



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Systems Corporation--Request for
Reconsideration

File: B-229905.2

Date: April 18, 1988

DIGEST

Request for reconsideration is denied where the protester essentially restates arguments previously considered in the original decision because a request for reconsideration must detail the factual and legal grounds warranting reversal of the decision, specifying errors of law made or information not previously considered.

DECISION

Marine Systems Corporation (MSC) requests reconsideration of Marine Systems Corporation, B-229905, Mar. 2, 1988, 88-1 CPD ¶ _____, in which we denied MSC's protest that it was improperly excluded from the competition under request for proposals (RFP) No. N00033-87-R-3054, issued by the Military Sealift Command, United States Navy, for litigation support services. MSC contends we failed to address issues which formed the basis of its protest and we reached an erroneous conclusion when we stated MSC used and endorsed the results of NAVSEA 028 methodology.

The request for reconsideration is denied.

The purpose of the contract under this solicitation is to assist the Navy in preparation and presentation of the Navy's defense of two contract claims filed by Coastal Dry Dock Corporation and scheduled for trial before the Armed Services Board of Contract Appeals (ASBCA). In our decision we found that a prior contract which MSC performed for the Navy, to provide technical and engineering services and technical advisory reports analyzing Coastal's claims, made MSC unsuitable for award because of the Navy's concern that MSC's testimony could be discredited at the trial. The reason for this is that in its prior contract, MSC accepted Coastal's results from Coastal's use of the NAVSEA 028 formula. The NAVSEA 028 formula is a method of computing claims which method the Navy asserts should be rejected. We

found, therefore, that were MSC to be awarded the contract, the use of its employee as the Navy's witness at the ASBCA hearings would present a risk that the Navy's witness would be impeached because of MSC's prior endorsement of the NAVSEA 028 formula.

MSC contends that our determination that MSC did use and endorse the results of NAVSEA 028 methodology is unsupported. In this regard MSC states that under its prior contract, MSC recommended that the agency accept the amount claimed by Coastal for local disruption for the claim for the USNS Rigel. This part of Coastal's claim used NAVSEA 028 methodology. MSC argues, however, that by accepting Coastal's claim in that instance, it effectively offered a 4 percent reduction in cost to the agency because the alternative method of computing the claim was 4 percent higher.

Moreover, MSC again states that in accepting Coastal's claim it clearly expressed its reservation with regard to the use of Coastal's methodology in computing the claim. MSC stated in regard to Coastal's methodology:

"The primary weakness of the approach is that the degree of impact factors in the various tables and the minutes per hour in the graph are not based on specific verifiable data. Thus, there is considerable judgment involved. However, disruption is not something that lends itself to auditing techniques; nor has sufficient data been developed by the industry or the government to eliminate such judgment. Notwithstanding, there has been sufficient analysis and experience in this area to the extent that it is generally accepted that Local Disruption manhours will be in the range of 10-50% of hardcore manhours for repair and overhaul contracts. Since Coastal's claim is 35%, and well within the generally accepted range, their approach, tables, graphs and percentage relationship are accepted."

MSC argues that in view of this caution its acceptance of either the results or the means to those results cannot be taken as an endorsement of the results. MSC also contends that we should address the agency's failure to support a legitimate justification and approval for limiting the competition. MSC also states that its elimination from the competition is contrary to the common practice in claims and appeals cases. Finally MSC states that it regrets its recommendation for a conference to discuss the issues was rejected.

Our Office will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1987). Here MSC merely restates its earlier argument and disagrees with our decision so we find that its request for reconsideration does not satisfy this requirement.

Although MSC contends that it did not endorse NAVSEA 028 methodology in its study of Coastal's USNS Rigel claim, the fact remains it does agree that it accepted a part of Coastal's claim which had used NAVSEA 028 methodology. MSC argues that this acceptance of Coastal's claim did not amount to an endorsement because of its above quoted reservation.

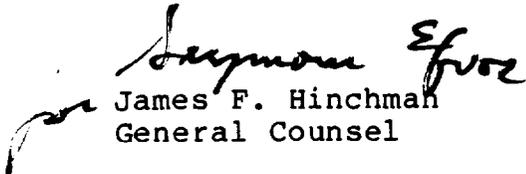
However, as we stated in our earlier decision, where an agency has a reasonable basis for its conclusion that an unacceptable risk exists that an offeror's testimony would be impeached, the agency's determination is to be awarded great weight. We recognize the inherent difficulty in estimating litigation risks. Transcomm, Inc., B-190273, Feb. 9, 1978, 78-1 CPD ¶ 113. However, the Navy has presented a reasonable argument that MSC's expert testimony risks being impeached and although MSC disagrees with the Navy it has not shown us that the Navy's position is unreasonable. An assessment of impeachment risk necessarily involves the weighing of whether impeachment would be attempted and whether it could be successfully completed. Id. Since MSC's analysis did utilize Coastal's NAVSEA 028 methodology results and the Navy wishes to repudiate NAVSEA 028 methodology in litigating these claims, we cannot say that the Navy's fear of impeachment is unreasonable. We do not think the Navy should be forced to utilize an expert witness which it has reasonably shown to present an impeachment risk.

In view of our finding that the Navy had a proper basis for excluding MSC from the competition, we find it unnecessary to rule on the other issues which MSC has already presented in its initial protest.

With respect to MSC's statement regarding a conference, we note that MSC made its recommendation in its comments to the Navy's report. Our Bid Protest Regulations provide that

conference requests should be made at the earliest possible time in the proceeding. 4 C.F.R. § 21.5(a). Under our regulations applicable at the time this protest was filed, conferences were to have been held not later than 5 days after receipt by the protester and interested parties of the agency report. 4 C.F.R. § 21.5(b). The protester's request for a conference was simply made late under our regulations.

The request for reconsideration is denied.


James F. Hinchman
General Counsel