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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Request for Reconsideration

FILE: B-195305

DATE: October 27, 1980

MATTER OF: Slack Associates, Inc.--Reconsideration

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DL604976

DIGEST:

Decision is affirmed where request for reconsideration fails to clearly demonstrate either errors of fact or law in decision, but rather essentially reiterates bases of protest and arguments previously considered.

Slack Associates, Inc. (Slack), requests reconsideration of our decision in the matter of Slack Associates, Inc., B-195305, July 28, 1980, 80-2 CPD 69. In that decision we denied Slack's protest against the rejection of its bid submitted under invitation for bids (IFB) No. N004210-79-B-0118, issued by the Supply Department, Naval Air Station, Patuxent River, Maryland, and the award on a sole-source basis made to Calcor Space Facility, Inc. (Calcor). The IFB solicited bids for closed-circuit television camera supports. The Supply Department rejected Slack's bid as nonresponsive for failing to provide any data under the IFB descriptive literature clause. Calcor received the award, but the contract was terminated for the Government's convenience when it was determined Calcor's bid was not acceptable and the subsequent sole-source award was made to Calcor.

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In our decision, we denied in part and dismissed in part Slack's protest. Specifically, we rejected Slack's argument that, although admittedly untimely under our Bid Protest Procedures because it was submitted after bid opening, we should consider Slack's protest that the descriptive literature requirement was improper. Slack argued that the descriptive literature requirement was contrary to prior decisions of this Office. We stated, however, that a previously decided issue, such as the one raised, did not fall within our "significant issue" exception to our timeliness requirements and that the issue was therefore untimely presented and not for our consideration.

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We also denied Slack's complaint that its failure to furnish the required descriptive material should have been waived because the specifications were so comprehensive that no further information was necessary and by signing the bid without exception it agreed to perform in accordance with the specifications. We found that the specifications were not detailed enough in at least one way--the need for the contractor to furnish information responsive to the IFB specification that "Camera support shall incorporate * * * lightning protection circuitry." We applied the rule that a general compliance offer does not cure an omission to supply descriptive literature required by the IFB as a necessary element in the evaluation to determine if the product offered meets the specifications.

We further noted that, since the bid was nonresponsive on the issue protested, it was unnecessary to consider the agency's allegation that Slack's method of pricing also rendered the bid nonresponsive. Furthermore, we found that Slack's contention that Calcor's bid was not acceptable was academic since the award to Calcor was found improper and as a result was terminated by the agency.

We also found without merit Slack's contention that award to Calcor on a sole-source basis for a reduced quantity to satisfy an urgent need pending a new competition was improper. Slack questioned one basis for the sole-source award that only Calcor could begin delivery by January 2, 1980, on the basis that Calcor had not delivered any supports as of March 2, 1980. We found this to be a disagreement with the agency's affirmative determination of responsibility implicit in the award to Calcor which is not generally reviewable by our Office.

{ To prevail on reconsideration, the protester must present evidence demonstrating error of fact or law in our original decision or provide additional information not previously considered. } U.S. Duracon Corporation--
Reconsideration, B-194673, B-194225, June 18, 1979, 79-1
CPD 434. We do not believe the protester has satisfied this burden. { Slack essentially reiterates its basis for protest by arguing that we misunderstood the bases of protest and rearguing those points of contention again. }

For example, the protester again requests that we consider untimely allegations that the descriptive literature requirement is improper and that the clause which was included in the IFB was defective. Slack contends that we should consider these allegations because they reflect a serious misunderstanding by the agency of concepts set forth in prior GAO decisions. However, as we stated in our prior decision, these allegations concern previously decided issues and even though we may not have specifically addressed this case's particular fact situation--an IFB with Government design-type drawings--Slack's allegations do not fall within the "significant issue" exception to our timeliness requirements. We have no exception for considering Slack's untimely allegations on the basis Slack suggests.

Furthermore, Slack raises several other points concerning improprieties in the IFB which are not timely raised. For example, Slack's contentions that the invitation was defective in allegedly allowing the bidder to define design and performance characteristics required by the Government and that the definitions in the specifications were inadequate for an IFB are allegations of improprieties in the solicitation untimely raised. 4 C.F.R. § 20.2(b)(1) (1980).

We also believe that the issue of the type of solicitation which should have been used for this procurement, whether by a single stage IFB or two-step formal advertising procedure, was a matter which should have been protested prior to bid opening and certainly not for the first time on reconsideration. See Essex Electro Engineers, Inc., B-191116, October 2, 1978, 78-2 CPD 247.

Slack has submitted additional documents relating to the technical acceptability of Calcor's bid which it received under a freedom of information request. It alleges that these documents evidence discrimination and bias in the original contract award. We point out again that the issue of the technical acceptability of Calcor's bid is academic since the agency found the award improper and terminated the award. Slack contends that it is an aggrieved party and therefore entitled to a

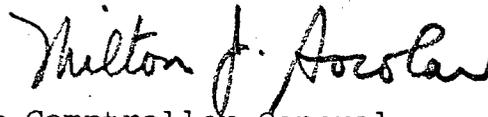
ruling on this issue or that we should decide this issue in order to give the agency guidance. We have no reason to decide the question of technical acceptability where the agency, by its action in terminating the contract, renders the issue superfluous for purposes of the protest. See S.E.S. Company, Inc., B-197508, February 14, 1980, 80-1 CPD 136.

Slack states that the sole-source award to Calcor, after Calcor was found nonresponsive and the original award terminated, was improper since it was made prior to submission of a report to GAO or prior to resolution of the protest. The sole-source award was for a reduced quantity to satisfy an urgent need in the interim before a new IFB could be completed and award made. Defense Acquisition Regulation (DAR) § 2-407.8(b) (1976 ed.) provides the circumstances when an award may be made while a protest is pending. If the award action was contrary to the DAR provision, it would not affect the legality and validity of the award, since the DAR provision is purely procedural. Kleen-Rite Corporation, B-193731, May 11, 1979, 79-1 CPD 337. See Roy F. Weston, Inc., B-197866, B-197949, May 14, 1980, 80-1 CPD 340.

Slack argues that we did not give sufficient weight to its critique of a number of contracting agency statements which it believes were untrue and show that the rejection of Slack's bid was "discriminatory, arbitrary and capricious." We have again examined these statements. However, our review under bid protest procedures is limited to determining whether rejections of offers and awards were proper and we do not conduct investigations to establish the validity of a protester's allegations, since it is the protester's burden to affirmatively prove its case. Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. It is well settled that a protester's disagreement with an agency's technical judgment does not prove the protester's case. See EMI Medical, Inc., Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96; U.S. Duracon Corporation, B-196760, February 22, 1980, 80-1 CPD 154. Thus, [we do not believe the protester has proven his allegation that the contracting agency acted improperly with regard to its consideration of Slack's bid.]

As a final matter, Slack requests a conference on the case. Our bid protest procedures do not explicitly provide for conferences in connection with reconsiderations. 4 C.F.R. § 20.9 (1980). We believe a request for a conference should be granted only where the matter cannot be resolved without a conference. In light of the previous discussion, we do not believe this is such a case. Serv-Air, Inc.--Reconsideration, B-189884, March 29, 1979, 79-1 CPD 212.

Since Slack has not presented evidence demonstrating any error of fact or law in the original decision nor provided any substantive information not previously considered, our decision is affirmed.



For the Comptroller General
of the United States