

The protest is denied.



James F. Hinchman
General Counsel