



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Basile, Baumann, Prost & Associates, Inc.

File: B-274870

Date: January 10, 1997

Michael P. Darrow, Esq., Hillman, Brown & Darrow, P.A., for the protester.
Edward Wasilewski, Esq., Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly excluded a firm from competing under a solicitation where the firm has an organizational conflict of interest with respect to competing under that solicitation because it prepared the statement of work and cost estimate which the agency used for the solicitation.

DECISION

Basile, Baumann, Prost & Associates, Inc. (Basile) protests the elimination of its proposal from consideration under request for proposals (RFP) No. DACW31-96-R-0028, issued by the U.S. Army Corps of Engineers, Baltimore, Maryland District, for services to develop and implement a private sector outreach program for the Recreational Partnerships Initiative (RPI).

We deny the protest.

The RFP identified seven potential sites for the RPI, and requested prices for 14 separate tasks to develop and implement the program. The goal of RPI is to cause private developers to lease property at selected Corps water resource projects, and to develop and operate public recreation facilities on these properties at no cost to the government.

In 1992, Basile was awarded contract No. DACW31-92-C-0097 by the Corps, under which Basile assessed the potential for recreational development at each of 460 sites, ranked the sites according to development potential, prepared development feasibility reports for 38 of these sites, and prepared an implementation strategy for successfully realizing the current potential for private sector recreation development.

In 1994, the Corps considered modifying Basile's contract to include the services solicited under the current RFP. At the request of the contracting officer's representative (COR), Basile submitted a proposed statement of work (SOW) and cost estimate for such a modification. The SOW identified 25 tasks to be performed by either the contractor or the government. The cost estimate provided the estimated cost for each of the tasks to be performed by the contractor--14 tasks in all--as well as for three "additional items."

The Corps determined not to modify the 1992 contract to include these services. The COR then prepared a memorandum requesting that the services be acquired from Basile using sole source procedures. This memo included an SOW with the same 25 tasks identified by Basile using Basile's SOW almost verbatim. The memo also included a government cost estimate which stated the same estimates as Basile's estimate had stated for 13 of 14 of the contractor's tasks and within \$100 for the remaining task. The government estimate also included the three additional items at the same cost as estimated by Basile. A sole source procurement was not approved.

The Corps instead determined that this need should be satisfied through full and open competition and, on March 4, 1996, issued the current RFP. The RFP contemplated award of a firm, fixed-price contract. The SOW in the RFP identified the same 25 tasks almost verbatim from Basile's earlier SOW. The schedule of prices listed 15 contract line items--one for each of the 14 tasks to be performed by the contractor and one for total price.

A number of proposals were submitted on April 23 in response to the RFP. The agency's technical evaluators evaluated the proposals and determined that, although some proposals were considered technically acceptable, only Basile submitted an "outstanding" proposal. One of the cost evaluators determined that Basile was the only offeror that appeared to fully understand the RFP requirements. Upon requesting the government estimate,¹ this evaluator noticed that Basile's proposed price was nearly identical to the government estimate. She also noticed that Basile proposed prices for optional items which were not in the RFP, but which were in the government estimate.

¹The government estimate had not been provided to the cost evaluators. In response to the cost evaluator's request, the COR provided the government estimate which he had prepared for the earlier request for a sole source procurement.

An investigation was conducted by the Army's Criminal Investigation Command. It was determined that the COR had used Basile's SOW for the description of the 25 tasks in the RFP's SOW, and its cost estimate for the government cost estimate with only a minor adjustment.² The contracting officer states that she was unaware when the RFP was issued and evaluations performed that Basile had prepared the SOW and government estimate.³

The contracting officer determined that, since Basile had prepared the work statement used in this RFP, a conflict of interest existed which, under Federal Acquisition Regulation (FAR) § 9.505-2(b)(1), prohibited Basile from providing these services. She subsequently eliminated Basile from the competition. This protest followed.

The FAR, under subpart 9.5, generally requires contracting officials to avoid, neutralize or mitigate potential significant organizational conflicts of interest, including precluding a particular firm from competing, so as to prevent unfair competitive advantages, the existence of conflicting roles that might impair a contractor's objectivity, or the existence of biased ground rules created, whether intentional or not, in situations where, for example, a firm writes the statement of work or specifications. GIC Agricultural Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263; Aetna Government Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129. Specifically, FAR § 9.505-2(b)(1) states:

"If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system or services unless:

- (i) It is the sole source;
- (ii) It has participated in the development and design work; or
- (iii) More than one contractor has been involved in preparing the work statement."

The responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency, and we will not overturn such a determination unless it is shown to be

²The investigation did not find any evidence of criminal actions.

³While the protester disputes this statement, it has not shown the statement was untrue.

unreasonable. Ressler Assocs., Inc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230; LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531.

It is not disputed that Basile prepared the statement of work and government estimate for the specific tasks which are to be performed under this RFP. Although these documents were initially prepared for the purpose of modifying Basile's contract, the Corps nevertheless used this contractor-prepared work statement and cost estimate for the subsequently issued competitive RFP.

Basile contends that its work under the 1992 contract was "development or design work" and therefore falls under FAR § 9.505-2(b)(1)(ii), quoted above, which permits award to a firm that prepared the work statement in the RFP. The contracting officer responds that under the 1992 contract:

"[Basile] was required to evaluate lands at Corps-owned water resources projects for the purpose of determining the suitability of the real estate for development of public recreational facilities by private industry. The contract did not call for any improvement in technology, materials, processes, or method. Accordingly, the work performed by [Basile] cannot be characterized as 'design and development work' as those terms are used in [FAR subpart 9.5]."

Basile has not refuted this statement. Because the contracting officer's assessment of this issue is consistent with our prior decisions on this FAR exception, we have no basis to find as unreasonable her determination not to apply the exception. See GIC Agricultural Group, supra; Ressler Assocs., Inc., supra.

Basile also contends that its proposal should not be rejected because there is no evidence that this work gave it an unfair competitive advantage. However, the record suggests otherwise. For instance, prior to learning that Basile had prepared these documents, it was determined by the technical and cost evaluators that Basile was the only offeror to fully understand the requirements. We think this is reasonable evidence that Basile had an inherent advantage over other offerors which it gained from preparing the work statement and government estimate. Ressler Assocs., Inc., supra. In any event, when the FAR conditions defining a conflict of interest exist, the existence of an unfair competitive advantage is assumed and a contracting official may reasonably impose remedies prescribed under FAR subpart 9.5. GIC Agricultural Group, supra. Since Basile prepared the SOW and the cost estimate, the contracting officer reasonably determined that a

conflict of interest existed and reasonably prohibited Basile from providing the services solicited under this RFP. Id.; Ressler Assocs., Inc., supra.

The protest is denied.

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