Westfall

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hampton Roads Leasing, Inc.--Second Request for Reconsideration

File: B-236564.4

Date: August 6, 1990

Benjamin A. Hubbard, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester does not show that challenged decision is inconsistent with other decisions issued by General Accounting Office.

DECISION

Hampton Roads Leasing, Inc., requests reconsideration of our decisions, Hampton Roads Leasing, Inc., 69 Comp. Gen. 80 (1989), 89-2 CPD ¶ 537, and Hampton Roads Leasing, Inc.--Request for Recon., B-236564.3, Apr. 4, 1990, 90-1 CPD ¶ 357, in which we denied its protest against the Department of the Navy's proposed award of a contract under invitation for bids (IFB) No. N62470-89-B-2238 to a bidder that had failed to submit a signed and completed Certificate of Procurement Integrity prior to bid opening. Hampton Roads argues that these decisions are inconsistent with two other recent decisions by our Office, Atlas Roofing Co., Inc., B-237692, Feb. 23, 1990, 90-1 CPD ¶ 216, and Fry Communications, Inc., B-237666, Feb. 23, 1990, 90-1 CPD ¶ 215, and should therefore be reversed.

We deny the request for reconsideration.

By way of background, we note that although the solicitations in the Hampton Roads case and the Atlas and Fry cases incorporated the Certificate of Procurement Integrity

provision, Federal Acquisition Regulation (FAR) § 52.203-8,1/ application of the provision had been suspended prior to the date of award in all three cases.2/

In Atlas and Fry, the agency rejected the protester's bid as nonresponsive because it did not include a completed certificate at the time of bid opening. We concluded that the agency had acted reasonably in interpreting the certification requirement as relating to responsiveness, and that the subsequent suspension of the procurement integrity legislation did not retroactively invalidate the decision.

In Hampton Roads, in contrast, the agency viewed the certification requirement as a matter of responsibility that could be cured at any time prior to award. It therefore proposed to award to Anderson Funding Group, which had failed to submit a certificate prior to bid opening, but had furnished one shortly thereafter. We declined to interfere with the proposed award since the statutory requirement for completion and signing of the certificate had been suspended prior to the proposed date of award.

The protester argues that our holdings in the Atlas and Fry cases are inconsistent with our original Hampton Roads decision. Atlas and Fry stand for the proposition that a decision as to the responsiveness of a bid should be made on the basis of the solicitation's requirements as they exist at the time of bid opening, while, according to the protester, our original Hampton Roads decision stands for the proposition that deletion of a material requirement from

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1/ FAR § 52.203-8, which implements 41 U.S.C. § 423(d)(1) (West Supp. 1989), requires that the officer or employee responsible for an offer certify that, with the exception of any information described in the certificate, he has no information concerning a violation or possible violation of subsections (a), (b), (c), or (e) of 41 U.S.C. § 423, and that each representative of his firm substantially involved in the preparation of the offer has certified that he is familiar with and will comply with the requirements of 41 U.S.C. § 423(a) and will report to him immediately any information concerning a violation or possible violation of the section pertaining to the procurement.

2/ Pursuant to § 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989), 41 U.S.C. § 423 and the implementing regulations, including FAR § 52.203-8, were suspended for a 1-year period beginning on Dec. 1, 1989.

a solicitation after bid opening may transform a nonresponsive bid into a responsive bid.

We think that the protester has mischaracterized the original Hampton Roads decision. In that decision, we declined to interfere with the proposed award to Anderson since the statutory requirement for completion and signing of the certificate had been suspended prior to the proposed date of award. Our rationale for allowing the agency to proceed with award was not that Anderson's nonresponsive bid had become responsive after suspension of the procurement integrity legislation. Rather, as we explained in response to the protester's initial request for reconsideration, Anderson's bid remained nonresponsive. It could be accepted nevertheless because the awarded contract would serve the government's actual needs and no other bidder would be prejudiced by acceptance of the bid. The protester had not argued and there was no evidence that an award to Anderson would not serve the government's needs. The protester had not been prejudiced by its completion of the certificate, since, despite the fact that it had assumed legal obligations not assumed by other bidders, it would not be required to comply with these obligations if awarded the contract since the certification would be deleted from any resultant contract.

The protester takes issue with our finding that it was not prejudiced by acceptance of Anderson's bid, arguing that it was prejudiced in that it was denied an award to which it otherwise would have been entitled. When we speak of prejudice in the bid protest context, we mean action taken by the agency which places a bidder or offeror at a competitive disadvantage, and not simply any decision by the agency which is unfavorable to the competitor's interests. In our view then, Hampton Roads was not prejudiced by the mere fact that another competitor was selected for award.

The request for reconsideration is denied.

James F. Hinchman
General Counsel