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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Johnson Engineering and Maintenance Company--Reconsideration

File: B-228184.2

Date: March 23, 1988

DIGEST

Request for reconsideration is denied where protester essentially reiterates arguments initially raised and basically disagrees with original decision and therefore fails to show any error of fact or law that would warrant reversal or modification.

DECISION

Johnson Engineering and Maintenance Company requests reconsideration of our decision in Johnson Engineering and Maintenance, B-228184, Dec. 3, 1987, 87-2 CPD ¶ 544. In that decision, we denied Johnson's protest against the Army's proposed award of a sole-source contract to Honeywell, Inc., under solicitation No. DABT01-87-R-1054 for maintenance and repair services for the Honeywell "Delta 5600" Energy Monitoring and Control System (ECMS) located at Fort Rucker, Alabama.

The award is to be made under the authority of 10 U.S.C. § 2304(c)(1) (Supp. III 1985), which permits a noncompetitive award where only one known responsible source is available and no other type of property or services will satisfy the agency's needs. The proposed contract required the maintenance and repair of system hardware and software, including supplying any factory revisions to the software. Honeywell has retained proprietary rights to all software in the system.

Johnson had alleged that the solicitation of these services on a noncompetitive basis was improper because Fort Rucker's requirements are not of a type available from only one source. We found that it was reasonable for the agency to have concluded that Honeywell was the only known source that could meet the agency's requirements. Specifically, the contract covers repair and maintenance of the software and without properly running software the diagnostic features of

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the software would be impacted adversely and, in turn, repair and maintenance of the system under this contract would be adversely affected. The record showed that only Honeywell had complete access to all of the software information necessary to perform the contract.

We deny the request for reconsideration.

At the outset, we note that to obtain reversal or modification of a decision the requesting party must convincingly show that our prior decision contains either errors of fact or of law or information not previously considered that warrant its reversal or modification. See 4 C.F.R. § 21.12(a) (1987); Roy F. Weston, Inc.--Reconsideration, B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. Repetition of arguments made during resolution of the original protest or mere disagreement with our decision do not meet this standard. Id. In addition, our Office will not reconsider a decision on the basis of an argument previously presented but supported for the first time in a request for reconsideration by evidence that could have been furnished at the time of our original consideration. J.R. Youngdale Construction Co., Inc.--Request for Reconsideration, B-219439.2, Feb. 20, 1986, 86-1 CPD ¶ 176.

In its request for reconsideration, Johnson again maintains generally that it is qualified to provide the required services notwithstanding its lack of access to the software updates. However, it has provided no specific information to show how it would overcome this lack of access. Instead, Johnson continues to emphasize its experience in "providing maintenance of the kind required by Fort Rucker on similar Honeywell systems."

In this respect, Johnson complains that our decision was based, in part, on the fact that Johnson had not provided any specific or sufficiently detailed information to show that other locations with the exact system in place at Fort Rucker had successfully procured the same services as required here on a competitive basis. The protester contends that this represents an error of fact in the decision, since two of the systems mentioned in the protest are, in fact, identical to Fort Rucker's. In this connection, Johnson also alleges that it has discovered an additional government facility, the Fitzsimons Army Medical Center, that allegedly has the same EMCS and procures its maintenance contracts competitively.

In our decision, we stated that although Johnson had identified users of "similar systems," the record indicated that many systems were not as complex as Fort Rucker's EMCS, and that more recent government contracts for these systems

have required sublicense agreements that give the government the right to divulge software rights to third parties for maintenance purposes, a right that the Army does not have here. Johnson now claims that even though it identified the other systems only as "similar," we were in error for failing to conclude that the systems were identical. Obviously, we relied on what Johnson presented, and under those circumstances we do not view the decision as based on an error of fact.

Moreover, in our view, this "new" information is not conclusive on the issue of whether other contractors could provide all of the services required under Fort Rucker's EMCS service and maintenance contract. We do not know, for example, whether the other service contracts included the same software requirements, or were for hardware maintenance only. Also, as indicated in our decision, more recent government contracts for these systems require agreements which permit the government to divulge software rights to third parties for maintenance purposes, thus permitting sources other than Honeywell to service the systems. Thus, the fact that other agencies have awarded service contracts to firms other than Honeywell simply does not render the contracting officer's determination in this case, that Honeywell's proprietary rights agreement must be honored, unreasonable.

The protester also alleges that we have misconstrued evidence Johnson presented in its protest on the issue of its performance of other contracts. Johnson presented a letter from an Air Force contracting officer expressing, in summary, dissatisfaction with the EMCS and with the quality of service it has received both from Honeywell and from Johnson. Johnson now offers another letter, stating that Johnson's performance was not inferior to Honeywell's, to refute the Army's conclusion that only Honeywell could meet its requirement here. However, the letter Johnson originally submitted specifically states that "many of the EMCS contractors are limited as to what they can do as a result of proprietary data that has not been released to the general public." Thus, notwithstanding the question of the contracting officer's dissatisfaction with Honeywell's or Johnson's performance, the point which is relevant here is the finding that performance by contractors which do not have access to Honeywell software is limited, which supports the agency's finding that only Honeywell can perform this contract.

Next, Johnson argues that 41 U.S.C. § 253d (Supp. III 1985) permits a contracting officer to review the alleged validity of any data restriction under a contract with the government. The protester contends that the contracting officer

should have challenged the Honeywell restriction, and our Office should have noticed the agency's failure to invoke the statute.

A protester may not raise a new ground of protest in a request for reconsideration which could have been made in its original protest, as our Bid Protest Regulations do not contemplate the unwarranted piecemeal development or presentation of protest issues. Adrian Supply Co.--Reconsideration, B-225630.3, Aug. 7, 1987, 87-2 CPD ¶ 136. Here, Johnson's first mention of the statute and the contention that Honeywell's data rights should have been challenged by the agency appeared in its request for reconsideration. We have held that parties that withhold or fail to submit all relevant evidence, information or analyses for our initial consideration do so at their own peril. See Western Wood Preservers Institute--Reconsideration, B-203855.8, Jan. 9, 1985, 85-1 CPD ¶ 29. We therefore will not consider this argument further.

Johnson also contends that separate contracts could have been awarded for the repair of hard equipment and the programming of software updates. The repair-maintenance portion could then have been competitively bid. However, the record indicates that the acquisition of software updates under a separate solicitation would be impractical, time consuming and potentially more expensive. The record indicates that a malfunction could involve problems related to both hardware and software, and dividing the repairs between two separate contractors would complicate the problem. In this connection, we note that we recently denied this protester's contention that the software update requirements for Honeywell's Delta 1000 systems should not be solicited with the repair and maintenance needs. See Johnson Engineering and Maintenance Co., B-228385, Jan. 14, 1988, 88-1 CPD ¶ 34.

In order to prevail in its protest, Johnson would have had to demonstrate either that it has legal access to Honeywell's software information (or has some workable substitute) or that it was unreasonable for the agency to conclude that access to the software information is unnecessary. It failed to do so in its initial protest and it has not shown any error of fact or law in our initial decision. Therefore, Johnson's request for reconsideration is denied.

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for James F. Hinchman
General Counsel