

*P. Ahearn*



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** The Department of the Navy--Request for Reconsideration  
**File:** B-237342.2  
**Date:** July 17, 1990

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Douglas P. Larsen, Jr., Esq., Office of the General Counsel, Department of the Navy, for the agency.  
Robert E. Little, Jr., Porter, Wright, Morris & Arthur, for the protester.  
M. Penny Ahearn, Esq., David Ashen, Esq., and John M. Melody, Esq., GAO, participated in the preparation of the decision.

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## DIGEST

Decision sustaining protest on ground that reopening discussions with awardee to afford it an opportunity to make its proposal acceptable was improper is reversed where agency's reconsideration request shows that, as it originally asserted, it merely allowed awardee to substitute an acceptable item offered as alternate in best and final offer.

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## DECISION

The Department of the Navy requests reconsideration of our decision in Dresser-Rand Co., B-237342, Feb. 12, 1990, 90-1 CPD ¶ 179, wherein we sustained Dresser-Rand's protest of the award of a contract to Rix Industries, under request for proposals (RFP) No. N00228-89-R-2223, for air compressor units involved in ship alteration.

We reverse our prior decision.

The solicitation requested offers on a firm, fixed-price basis for compressors meeting various requirements, including a referenced military specification and a 10 horsepower (HP) motor. The record indicated that Rix made an initial written offer of its model 2KX2-30A motor, described as a "MIL-Spec 15 HP motor slowed down to draw 10 BHP (brake horsepower) on the ships' electrical system." According to the report submitted by the Navy, in its best

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and final offer (BAFO), Rix orally reiterated its original offer. The Navy determined that the offer was technically acceptable and the lowest priced, and made award to Rix for a "15 horsepower" motor. After award, the requiring activity notified the contracting office that only a 10 HP motor was acceptable in order to meet the government's minimum needs; that is, the 10 HP requirement was an absolute, rather than a minimum requirement, as originally understood by the contracting office. The agency then determined to modify the contract by accepting a 10 HP motor from Rix.

In our decision sustaining the protest, we stated that we would agree with the Navy that substituting an alternate 10 HP motor, if originally offered by Rix at the same price, would be a permissible means of satisfying the requirement. We concluded from the record that the firm's initial, written offer was for a 15 HP motor operating at 10 HP; that this offer was accepted; and that Rix had not offered a 10 HP "alternate." We held that providing the awardee an opportunity after award to offer a compliant motor to make its proposal acceptable would constitute an improper reopening of discussions with only the awardee. Consequently, we recommended that the agency conduct discussions with all offerors in the competitive range and give them an opportunity to submit revised proposals.

In its request for reconsideration, the Navy disagrees with our reading of the record, maintaining that Rix's original offer (and BAFO) of a 15 HP motor operating at 10 HP in fact is the motor it proposed to substitute. The agency explains that prior to award, Rix offered to deliver its 15 HP motor without a reduction to operate at 10 HP. The contracting officer accepted this late offer from the otherwise successful offeror as being on terms more favorable to the government. See Federal Acquisition Regulation § 52.215-10(g). Thus, the award was made initially on the basis of Rix's offer of a 15 HP motor operating at 15 HP, not on the basis of a 15 HP motor operating at 10 HP, as we read the Navy's report. Subsequently, the contracting officer learned that only a motor operating at 10 HP would fulfill the requirement and therefore determined to allow Rix to substitute its 15 HP motor operating at 10 HP, as offered in its BAFO. The agency maintains that since this motor met the 10 HP requirement, it now can properly be accepted.

We find, based on the agency's explanation in its reconsideration request, that the factual underpinnings of our prior decision--that Rix's award was based on a 15 HP motor operating at 10 HP, that the agency found this motor

unacceptable, and that it then allowed Rix to substitute a 10 HP motor operating at 10 HP--were incorrect. In fact, the Navy's reconsideration request establishes that Rix's initial award was based on a 15 HP motor operating at 15 HP, that this was the motor the agency found unacceptable, and that the agency then permitted Rix to substitute the acceptable 15 HP motor operating at 10 HP it had proposed in its initial offer and BAFO. Since Rix's offer and BAFO actually met the requirement for a 10 HP motor, the Navy was not improperly reopening discussions with Rix.<sup>1/</sup>

We conclude that our decision was incorrect. We withdraw both our recommendation that the competition be reopened and our finding that Dresser-Rand is entitled to reimbursement of its costs of filing and pursuing the protest.

The prior decision is reversed.

*Milton J. Fowler*  
for Comptroller General  
of the United States

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<sup>1/</sup> Although Dresser-Rand argued in its initial protest that Rix's 15 HP motor operating at 10 HP would not be as efficient as a 10 HP motor, we find no specific RFP requirements with which Rix's 15 HP motor, derated to 10 HP, does not comply.