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DECISION

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

FILE: B-205380.2; B-205380.3 **DATE:** March 28, 1983

MATTER OF: Development Associates, Inc.--Reconsideration

DIGEST:

1. New information presented by a procuring agency in its request for reconsideration of a decision sustaining a protest against the award of a contract will not be considered, since the information was available and known to the agency at the time of the protest, but was not introduced into the record.

2. Procuring agency's argument in its request for reconsideration that its prior action is justified because of the discovery of a statement, inadvertently left out of the request for proposals, which would have informed offerors of its intent to weigh technical factors more heavily than noted in the RFP, is not an error of fact or law justifying reconsideration. The argument merely establishes that the competitors were not adequately apprised of the selection criteria to be used by the agency.

3. Reimbursement for proposal preparation costs is denied to a protester who has not demonstrated that, had the agency acted properly, the protester would have had a substantial chance of receiving the award.

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This decision responds to the Department of Education's request for reconsideration of our decision in Development Associates, Inc., B-205380, July 12, 1982, 82-2 CPD 37, and to Development Associates, Inc.'s claim for proposal preparation costs. In the decision, we sustained Development Associates' protest against the Department's award to Kirschner Associates, Inc. of a negotiated cost-plus-fixed-fee contract to develop and disseminate a handbook concerning bilingual vocational training programs. We did not, however, recommend that corrective action be taken since Kirschner had already performed substantial work under the contract and the agency had incurred significant costs. The Department requests reconsideration of the merits of the original decision, maintaining that our assessment of the technical proposals, and our interpretation of the relative weights of technical and cost considerations, were inaccurate. Both the request for reconsideration and Development Associates' claim are denied.

In connection with the protest, the Department supported its decision in favor of Kirschner on the basis of three weaknesses in Development Associates' proposal, which were identified after evaluating the firm's technical proposal, responses to questions, and best and final submission. The defined weaknesses were Development Associates' failure to recognize and resolve potential problems to be addressed, to propose a procedure for selecting information workshop locations, and to identify the criteria for choosing visitation sites adequately. In evaluating the Department's support for these conclusions, we found that similar weaknesses had been identified by the agency in the Kirschner proposal and, therefore, that Kirschner's technical superiority was not demonstrated in the record.

In its request for reconsideration, the Department disagrees with our conclusion in the original decision that its technical evaluation of Kirschner's proposal was unsupported by the record. As support for its original assessment of the proposals, the Department submits a reanalysis which was prepared subsequent to our decision but which allegedly reflects the content of the original evaluation

worksheets. The worksheets never were furnished to our Office, and the Department advises they now are unavailable. The Department's reanalysis reviews all the relevant documentation--primarily documentation not furnished to Office originally--and provides a more detailed assessment and analysis in favor of Kirschner's technical superiority.

Our Bid Protest Procedures require that a request for reconsideration contain a detailed statement of the factual and legal grounds for such action, specifying any errors of law or information not previously considered. 4 C.F.R. § 21.9(a) (1982). That standard is not met here. Much of the Department's attempt to justify its former technical assessment essentially consists of a reargument of its position as asserted in the original bid protest. Arguments which amount to a reiteration of those previously considered do not provide a basis for reconsideration. See System Sciences Inc.--Request for Reconsideration, B-205279.2, January 25, 1983, 83-1 CPD 90; W. M. Grace, Inc.--Request for Reconsideration, B-202842.2, September 21, 1981, 81-2 CPD 230.

Further, to the extent the Department is requesting reconsideration based on information not previously considered within the meaning of our reconsideration rule, that part of the rule refers to information a party believes may have been overlooked by our Office or to information to which a party did not have access during the pendency of the original protest. Space Age Engineering,Inc.--Reconsideration, B-205594.3, September 24, 1982, 82-2 CPD 269. That certainly is not the case here. Although the reconstructed evaluation of the technical proposals may provide better evidence justifying the selection of Kirschner's proposal, it is based on information that was available to the Department at the time of the original protest but that the agency failed, during the initial case, to proffer. Our Procedures do not contemplate reconsideration in response to such material. Rather, we have held that parties that withhold or fail to submit all relevant evidence for our initial consideration do so at their own peril.

We will not consider on reconsideration any new evidence which was available, and of which the party had knowledge, at the time of the original decision. Interscience Systems, Inc.; Cencom Systems, Inc. -- Reconsideration, 59 Comp. Gen. 658 (1980), 80-2 CPD 106; see A. J. Fowler Corp. -- Second Request for Reconsideration, 61 Comp. Gen. 238, 241 (1982), 82-1 CPD 102. The purpose of this rule is to prevent the piecemeal presentation of information to our Office.

In its final argument for reconsideration, the Department disagrees with our conclusion in the original decision that it had failed to weigh properly Kirschner's perceived technical advantage against the added cost to the Government which that proposal represented. We applied the rule that, where the request for proposals (RFP) indicates that technical factors and cost will be evaluated and considered for award, both factors are to be considered substantially equal in weight absent any contrary indication. See 52 Comp. Gen. 686 (1973). In its request for reconsideration, the Department now asserts that the correct statement regarding the relative weight to be accorded technical merit and cost--that technical considerations would be paramount--was inadvertently left out of the final RFP, and that it based its report in the original case on the assumption that the correct wording had been included.

The mistake in the wording of the solicitation represents no error of fact or law on this Office's part in resolving the protest initially which warrants reconsideration. Rather, the Department's recognition of its own error at this time only illustrates a patent unfairness in the procurement, since the evaluations used selection criteria which were different from those presented in the solicitation. An agency cannot invite offers on one basis and evaluate them on another. A.R.&S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193.

The request for reconsideration is denied.

Development Associates seeks reimbursement for proposal preparation costs as "some measure of equity to compensate for the Government's errors."

We recognize that agency errors in conducting procurements may cause unnecessary expense on the part of firms competing for the contract. The test established by the courts for proposal preparation cost recovery, however, is whether, if the Government had acted properly, the claimant would have had a substantial chance of receiving the award. See Morgan Business Associates, Inc. v. United States, 619 F. 2d 892 (Ct. Cl. 1980). The reason that a breach of duty on the Government's part does not of itself entitle an aggrieved firm to recovery basically is that bid and proposal preparation expenses are a cost of doing business that is lost any time a firm fails to receive a Government contract; the Government thus is not an insurer of these costs whenever an offeror is not selected for an award. See University Research Corporation, 61 Comp. Gen. 106 (1981), 81-2 CPD 428.

In our first decision, we did not find that Development Associates should have been awarded the contract that went to Kirschner. Rather, we stated that the appropriate relief under the circumstances normally would be a reopening of negotiations with the two firms and reevaluation of proposals, with Kirschner's contract being terminated only if Development Associates were selected. That relief, however, was not practicable at the time we rendered our decision. Nonetheless, our finding in that respect reflects our view that, although the Department had not supported its evaluation of Kirschner's offer as technically superior to the protester's, Kirschner may still have been entitled to the contract award.

Since one thus cannot conclude that, but for the Department of Education's actions, Development Associates had any greater chance at the award than did Kirschner, there is no legal basis to reimburse Development Associates for its proposal preparation expenses. The request is denied.

Milton J. Socolar

Acting Comptroller General
of the United States