Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CDA Investment Technologies, Inc.--Reconsideration

File: B-272093.3

Date: March 11, 1997

Kenneth B. Weckstein, Esq., and Raymond Fioravanti, Esq., Epstein, Becker & Green, P.C., for the protester.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester does not show that prior decision denying its protest contained any errors of fact or law or present information not previously considered that warrants reversal or modification of the decision.

DECISION

CDA Investment Technologies, Inc. requests that we reconsider our decision in CDA Investment Technologies, Inc., B-272093; B-272093.2, Sept. 12, 1996, 97-1 CPD ¶ __, in which we denied CDA's protest of the award of a contract to Disclosure, Inc. under request for proposals (RFP) No. SECHQ1-94-R-0013, issued by the Securities and Exchange Commission (SEC) for processing various forms required to be filed with the SEC.

We deny the request for reconsideration.

To obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (1996). As explained in detail below, CDA's request for reconsideration does not meet this standard.

BACKGROUND

The RFP required the contractor to perform several tasks, including keying in and processing data filed with the SEC on Forms 13F, 3, 4, 5, and 144.[1] Section M of the RFP stated that technical proposals would be evaluated on the basis of the following four factors: (1) technical qualifications; (2) experience and references of key individuals; (3) past performance; and (4) facilities. The technical qualifications factor was more important than the other three, and had four subfactors (demonstrated ability including past performance on similar contracts; reliability and maintainability of the computer system; computer flexibility to respond to requests for special projects; and understanding of contract requirements). Of the total number of points available in the evaluation, technical and price were worth 75 and 25 percent, respectively. Award was to be made to the offeror whose proposal was deemed to be most advantageous to the government.

A technical evaluation panel (TEP) rated the six proposals the agency received by the time set on January 12, 1995, for receipt of initial proposals. The TEP concluded that no discussions were necessary with any offeror, but directed the contracting specialist to ask the offerors to clarify their intent with respect to their proposed use of subcontractors. Out of a maximum possible score of 75 weighted points, CDA's technical proposal received 69.3 points, while Disclosure's proposal received 70.3 points. Of the six technical proposals, Disclosure's was ranked first and CDA's third, based on these scores. Both proposals received the maximum number of points in the price area.[2] Based on the combined technical and price scores, Disclosure's and CDA's proposals were ranked first and second, respectively (95.3 points for Disclosure's proposal, 94.3 points for CDA's). The TEP recommended that award be made to Disclosure.

Based on the TEP's recommendation, the contracting officer offered the contract to Disclosure on May 1, 1996, expressly incorporating its January 1995 proposal. Disclosure signed the contract on May 1 and returned it to the SEC with a cover letter dated May 2, the contents of which are discussed further below. On May 2, the contracting officer signed the contract on behalf of the government.

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[1]SEC rules require securities holdings by certain "insiders," such as officers and directors, to be reported to the SEC on Form 3; subsequent transactions are reported on Form 4; and an annual report is submitted on Form 5. Form 144 is a notice of intent to sell restricted securities. Form 13F is a report of securities holdings filed quarterly by institutional investment managers. See 17 C.F.R. §§ 240.13f-1, 240.16a-3 (1996).

[2]Both CDA and Disclosure offered proposals at no cost to the government, and thus each proposal earned 25 points for price, the maximum number of points available.

In its protest, CDA maintained that the evaluation of Disclosure's proposal was unreasonable because it was based on inaccurate information regarding Disclosure's proposed use of subcontractors. CDA also argued that prior to award the SEC improperly permitted Disclosure to modify its proposal, without giving CDA a similar opportunity.[3]

Evaluation of Disclosure's Proposal

CDA contended that the SEC failed to identify and evaluate the subcontractors Disclosure intends to use to perform the data-entry services and instead improperly evaluated Disclosure's proposal under the assumption that the firm would perform all work in-house. Since Disclosure indicated its intent to use a subcontractor for some data entry, and since the TEP failed to evaluate this aspect of the proposal, CDA believed that the evaluation was unreasonable. CDA took the position that had the TEP been aware that Disclosure intended to use a subcontractor, Disclosure's proposal would have been downgraded because of the firm's failure to properly manage subcontractors under a previous contract. We concluded that CDA was not prejudiced by any deficiencies that may have occurred in the evaluation.

In its reconsideration request, CDA argues that in concluding that CDA was not prejudiced, we improperly substituted our judgment for that of the agency. According to CDA, our Office is not in a position to know what the TEP would have done had it known that Disclosure was proposing to use a particular subcontractor.

As explained in our prior decision, competitive prejudice is an essential element of a viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD 379. To demonstrate prejudice, the protester must show or it must otherwise be evident from the record before us that there is a reasonable possibility that but for the alleged agency error, the protester would have otherwise been selected for award. Global Assocs. Ltd., B-271693; B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100, at 6. On the other hand, where no reasonable possibility of prejudice is shown or is otherwise evident from the record, our Office will not disturb an award, even if

[3]In its protest, CDA also argued that the TEP's evaluation of its past performance was unreasonable because the TEP downgraded its proposal for performance problems for which, according to CDA, it was not responsible. We found no basis to object to the evaluation of CDA's proposal in this area. In its reconsideration request, CDA does not take issue with this aspect of our decision.

some technical deficiency in the procurement is apparent. MetaMetrics, Inc., B-248603.2, Oct. 30, 1992, 92-2 CPD ¶ 306 at 8; Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130 at 4, recon. denied, B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444.

Here, the record showed that the volume of Forms 3, 4, and 5 processed over the last year had been approximately 16,000 per month, while the volume of Form 144 is approximately 3,000 per month, for a total of approximately 19,000 forms processed per month or 57,000 forms per quarter (about 228,000 forms per year). The record further showed that the volume of Form 13F--which is only filed on a quarterly basis--is approximately 1,100 per quarter (or about 4,400 forms per year). In addition, the agency stated, and the protester did not dispute, that keying in paper Form 13F data will soon be obsolete. In this regard, the SEC explained that it was moving towards requiring that all Form 13F filings be made electronically by the end of 1996, rendering manual data entry unnecessary. Consistent with its transition toward electronic filings, the SEC stated that it anticipates that the volume of paper Form 13Fs filed will decrease over time as electronic filing of that form becomes mandatory.[4]

Based on these figures, and since the Form 13F filings will be made electronically by the end of the current year, we concluded that manual processing of Form 13F (i.e., keying in data from paper forms) would constitute less than 2 percent of the total work contemplated under the contract. Given that the "technical qualifications" evaluation factor encompassed several elements unrelated to subcontractor use, and given that manual Form 13F processing is expected to account for less than 2 percent of the total effort and that this task will soon become obsolete, we found no reasonable basis to conclude that the TEP, had it known Disclosure intended to use a subcontractor to key in Form 13F data, would have downgraded Disclosure's proposal[5] by any meaningful amount. Accordingly, we concluded that CDA was not prejudiced by any deficiencies that may have occurred in the evaluation of Disclosure's proposal with respect to the use of a subcontractor.

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[4]Recognizing that electronic filing of Form 13 is the wave of the future, CDA stated in its proposal that "[t]oday, approximately 13 or one [percent] of Form 13F filings are received on tape and process[ed] via the [Electronic Data Gathering Analysis and Retrieval] system. This number is expected to grow materially over the period of the contract."

[5]With respect to Form 13F, since CDA proposed to use "external keyers predominantly to meet the four peak [quarterly filing periods]," any rescoring involving subcontractors could also affect CDA's score.

Contrary to CDA's argument on reconsideration, our analysis did not involve substituting our judgment for the TEP's. Rather, our conclusion recognized that, based on the record before us, and in view of the evaluation scheme and the significance of the Form 13F work within the context of the contract as a whole, it would not be reasonable for the TEP to reduce Disclosure's rating materially based on any proposed use of a subcontractor for the Form 13F work. Given that CDA does not dispute that the work contemplated to be performed by a subcontractor constitutes a relatively minor portion of the work under the contract, there is no basis to conclude that our prior decision was in error.

Alleged Revisions to Disclosure's Initial Proposal

Disclosure signed the contract on May 1, and returned the signed contract to the SEC with a cover letter dated May 2, stating in relevant part:

> "We note that Disclosure's offer dated January 12, 1995, has been incorporated [into the contract] by reference. . . . However, given the period of time between the date of that offer, and now, when the selection of the contract has been finalized, we would like to inform the [SEC] that several changes have occurred with regard to our operations. In summary, these changes related to certain personnel who are no longer with the company but for whom equal or more capable staff have been employed, to the exact technical solutions and methodologies to be used, and the use of subcontractors, which have impacted our approach today versus the 1995 proposal.
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> These updates in no way alter the material terms and conditions of our offer, particularly as they relate to the services contemplated, tasks, and prices. We intend to fulfill the requirements indicated in the contract completely, albeit in a different, more capable manner than . . . initially proposed. . . ."

Subsequent to the SEC's receipt of Disclosure's May 2 letter, and after CDA filed its protest, the contracting officer informed Disclosure that the SEC could not accept changes to its proposal. The contracting officer explained that Disclosure's proposal had been evaluated and selected for award according to the terms of the RFP and Disclosure's initial proposal, and requested Disclosure to confirm in writing its willingness to accept and perform the contract under the terms of the RFP and in accordance with Disclosure's proposal as submitted.

In a May 29 letter, Disclosure's president responded to the contracting officer's request, assuring the SEC that the firm was committed to performing the contract consistent with the terms of its proposal. Disclosure's president stated that the May

2 letter neither diminished the firm's commitment "nor modified any term or condition" of its proposal.

Disclosure further explained that its statement with respect to the use of subcontractors is consistent with its technical approach as stated in its initial proposal. In this regard, Disclosure's proposal stated that "Disclosure is considering the use of an outside vendor for keying the 13F filings . . . ." Disclosure reaffirmed that statement in its response to the contracting officer, explaining that the firm was still considering that option. Disclosure's letter further assured the SEC that it had "no other plans, intentions, or agreements to use subcontractors to produce the data required by the contract."

Subsequently, to further assure himself that Disclosure agreed to be bound by the terms of its proposal as it was evaluated and selected for award, the contracting officer held a telephone conference with Disclosure. The record shows that the conference included a representative of Disclosure and SEC's Director of the Office of Filings and Information Services (OFIS) (the division within the SEC responsible for processing the forms covered by the contract). The record contains a document dated June 3 memorializing that telephone conference in which the contracting officer affirms that both he and the OFIS Director were satisfied that Disclosure "had made no changes to its proposal and was contemplating performance in accordance with the terms of the contract and its proposal."

Contrary to the protester's contentions, the record does not show that Disclosure made any material changes to its initial proposal with respect to the use of subcontractors through the May 2 letter, or through subsequent communications with the SEC. As noted above, Disclosure's proposal stated that the firm was considering the use of a subcontractor for keying in the Form 13F filings; the record indicates that it is not an uncommon practice for the contractor to supplement its work force during the peak periods corresponding to the regulatory quarterly filing deadlines. The May 2 letter, with its general reference to the use of subcontractors, cannot reasonably be read as materially changing the approach set out in Disclosure's proposal.[6]

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[6]In its reconsideration request, CDA maintains that our decision overlooked other alleged "changes" allegedly reflected in Disclosure's letter regarding personnel and technical solutions. CDA focused its protest on Disclosure's statement regarding its use of a subcontractor and did not present any arguments or evidence showing that Disclosure also made material changes to its proposal regarding personnel or technical methods. CDA also complains in its reconsideration request that it was denied the opportunity to obtain relevant documents to prove its case. Contrary to CDA's assertions, the SEC produced all documents relevant to CDA's protest.

(continued...)

In its reconsideration request, CDA argues that in concluding that the May 2 letter made no material changes to the proposal, we should not have considered "parol evidence"--i.e., the correspondence between the parties after CDA filed its protest. Specifically, CDA maintains that we should have reached our conclusion based solely on the language of the May 2 letter, and not on Disclosure's statements made after CDA filed its protest. CDA argues that our conclusion regarding the letter is clearly erroneous since the cover letter itself stated that certain "changes" impacted on Disclosure's proposal.

CDA's contention that we should have ignored the correspondence between Disclosure and the SEC regarding the May 2 letter is without merit. In appropriate circumstances, contracting officials should consider extrinsic evidence when evaluating proposals. E.g., Magnavox Advanced Prods. and Sys. Co., 69 Comp. Gen. 89 (1989), 89-2 CPD ¶ 458. This is clearly such a case. As Disclosure correctly points out, at a minimum, Disclosure's May 2 letter raised some doubt in the contracting officer's mind regarding Disclosure's proposal. As a result, the contracting officer inquired further as to Disclosure's intent and the meaning of the May 2 letter. In this connection, we have held that where there is any doubt as to an offeror's intent, an agency could not properly reject an offer that was otherwise in line for award without inquiring further as to the offeror's intent. AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287. To require an agency to ignore information which it reasonably believes relevant to an offeror's proposal, or which suggests that an offeror may not perform or intends to perform in a manner different from that reflected in a technically acceptable offer, would be unfair to both the agency and other competitors, and thus inconsistent with the competitive procurement system. Department of the Navy--Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199 at 4. Thus, to the extent that Disclosure's letter raised any questions or introduced ambiguities regarding Disclosure's proposal, those questions were eliminated by the SEC's subsequent inquiry. Since the agency acted reasonably in relying in part on the results of that subsequent inquiry to determine that the award to Disclosure was properly made, we see no reason to exclude that information from the record in reviewing CDA's allegations.

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[6](...continued)
Moreover, during a telephone conference held between the parties to address CDA's supplemental document request, the SEC confirmed that it had produced all documents responsive to CDA's document request. The fact that the record did not contain any documents supporting CDA's protest allegations does not mean that the firm was in any way denied an opportunity to request relevant documents, or to inquire further, as it in fact did here, as to the existence of any specific document that it believed may have been inadvertently omitted from the record.

Finally, CDA argues that we erred in concluding that the SEC properly allowed Disclosure to waive the expiration of its proposal acceptance period. According to CDA, that conclusion is erroneous because Disclosure made acceptance of its initial proposal contingent on the agency's acceptance of the alleged changes. As we explained, it is not improper for an agency to accept an expired offer without opening negotiations where, as here, acceptance is not prejudicial to the competitive system. See The Fletcher Constr. Co., Ltd., B-248977, Oct. 15, 1992, 92-2 CPD ¶ 246. Since we concluded that Disclosure made no material changes to its proposal, and all offers had expired by the May 1996 award date, the SEC properly allowed Disclosure to waive the expiration of its proposal acceptance period since a waiver under such circumstances is not prejudicial to the competitive system. See Sublette Elec., Inc., B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540. CDA has not shown that our decision contained any errors in this regard.

The request for reconsideration is denied.

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of the United States