



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Blue Dot Energy Company--Reconsideration

File: B-253390.2

Date: November 4, 1993

Timothy S. Kerr, Esq., Starfield & Payne, for the protester. Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration is denied where the protester does not show that prior decision denying its protest contained any errors of fact or law or present information not previously considered that warrants reversal or modification of our decision.
2. General Accounting Office's resolution of protest without holding a hearing does not constitute error warranting reconsideration of prior decision where protest issues did not present sophisticated technical questions or complex legal issues requiring oral explanation; a telephone conference was held; and the written record was complete and contained no inconsistent statements or evidence suggesting questionable or incomplete testimony requiring the assessment of witness's credibility.

DECISION

Blue Dot Energy Company, a small disadvantaged business (SDB), requests that we reconsider our decision in Blue Dot Energy Co., B-253390, Sept. 7, 1993, 93-2 CPD ¶ , in which we denied its protest of the cancellation of invitation for bids (IFB) No. F25600-93-B-0004, issued by the Department of the Air Force as a total SDB set-aside, and withdrawal of the requirement from the SDB program. The IFB sought bids to install central air conditioners and replace furnaces in 430 military family housing units at Offutt Air Force Base (AFB), Nebraska. In its protest, Blue Dot, the low bidder, argued that the contracting officer's decision to reject its bid as unreasonably priced after determining that the bid exceeded the fair market price (FMP), and to cancel the solicitation, was unreasonable because the agency's FMP was flawed and, thus, could not properly form the basis for canceling the IFB. In

denying its protest, we concluded that the FMP determination was reasonably based, and found unobjectionable the agency's decision to cancel the IFB and withdraw the requirement from the SDB program. In its reconsideration request, Blue Dot continues to argue that the contracting officer's FMP determination was flawed and that the agency acted in bad faith. The protester also asserts that it should have been granted a hearing pursuant to our Bid Protest Regulations.

We deny the request for reconsideration.

BACKGROUND

The IFB contemplated the award of a fixed-price contract and required bidders to submit a price for removing and disposing of asbestos, contract line item number (CLIN) 0001; a price for all materials and labor required to install the air conditioners and replace the furnaces in accordance with specifications attached to the IFB, CLIN 0002; and a total for both line items. Award was to be made to the responsible bidder offering the lowest total price for CLINs 0001 and 0002.

The agency received seven bids by the February 12, 1993, extended bid opening date, ranging from \$2,119,395 to \$3,182,000; Blue Dot's bid of \$2,283,100 was second low. Following bid opening, Blue Dot challenged the SDB status of the low bidder, Keweenaw-K Joint Venture, which the contracting officer forwarded to the Small Business Administration (SBA); SBA subsequently dismissed that challenge. By letter to the SBA dated April 19, however, the contracting officer challenged Keweenaw-K's size status, and on April 21, Blue Dot reinstated its challenge to Keweenaw-K's SDB status. On May 6, SBA determined that Keweenaw-K was not a small business eligible for award; Blue Dot thus became the apparent low bidder under the IFB.

While SBA was considering the size and SDB status challenges against Keweenaw-K, the contracting officer noticed a marked disparity between the price of a recently awarded contract for similar work, described as phase I of a larger renovation project, and the prices bid under the IFB, phase II of that project. This disparity led the agency to reexamine the original FMP for phase II (\$3,467,836), which had been developed by the architectural and engineering firm that prepared the specifications for the project before bid opening under phase I. After this reexamination, the agency revised the FMP for phase II downward to \$1,597,450, based on an average unit price of \$3,715 for 430 units. Relying on Defense Federal Acquisition Regulation Supplement (DFARS) § 219.506(a), which prohibits the award of a contract under an SDB set-aside where the low bid exceeds the FMP by more than 10 percent, the contracting officer, after determining

that Blue Dot's price exceeded the FMP by approximately 43 percent, canceled the IFB and resolicited the requirement on an unrestricted basis.

Blue Dot's Protest

The protester challenged the agency's decision to cancel the IFB, arguing that the FMP developed for phase II was defective and thus could not be relied upon to determine whether award to Blue Dot would result in a price not exceeding the FMP by more than 10 percent. The protester argued that there are significant differences between phases I and II, particularly with respect to the scope of work required under phase II, which were not accounted for in the agency's revised FMP determination. Blue Dot maintained that the agency instead should have relied on the estimate initially developed for phase II of the project. Since its bid is well below that estimate, Blue Dot argued that the agency should have made award to the firm.¹

We concluded that the agency's FMP determination was reasonable. In reaching our conclusion, we examined the spreadsheets completed by the architectural and engineering firm that prepared the specifications for the project, which the agency used to calculate its revised FMP. For each type of equipment, the agency's engineer revised some of the original figures by annotating the estimated costs shown for each line item to reflect adjustments to labor costs based on an anticipated learning curve resulting from repetitive work, and volume discounts for materials. The engineer based the adjustments on his 27 years of experience as both a private contractor and as a government engineer. The agency then compared the average unit price under the phase I contract and the average unit price derived from the engineer's estimate, and concluded that the revised FMP was reasonable. Since Blue Dot's price exceeded the revised FMP by more than 10 percent, award could not be made to the firm.

On August 23, a telephone conference was held with the parties, which included the agency's engineer. The protester, represented by counsel, and an official from

¹After reviewing the protester's comments on the agency report on the protest, the Air Force reconsidered its FMP determination, and adjusted the FMP upward to \$1,762,205 (an average unit price of \$4,098), to account for various costs attributable to the differences between phases I and II not previously considered. Since Blue Dot's bid nevertheless exceeded the revised FMP by approximately 30 percent, the agency concluded that the DFARS prohibited the award to Blue Dot, and that the cancellation was proper.

another firm which apparently had assisted Blue Dot in preparing its bid, also participated in the conference. Prior to the conference, the parties were provided with written questions generated by our Office to help focus the discussion. Specifically, question No. 2 referred the parties to the Air Force engineer's annotated estimates, and suggested that he should be prepared to explain the basis for his annotations during the conference. Question No. 3 referred the parties to an attachment accompanying the protester's comments on the agency report--Blue Dot's detailed explanation of how it prepared its bid--and indicated that the protester should be prepared to discuss that document.

During the telephone conference, the agency's engineer randomly selected a contract line item for which he had changed the estimated price, and explained his rationale for the adjustment in detail to the conference participants.² The parties subsequently filed comments on the telephone conference.

Based on our review of the record, including the explanations offered by the parties during the telephone conference, and in their supplemental comments, we concluded that the agency had offered a reasonable explanation of why it considered the original government estimate to be flawed, and thus could not have relied on that figure as its FMP for phase II. See Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153. We also found the agency's revised FMP to be reasonably based. Since Blue Dot's low bid exceeded the FMP by more than 10 percent, we found unobjectionable the agency's decision to cancel the IFB and withdraw the requirement from the SDB set-aside program. See DFARS § 219.506; Sach Sinha & Assocs., Inc., B-236911, Jan. 12, 1990, 90-1 CPD ¶ 50.

Reconsideration Request

The protester argues that the agency's FMP determination was flawed because there is no "objective" support in the record for the discounted prices calculated by the engineer. The protester also argues that agency officials acted in bad faith by canceling the IFB, and that Blue Dot should have

²The example involved removing a screw, for which the original estimate listed \$6 as the unit labor cost, for a total of \$102 for that line item (17 units x \$6). The engineer stated that such simple task generally requires no more than 5 minutes to perform for each unit. He explained that assuming a \$20 hourly wage rate, a more reasonable price for that line item, rounded to the nearest dollar, is \$2/unit, for a total of \$34 for the 17 units.

been granted a hearing pursuant to our Bid Protest Regulations.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1993). Mere disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Regarding the agency's FMP determination, Blue Dot simply states that the discounts the agency's engineer applied to labor and materials were "arbitrary and without foundation." The protester's bare assertions--which merely express Blue Dot's disagreement with our decision regarding the agency's FMP determination--do not show that our decision denying its protest contained any errors of fact or law. Nor has the protester presented any new information not previously considered that warrants reversal or modification of our conclusion that the agency's FMP determination was reasonable.

The protester also alleges that since the agency was "clearly aware at the time of bid opening in February of the purported price disparity with the Phase I effort," it should have canceled the IFB at that time, rather than permit Blue Dot to expend its resources challenging the low bidder's size and SDB status. According to Blue Dot, the timing of the cancellation, after bid opening and after the successful challenge to the low bidder's size status, which placed Blue Dot in line for award, suggests bad faith.

This issue clearly is untimely, since it was not raised in the protest until Blue Dot's comments on the agency report, and then only in conclusory fashion. In any event, while the decision to cancel the IFB was based on facts (the disparity of prices between phases I and II) that could have been discovered at bid opening had the Air Force acted more diligently, the agency's oversight or failure to react sooner than it did does not constitute bad faith. See The Taylor Group, Inc., 70 Comp. Gen. 343 (1991), 91-1 CPD ¶ 306. An agency may cancel a solicitation after bid opening regardless of when the information precipitating the cancellation first surfaces or should have been known, Currents Constr., Inc., B-236735.2 Feb. 27, 1990, 90-1 CPD ¶ 236, even if that is not until after bid opening and the protester has incurred costs in seeking the award. See System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

Hearing Request

Blue Dot argues that because of the fact-intensive nature of the protest, it should have been granted a hearing pursuant to our Bid Protest Regulations. Although the protester concedes that a telephone conference was held, according to Blue Dot that format "simply did not provide for the 'give-and-take' and credibility assessments available with live testimony."

In appropriate cases, a hearing may be held to develop the protest record through oral argument and/or oral testimony; as specified in our Bid Protest Regulations, the determination to hold a hearing is solely within the discretion of our Office. 4 C.F.R. § 21.5(a). As a general rule, we conduct hearings where there is a factual dispute between the parties which cannot be resolved without oral examination and which requires us to assess witness credibility, or where a protest issue is so complex that proceeding with supplemental written pleadings clearly constitutes a less efficient and burdensome approach than developing the protest record through a hearing. See, e.g., National Mailing Sys., B-251932.3, Aug. 4, 1993, 93-2 CPD ¶ 78. Absent evidence that a protest record is questionable or incomplete, this Office will not hold a bid protest hearing merely to permit the protester to orally reiterate its protest allegations or otherwise embark on a fishing expedition for additional grounds of protest--a result that would undermine our obligation to resolve protests expeditiously without unduly disrupting or delaying the procurement process. Border Maint. Serv., Inc.--Recon., B-250489.4, June 21, 1993, 72 Comp. Gen. ____, 93-1 CPD ¶ 473.

On the other hand, where appropriate, our Office may hold a telephone conference in lieu of a hearing to clarify the record, or to obtain background information about a procurement that may serve to provide a better understanding of a particular dispute. See, e.g., Aegis Analyt. Labs, Inc., B-252511, July 2, 1993, 93-2 CPD ¶ 4; PAE GmbH Plan, and Constr., B-250470, Jan. 29, 1993, 93-1 CPD ¶ 81, aff'd, 93-2 CPD ¶ 45.

Here, a hearing was not warranted. Despite Blue Dot's contentions to the contrary, the protest did not present complex technical or legal issues requiring oral explanations or demonstrations. Moreover, there was absolutely no evidence in the record to suggest that the agency report or any of the agency's supplemental submissions to our Office contained inconsistent or incomplete statements that required the assessment of any witness's credibility. The record contains the spreadsheets originally completed by the architectural and engineering

firm; the engineer's hand-written annotations; the agency's extensive explanation of the adjustments made to the original FMP; and the protester's detailed comments on the agency report. In short, the record was complete.

To clarify a portion of the record, a telephone conference was held with the parties including the agency's engineer, in which Blue Dot participated. During that telephone conference, the protester had an opportunity to, and did in fact, question the agency's engineer regarding his calculations. The parties then submitted supplemental comments on the telephone conference.

In view of the fact that the record contained all relevant documents upon which the agency based its FMP determination, including the engineer's hand-written annotations--numbers which require no interpretation and which could not be altered by oral testimony--and written explanations for his calculations, we fail to see, and the protester does not explain, how the "give-and-take" and "credibility assessments" otherwise available during a hearing deprived Blue Dot of a meaningful opportunity to show that the agency's FMP was unreasonable. The fact that the protester's own calculations resulted in a bid price that was substantially higher than the agency's FMP simply does not constitute a factual dispute between the parties that warranted oral explanation or testimony.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel