



Comptroller General  
of the United States

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Washington, D.C. 20548

## Decision

**Matter of:** Agency for International Development;  
Development Alternatives, Inc.--  
Reconsideration

**File:** B-251902.4; B-251902.5

**Date:** March 17, 1994

William A. Roberts, Esq., Brian A. Darst, Esq., and Alice Crook, Esq., Howrey & Simon, for the protester. Mark W. Foster, Esq., Zuckerman, Spaeder, Goldstein, Taylor & Kolker, for Development Alternatives, Inc.; and William R. Thomas, 3rd, for International Science and Technology Institute, Inc., interested parties. Jonathan Silverstone, Esq., Agency for International Development, for the agency. Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Prior decision sustaining protester's challenge to its exclusion from a competition based on the competitive advantage received from information provided in response to a Freedom of Information Act (FOIA) request is affirmed where there is no showing that further dissemination of the FOIA response would be improper.
2. Award of protest costs to prevailing protester is affirmed even though protest presented issue of first impression, since the award of costs is consistent with the intent of the Competition in Contracting Act of 1984 to relieve protesters of the burden of vindicating the public interest in full and open competition.

### DECISION

The Agency for International Development (AID) and Development Alternatives, Inc. (DAI) request reconsideration of our decision, KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272, in which we sustained Peat Marwick's protest of its exclusion from a reopened competition under request for proposals (RFP) No. OP/B/AEP-92-003, issued by AID for technical assistance for macro and international economic analysis. Both AID and DAI argue that our prior decision erred in concluding that the agency's exclusion of Peat Marwick from the reopened competition was improper, and that the remedy set forth in the decision is unfair, and improperly directs agency contracting officials to release

proprietary information to other offerors. AID also argues that our Office improperly concluded that Peat Marwick was entitled to be reimbursed its costs of pursuing the protest.

We affirm our prior decision.

This protest arose after AID awarded indefinite quantity contracts for short-term technical and advisory services related to macroeconomic policy to two offerors--Nathan Associates and DAI. These awards, made in response to the above-referenced solicitation, were made on the basis of initial proposals--i.e., without discussions.

After Peat Marwick--one of the seven firms that responded to the RFP--learned that its proposal had not been selected for award, it filed a Freedom of Information Act (FOIA) request with AID. Peat Marwick's FOIA request sought certain evaluation information related to its own proposal and that of the two awardees, as well as the technical proposals submitted by the awardees. Upon receipt of AID's December 17 FOIA response--the contents of which are discussed in detail below--Peat Marwick protested to our Office that AID's award to Nathan and DAI failed to follow the evaluation scheme in the RFP, and violated the statutory prohibition against making award on the basis of initial proposals to other than the lowest-priced offeror.<sup>1</sup>

In response to Peat Marwick's initial protest, AID first advised our Office that the protest had "substantial merit," and later advised that the agency would "reopen the procurement and request best and final offers (BAFO), taking whatever action is possible and appropriate to deal with the information access problems." Based on the promised corrective action,<sup>2</sup> our Office dismissed the

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<sup>1</sup>The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (1988), bars civilian agencies from making award on the basis of initial proposals unless the solicitation advises offerors of that possibility and the award is to the offeror with the lowest overall cost to the government. TEA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239.

<sup>2</sup>AID's assertion that our Office required the agency to reopen discussions in response to the initial protest is not accurate. Rather, AID's first proposed "corrective action" in response to Peat Marwick's protest was that the agency would begin a new procurement while leaving the improperly awarded contracts in place. When our Office did not agree that the agency's proposed remedy mooted Peat Marwick's initial protest--and therefore did not grant the agency's

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protest, see KPMG Peat Marwick, B-251902, Mar. 4, 1993, and subsequently denied a request from Peat Marwick that it be reimbursed its costs for pursuing the protest. KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

After reopening the competition, the contracting officer prepared a memorandum dated June 7 setting forth the facts surrounding the FOIA request and response, and concluded that Peat Marwick should be disqualified from participating in the reopened competition. The contracting officer based her decision on the fact that the agency's FOIA response gave Peat Marwick "information concerning its competitors' initial proposals and their evaluation and scoring." Thus, according to the contracting officer, Peat Marwick's exclusion was necessary "to assure a full and fair competition and to protect the integrity of the procurement system because it reasonably appears that the information would give the firm an unfair competitive advantage."

#### AID MAY PROPERLY PROVIDE THE FOIA RESPONSE TO OTHER OFFERORS

In our prior decision, we agreed that the FOIA response provided to Peat Marwick gave that company a competitive advantage in the reopened competition, but disagreed with the remedy AID chose to rectify the situation. We concluded that the decision to exclude Peat Marwick from the reopened competition struck an unreasonable balance between ameliorating the competitive advantage given Peat Marwick, and imposing an economic hardship on one offeror to protect the integrity of the competitive procurement system.

AID and DAI argue that our prior decision erred in concluding that the agency should provide the information in the FOIA response to the other offerors, and allow Peat Marwick back into the competition. Both requesters contend that our decision failed to recognize that further dissemination of the information would be improper.<sup>3</sup>

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<sup>2</sup>(...continued)

request that the initial protest be dismissed--AID decided to reopen the procurement.

<sup>3</sup>AID's contentions are, and have been, inconsistent with its own actions--i.e., while AID claims that our prior decision recommends an improper release of proprietary information, AID has taken no steps to request that the information be returned; has not admonished any agency personnel for releasing such material; and, to our knowledge, has provided no guidance to agency employees to prevent similar releases in the future.

To obtain reversal or modification of a decision on reconsideration, the requesting party either must convincingly show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of the decision. 4 C.F.R. § 21.12(a) (1993); Gracon Corp.--Recon., B-236603,2, May 24, 1990, 90-1 CPD ¶ 496. For the reasons set forth below, both requests for reconsideration fail to show that our analysis of the decision to exclude Peat Marwick from the competition was in error. We stand by our initial conclusion that release of the information to all of the offerors is permissible, and that such release (and not the exclusion of Peat Marwick from further participation in the procurement) is the appropriate remedy.

As an initial matter, while, as AID contends, our prior decision did not include an extended discussion on the releasability of the types of information included in the FOIA response, that does not mean we did not review this issue, or did not reach specific conclusions about whether the documents were properly released. In fact, our prior conclusion that all of the information provided in the FOIA response may be properly released to the other offerors to avoid the harsh--and in this case, unjustified--exclusion of Peat Marwick is based on the same analysis AID now urges our Office to undertake. In essence, AID does not challenge our recommendation that AID release information it has the authority to release, but seeks reconsideration of our recommended release of information which AID terms proprietary.<sup>4</sup>

As stated in our earlier decision, the information provided to Peat Marwick in the FOIA response clearly has commercial value in the reopened competition here. AID's FOIA response provided the following information to Peat Marwick:

1. redacted versions of the Nathan and DAI technical proposals, released in accordance with the instructions of both awardees;
2. a 1-page table entitled "Proposals Ranked in Order of Weighted Technical and Price Scores,"

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<sup>4</sup>Specifically, AID's reconsideration request complains that our prior decision failed to distinguish between information "covered by a [g]overnment privilege, which the [e]xecutive [b]ranch has the authority to waive" and information "subject to commercial, financial, or trade secret claims by the sources from which the information came." AID does not dispute that the former may be properly released, but argues that the latter may not.

ranking the 7 offerors by their total weighted scores;

3. a 1-page table, without a heading, listing the maximum fixed daily rates of an unidentified offeror;

4. a 1-page document, with the handwritten title "Attachment One," showing 4 tables ranking the 7 offerors by different calculation methods (each table includes each offeror's point score and combined average daily rate);

5. five score sheets (apparently prepared by 5 different evaluators), entitled "Selection Criteria Summary," showing the scores given each of the 7 offerors on each of the 4 evaluation factors, and 21 subfactors; and,

6. handwritten narrative comments prepared by an unidentified evaluator assessing the 7 offerors under each of the 4 evaluation factors.

All of this information properly may be released to ameliorate any competitive advantage to Peat Marwick as a result of the FOIA release.

First, AID has no basis to withhold from any party the redacted versions of the Nathan and DAI technical proposals. In response to Peat Marwick's FOIA request, AID properly notified Nathan and DAI that a request had been made for their technical proposals. Both parties provided to AID recommended redactions to their proposals, and AID released the material as redacted. There has been no suggestion that AID failed to redact the proposals as requested, and no argument that these offerors erred in their redaction requests. Simply put, there is no issue regarding the further release of these redacted proposals.<sup>5</sup>

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<sup>5</sup>AID earlier agreed with this position. AID's agency report on this protest stated that the release of these documents did not support the decision to exclude Peat Marwick:

"The first item, redacted technical proposals from Nathan and DAI, is not source selection information [sic], as the originators agreed to their release. These documents did not include cost details or technical details that the originators were unwilling to reveal, and Peat Marwick's possession of them probably would not seriously jeopardize the integrity of the

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Other than the redacted technical proposals, there is only one remaining item in the list of documents provided by AID that was obtained from an offeror.<sup>6</sup> This item, number 3 in the list above, is a 1-page table listing the maximum fixed daily rates of an unidentified offeror. These maximum fixed daily rates, while not identified in the material provided by AID, have since been identified as those of one of the awardees--Nathan--and were required by the RFP.

Section B.3.f. of the RFP required offerors to propose maximum daily rates for 10 categories of economic specialists--such as monetary theory and trade specialists, public finance specialists, and agricultural economics specialists. These daily rates are now set forth in schedule B of the contracts awarded to Nathan and DAI, and are equivalent to unit prices. Unit prices in contracts are not confidential and may be properly disclosed where the disclosure does not reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier. JL Assocs., Inc., B-239790, Oct. 1, 1990, 90-2 CPD ¶ 261, citing Acumenics Research & Technology, Inc. v. Dept. of Justice, 843 F. 2d 800, 808 (4th Cir. 1988); and Pacific Architects and Engineers, Inc. v. Dept. of State, 906 F.2d 1345 (9th Cir. 1990). In addition, FAR § 15.1001(c)(iv) expressly advises awardees that their unit prices will be disclosed to unsuccessful offerors, and AID has no basis for refusing to provide offerors with such unit prices. Thus, none of the offeror-provided information included in the FOIA response is eligible for protection as proprietary.

The remainder of the materials provided in the FOIA response--the score sheets, rankings, and narrative

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<sup>5</sup> (...continued)  
competition." AID Agency Report, July 30, 1993 at 8-9.

We presume the agency meant to describe the redacted technical proposals as proprietary information, not source selection information. Compare Federal Acquisition Regulation (FAR) § 3.104-4(j) (proprietary information) with § 3.104-4(k) (source selection information).

<sup>6</sup>Contrary to AID's earlier assertions, the rates included in the tables set forth in item 5 are not rates provided by the offerors. Rather, they are averages of maximum rates for 10 different categories calculated by the agency for evaluation purposes. As such, these rates impart little meaningful information about the prices actually proposed by the offerors, and cannot be considered proprietary to the offerors.

evaluation comments--while not proprietary, is "source selection material," see FAR § 3.104-4(k), and falls within the category of information AID acknowledges the government may waive its right to protect. Specifically, the procurement integrity provisions of the Office of Federal Procurement Policy (OFPP) Act recognize that source selection information may be released during the conduct of a procurement as authorized by the contracting officer or the head of the agency. 41 U.S.C. § 423(b)(3), (d) (1988 and Supp. IV 1992); FAR § 3.104-5(d). Even these limitations do not extend beyond the award of a contract, or a modification to a contract. FAR § 3.104-4(c)(2).<sup>7</sup> The OFPP Act thus does not bar the release of the information found in the remainder of the FOIA response. In short, the agency could have released this information at any time it chose, and cannot insist that the information related to contracts awarded more than a year ago is barred from release now, even if the procurement has been reopened.<sup>8</sup>

DAI complains that our recommended remedy is unfair because other offerors will have the benefit of its redacted proposal and its prices. We do not agree. First, with respect to its prices, DAI is in no different position than any other incumbent contractor; as the awardee of a government contract, its price is a matter of public record. FAR § 15.1001(c)(iv). We also note that DAI's prices were not released in the FOIA documents, thus our recommendation that the FOIA response be provided to all offerors does nothing to further disseminate DAI's prices--which, as stated above, are a matter of public record. Second, with respect to its redacted technical proposal, DAI recommended the redactions taken and AID proceeded as directed. DAI's recommended redactions were not conditional when proposed, and there is no basis for the government to now provide DAI with protections it waived more than a year ago.

#### PEAT MARWICK IS ENTITLED TO ITS PROTEST COSTS

CICA, 31 U.S.C. § 3554(c)(1)(A), authorizes our Office to declare that a protester is entitled to the costs of filing

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<sup>7</sup>This provision states that "[e]ach contract award and each contract modification constitutes a separate . . . period to which the prohibitions and the requirements of the Act apply."

<sup>8</sup>The suggestion that this situation is unique because the agency has reopened the procurement is unpersuasive. At this juncture, AID's awardees--having performed these services for more than a year--are in the same position as any contractor who must face competition to continue to perform services for the government.

and pursuing its protest, including reasonable attorneys' fees, where we find that "a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation." AID argues that we should not have invoked this authority here because, as our decision acknowledged, this was a case of first impression. In addition, AID argues that awarding Peat Marwick its costs will serve no public interest, and will not "provide relief to an impoverished citizen or small business."

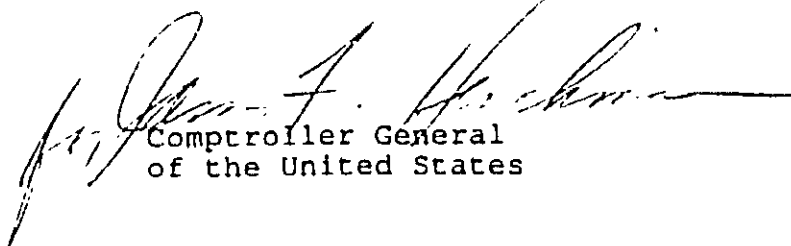
In essence AID argues that the outcome in this case could not reasonably be anticipated and that AID therefore should not be required to reimburse the protester for its costs. We disagree. Resolution of the issue in this case involved application of established legal principles regarding protection of competition-sensitive information and the statutory mandate for full and open competition. The fact that the circumstances giving rise to the protest here do not occur frequently--and that the case thus is unusual in this sense--does not mean that the award of costs is inappropriate.

On the contrary, award of costs here is consistent with the congressional intent behind the statutory provision authorizing the award of costs. Congress decided that reimbursing successful protesters their bid protest costs was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong. 2d Sess. 24-25 (1984). The entitlement to bid protest costs is intended to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. The award of costs is not intended as a reward to prevailing protesters, or as a penalty to the agency. W.S. Spotswood & Sons, Inc.--Claim for Costs, 69 Comp. Gen. 622 (1990), 90-2 CPD ¶ 50. Rather, reimbursement of protest costs serves the purpose of compelling agencies like AID to ensure that their procurement practices are fair and encourage full and open



competition. Thus, we think that the public interest is served by reimbursing Peat Marwick its costs of maintaining this protest.

The prior decision is affirmed.



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