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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dayton T. Brown, Inc.--Request for Reconsideration

File: B-231579.2

Date: November 29, 1988

DIGEST

Request for reconsideration which essentially restates arguments previously considered and does not establish any error of law or provide information not previously considered is denied.

DECISION

Dayton T. Brown, Inc. (DTB) requests reconsideration of our decision, Dayton T. Brown, Inc., B-231579, Oct. 4, 1988, 68 Comp. Gen. _____, 88-2 CPD ¶ _____, denying its protest against the award of a contract to National Technical Systems (NTS) for the testing of various aircraft systems and components under request for proposals (RFP) No. N00123-87-R-0998 issued by the Naval Regional Contracting Center, Long Beach, California.

We deny the request for reconsideration.

The solicitation was issued as a total small business set-aside and basically provided that award would be made to the firm offering the most advantageous proposal to the government, with cost being considered less important than the RFP's technical evaluation criteria. DTB and NTS were the only two firms that responded to the solicitation. After the evaluation of initial offers, both firms were considered technically acceptable by the Navy, although DTB's offer had been rated technically higher than NTS' offer. The agency concluded that NTS' proposal was most advantageous because of its lower price and conducted a preaward survey on that firm. The result of the preaward survey was a recommendation against award to NTS. The contracting officer concurred and found NTS nonresponsible. However, since the procurement was a small business set-aside, the nonresponsibility determination was referred to the Small Business Administration (SBA). The SBA concluded, based on information provided to it by NTS, that NTS was

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responsible and issued a certificate of competency. Award was subsequently made to NTS. DTB's protest followed.

In its protest, DTB argued that NTS had employed an individual who had been involved in the drafting of the subject RFP and also had been a member of an evaluation team which had reviewed DTB's proposal under a predecessor contract. DTB argued that this NTS employee had assisted in the preparation of NTS' proposal and had represented the firm during the award process in violation of the post-employment restrictions of 18 U.S.C § 207 (1982) and its implementing regulations, 5 C.F.R. § 737.5 and § 737.7. DTB argued that the former Navy employee's involvement with the predecessor contract gave NTS an unfair competitive advantage under the current RFP. Specifically, DTB asserted that NTS had access to DTB's highly sensitive and proprietary approach to structuring its proposal including DTB's management approach, its facilities and employee expertise, its direct labor pricings, overhead and other costs and profits. DTB also argued that NTS' employment of the former Navy employee as its project manager violated the post-employment restrictions of the above referenced statutes and regulations because in his capacity as project manager the employee would be representing NTS under the contract.

In our decision, we found that the record did not show that the former Navy employee had any direct involvement in the evaluation of DTB's proposal under the predecessor contract which had occurred 3 years prior to the subject procurement. We also found that the record did not show that the former employee was involved in the drafting of the current RFP. In addition, we noted that NTS had a lower technical score than DTB under this solicitation and the preaward survey team recommended no award, despite the former employee's presence at the preaward survey and NTS' proposed employment of the individual as program manager. We thus concluded there was no "hard evidence" that any action by the former Navy employee resulted in any prejudice for, or on behalf of, NTS in the award selection process. We also rejected DTB's contention that NTS should be disqualified from award because of the firm's employment of the former Navy employee as a consultant and proposed hiring as project manager. We found that there was no violation of 18 U.S.C. § 207 which proscribes representation to the government by a former government employee under certain conditions. We simply found no evidence of representation by the individual during the award process and concluded that representation in the future by the former government employee was not sufficient to disqualify the firm from award.

In its request for reconsideration, DTB asserts that we erred in concluding that there existed no conflict of interest violation. In particular, the protester argues that we misunderstood its argument regarding the proprietary information which the former Navy employee allegedly provided to NTS. Although DTB's original protest alleged that the former employee had access to technical as well as pricing information, the protester now claims that NTS specifically gained a "price structuring" advantage rather than a technical advantage over DTB as a result of the former Navy employee's access to DTB's predecessor contract. Thus, the protester contends that our decision fails to address this aspect of its protest and that our conclusion to the effect that NTS gained no unfair advantage in the technical evaluation of its proposal is irrelevant. In support of its argument, the protester refers to the "fact pattern" in the record and discounts the affidavit of the former Navy employee relied upon in our earlier decision. The protester also argues that the former Navy employee's presence at the preaward survey constituted improper representation of NTS by the individual in question. According to the protester, the former Navy employee was employed by NTS to "convince the preaward survey team that NTS was technically competent to perform the contract tasks."^{1/}

Our Office will not consider a request for reconsideration which does not contain a detailed statement specifying errors of law made or information not previously considered, which would warrant reversal of our prior decision. Where a protester merely restates previously considered arguments we will not further consider the matter. 4 C.F.R. § 21.12(a) (1988); Pacific Consolidated Industries-- Reconsideration, B-228724.3, Jan. 19, 1988, 88-1 CPD ¶ 46.

In this case, we think that the protester has merely restated its earlier arguments (which were considered by our office in our first decision) without offering any new evidence or information. First, as to the allegation that we did not consider DTB's argument regarding the acquisition of its proprietary price structuring data by the former Navy employee, we note that our first decision addressed the

^{1/}In this regard, DTB asserts that our first decision as well as the comments filed by NTS in the original case acknowledge that the individual in question was employed by NTS at the preaward survey. Our decision and NTS' comments merely indicate that the individual was "present" during the preaward survey.

protester's allegation that NTS had achieved an advantage through the former Navy employee's alleged access to proprietary technical, cost and pricing information. We did not specifically address the employee's alleged access to DTB's pricing structure because DTB did not raise this matter separately in its protest. Nevertheless, our consideration of DTB's allegation regarding access to DTB's proprietary cost information encompassed DTB's pricing structure as well. In any event, we found no evidence that the former government employee had any actual knowledge of DTB's proprietary information and we found no "hard" evidence that any action by the former employee resulted in prejudice for, or on behalf of, NTS in the award selection process. The protester's disagreement with our conclusions based on the record does not provide a basis for reconsideration.

Second, regarding the alleged advantage received by NTS because of the former Navy employee's presence at the preaward survey and proposed hiring as project manager, we find that the protester's submission on reconsideration restates its earlier argument. DTB has presented no evidence that the former Navy employee acted in a representative capacity on behalf of NTS at the preaward survey site visit. Further, we again note that, despite the former employee's presence at the preaward survey, the survey team recommended no award and the contracting officer found NTS nonresponsible. Thus, we again fail to see what advantage this individual's presence provided at the survey site visit. DTB continues to speculate that the former Navy employee will act in a representative capacity for NTS in the administration of the subject contract. As we stated in our prior decision, we will not disqualify a company based on speculation as to the future conduct of an individual.

DTB also argues that we erred in our earlier decision when we concluded that no discussions had occurred between the Navy and NTS. In this connection our previous decision stated that there was "no evidence in the record to indicate that NTS was afforded an opportunity to revise its proposal." According to DTB, this conclusion was erroneous because the record contains an affidavit executed by NTS' chief operating officer. In the affidavit, he states that the technical evaluation team was advised that a particular individual who had been proposed by NTS would not work on the contract if awarded to NTS and states his understanding that his name was removed from the NTS proposal by the evaluation team. DTB argues that this alleged action on the part of the technical evaluation team was tantamount to the conduct of discussions with NTS.

We find no error in our previous conclusion regarding this issue. We believe that the record contains evidence which shows that, in fact, the resume of the individual in question had not been withdrawn by the technical evaluation team. Specifically, the record contains a written statement prepared by the contract negotiator in which he discusses, among other things, the technical evaluation team's receipt of a statement from the individual who would not be employed by NTS. The contract negotiator states:

"While the technical evaluations were being conducted I received from the evaluators a copy of the attached statement. That statement was considered by the Government in reaching its award decision. The statement was not discussed with any offeror, and no offeror was invited or allowed to change its proposal." (Emphasis added.)

The contract negotiator also states that the solicitation did not require personal services and that the solicitation contains clauses which were to be incorporated into the resulting contract providing that the offeror is required to furnish personnel with those qualifications presented in the offeror's proposal and that those qualifications set the educational and experience standards for the personnel who actually perform the contract. This clause was intended to protect the government in the event specific contractor employees become unavailable or change during performance.

The mere receipt by the technical evaluation team of an unsolicited statement made by a prospective employee of NTS, without more, did not, in our view, constitute discussions. Moreover, as noted in the contract negotiator's statement NTS' proposal was not changed as a result of that statement. The Navy's award decision thus was based properly upon NTS' initial proposal as submitted. We therefore deny this basis for reconsideration.

The request for reconsideration is denied.


James F. Hinchman
General Counsel