



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: SSR Engineers, Inc.

File: B-282244

Date: June 18, 1999

Craig W. Jardine for the protester.

Marilyn Walter Johnson, Esq., and Richard G. Welsh, Esq., Naval Facilities Engineering Command, Department of the Navy, for the agency.

Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably excluded protester from participating in procurement where protester has an organizational conflict of interest arising from its preparation of the statement of work and cost estimates used by the agency in the procurement.

DECISION

SSR Engineers, Inc. protests the Department of the Navy's determination to exclude SSR from a procurement for changes to the electrical distribution system at Keesler Air Force Base, Biloxi, Mississippi, under request for proposals (RFP) No. N62467-99-R-0883, because of an organizational conflict of interest. The agency's determination is based on SSR's prior preparation of the statement of work and development of the cost estimates being used by the agency for the protested procurement.

We deny the protest.

The record shows that, in April 1996, SSR was awarded an architect-engineering services contract requiring that it "develop a long range comprehensive master plan to replace the overhead primary electrical, cable television, and Energy Management and Control System (EMCS) lines with new underground lines at Keesler AFB in Biloxi, Mississippi." Contract No. F22600-96-D-0010, Statement of Work § 2.1. The agency states that volume I of the three-volume master plan prepared by SSR under the prior contract is being used as the statement of work for the protested procurement, and that volume I also contains the cost calculations that are the basis for the agency's budgetary estimates.¹ Contracting Officer's Statement at 1, 3.

¹ The cost estimates are being withheld from other offerors in the competition.

Volume II of the master plan, as described by SSR itself, “includes the power flow analysis, short circuit analysis, and coordination analysis for the proposed underground distribution system” and “contains printouts from the computer programs used to evaluate the distributions systems.” Protester’s Comments at 1. Volume III of the master plan reflects SSR’s efforts to “develop generic specifications that would be given to an A/E firm as a guide for developing detailed construction specifications.” Id.

On February 5, 1998, the agency’s contracting officer advised SSR that, due to the conflict of interest created by SSR’s work under the prior contract, SSR would not be permitted to participate in this procurement.² Subsequently, this protest was filed with our Office.

Subpart 9.5 of the FAR 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. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12; GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263 at 6. 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 the 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 unreasonable. Ressler Assocs., Inc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230 at 2-3; LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531 at 4.

² The agency asserts that SSR was notified of the determination earlier, on January 27, 1998. SSR denies that it was notified prior to February 5. SSR first filed an agency-level protest on February 8.

SSR does not dispute that it essentially prepared the statement of work and the cost estimates being used by the agency in this procurement. Further, SSR does not suggest that any of the exceptions contained in FAR § 9.505-2(b)(1), quoted above, are applicable here. Rather, SSR first argues that the conflict of interest provisions of FAR subpart 9.5 should not be applied because “FAR [§] 36.302 [which deals with construction and architect-engineer contracts] specifically addresses how the Government can utilize a consultant to develop a scope of work for a design-build project” and “[n]o where in [FAR] Part 36 does it state that the firm developing the scope [of work] is precluded from being part of a design-build team.” Agency-Level Protest, Feb. 25, 1999, at 2. SSR concludes that, “if the intent of the FAR[] was to preclude the firm developing the scope [of work] from participating on a design-build team the exclusions would be discussed or referenced in [FAR] Part 36.” Id.

We find without merit SSR’s assertion that the provisions of FAR subpart 9.5 are inapplicable to this procurement. FAR § 9.502(a) provides that, “[t]his subpart applies to contracts with either profit or nonprofit organizations,” and FAR § 9.502(b) further states that, “[t]he applicability of this subpart is not limited to any particular kind of acquisition.” Accordingly, the fact that FAR part 36 does not specifically address conflict of interest provisions in the context of construction and architect-engineer services contracts does not somehow render the organizational conflict of interest provisions of FAR subpart 9.5 inapplicable to such contracts.

SSR also complains that it has not obtained any competitive advantage based on its prior work. Specifically, while acknowledging that “[n]umerous contractors have expressed their desire to have SSR on their design/build team,” SSR asserts that “[c]ontractors are interested in using SSR on the Keesler AFB project not because of any competitive advantage, but because of the design capabilities SSR brings to the team.” Agency-Level Protest, Feb. 25, 1999, at 2. Additionally, while acknowledging that “SSR’s cost estimates established the ceiling for the budget cost,” SSR asserts that “[n]o established contractor . . . would rely on SSR to determine the pricing for labor and materials to construct the project.”³ Protester’s Comments at 5. Finally, SSR maintains that it should be permitted to assist a prime contractor in preparing its proposal because SSR’s fees for such assistance would not constitute a major portion of the total contract cost, arguing that “[w]ith an insignificant share of the contract, the so called competitive advantage is also insignificant.” Protester’s Comments at 4-5.

Based on the record here, there is no basis to question the agency’s determination that, due to an organizational conflict of interest, SSR should be precluded from participating in this procurement. Specifically, on the basis of the undisputed facts

³ SSR also asserts, without explanation, that “[k]nowledge of the top price is a competitive disadvantage, not a competitive advantage.” Protester’s Comments at 5.

that SSR prepared material leading directly to the statement of work and prepared costs estimates which established the ceiling for the agency's budgeting of costs, we conclude that the agency reasonably determined that SSR's prior activities created an unfair competitive advantage as expressly contemplated by FAR subpart 9.5. SSR's assertions to the contrary provide no basis to object to the agency's determination.⁴

The protest is denied.

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⁴ SSR also protests that the Mississippi Power Company had access to the same type of information the agency has determined provides SSR with a competitive advantage, yet that company was permitted to participate in the procurement. The agency first notes that the Mississippi Power Company did not have access to the cost estimates created by SSR and that, while a sister corporation of Mississippi Power Company submitted an initial response to the solicitation, that firm "was not determined to be one of the most highly qualified and will not continue [in the procurement]." Affidavit of Technical Evaluation Board Chairman ¶ 7. Accordingly, there is no basis for further consideration of this portion of SSR's protest.