**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Defense Logistics Agency--Reconsideration

File: B-270228.4

Date: August 21, 1996

Jerome C. Brennan, Esq., and Robert E. Sebold, Esq., Defense Logistics Agency, for the requester.
Craig A. Holman, Esq., Dorn C. McGrath III, Esq., and Richard L. Moorhouse, Esq., Holland & Knight, for the intervenor.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of prior decision is denied where requester reiterates arguments which merely reflect the requester's disagreement with the decision, but fail to show that the initial decision contains either errors of fact or law and fails to present information not previously considered that warrants reversal or modification of the decision.

2. Recommendation that prevailing party in sustained protest be reimbursed protest costs is appropriate in case of first impression where the agency's actions failed to meet applicable statutory requirements.

DECISION

The Defense Logistics Agency (DLA) requests reconsideration of our decision in Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196, which sustained Occu-Health's protest against the award of a contract to EHG National Health Services, Inc., under request for proposals (RFP) No. S2202A-95-R-0001, for occupational health and industrial hygiene services.

We deny the request for reconsideration.

The RFP incorporated the standard "Evaluation of Options" clause, set forth at Federal Acquisition Regulation (FAR) § 52.217-5, which informed offerors that the government would evaluate offers by adding the prices for the base period and options years, unless the government determined in accordance with FAR § 17.206(b) that evaluation of options is not in the best interests of the government. Prior to the receipt of best and final offers (BAFO), DLA determined that it would not exercise the options under the contract; however, DLA did not advise the

offerors of this determination. Subsequently, in evaluating BAFOs and selecting EHG for award, DLA determined that it was not in the government's best interest to include the option year prices in the evaluation of offers for award purposes.

Occu-Health protested that the agency should have amended the RFP prior to receipt of BAFOs to inform offerors that option year pricing would not be evaluated; it asserted that it could have significantly reduced its base year price had it been apprised of the change in requirements and would have been in line for award. DLA essentially argued that FAR § 17.206(b) afforded the agency unfettered discretion not to evaluate options in making the award, notwithstanding when it became aware that the agency would not need the options. We found that, given the statutory requirements in 10 U.S.C. §§ 2305(a)(1)(A) and (b)(4)(B) (1994) that an agency inform offerors of its actual needs and select the most advantageous offer to the government, DLA had acted improperly by failing to inform offerors of its changed needs, and could not rely upon FAR § 17.206(b) to avoid this obligation when it knew, at least prior to the receipt of BAFOs, that its needs had materially changed and that it would not be evaluating options.

In its request for reconsideration, DLA primarily argues that our decision is inconsistent with prior decisions, which stated that an agency may make the decision not to evaluate option year prices at any time prior to award, and that we have now announced a new rule. DLA also asserts that, because we announced a new rule, it should not have to pay protest costs.

The decisions, Foley Co., 71 Comp. Gen. 148 (1992), 92-1 CPD ¶ 47; Schmidt Eng'g & Equip., Inc., B-250480.5, Dec. 17, 1993, 93-2 CPD ¶ 324; Mobile-Modular Express, Inc., B-250790, Feb. 22, 1993, 93-1 CPD ¶ 159, that DLA argues are inconsistent with our prior decision in this matter are the same decisions that DLA argued, during the protest, supported its interpretation that FAR § 17.206(b) granted it unfettered discretion to decide at any time not to evaluate options. We did not consider the cited decisions controlling because none involved circumstances under FAR § 17.206(b) where the agency during a negotiated procurement had the opportunity at least prior to receipt of BAFOs to inform offerors of its intention not to evaluate option years, but did not do so; instead, each of the cited decisions involved such determinations made after bids were opened under sealed bid procurements.

We also do not agree that we created a new rule. As indicated above, the prior cases construing FAR § 17.206(b) did not involve pre-BAFO situations, and there are no cases of which we are aware that suggest the language of this FAR section permits, or was intended to permit, an agency to avoid informing offerors that options will not be evaluated when the agency knows this and has a reasonable opportunity to so notify offerors prior to submission of BAFOs. In this regard, the rule that when the government's needs change the agency is required to notify

offerors of its changed needs and afford them the opportunity to make, and the government to obtain, the most advantageous offers is mandated by 10 U.S.C. §§ 2305(a)(1)(A) and (b)(4)(B). Notwithstanding the language in FAR § 17.206(b), DLA could not reasonably rely upon an interpretation of that regulation that abrogated the requirements established by statute. See International Limousine Serv., B-206708, July 26, 1982, 82-2 CPD ¶ 77.

This being so, we see no merit to DLA's assertion that DLA should not have to pay protest costs as we recommended in our decision. Since recovery of protest costs is intended to relieve protesters of the financial burden of vindicating the public interest, and not as an award to the protester or a penalty against the agency, the recommendation that Occu-Health recover its protest costs is appropriate. See Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201.

The request for reconsideration is denied.

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