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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Baxter Healthcare Corporation--Reconsideration

File: B-253455.5

Date: July 5, 1994

Justin D. Simon, Esq., Dickstein, Shapiro & Morin, for the protester.
Paul F. Khoury, Esq., Wiley, Rein & Fielding, for McGaw, Inc., an interested party.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the protester has not shown that the decision contained errors of fact or law and instead merely repeats arguments which were previously considered by our Office.

DECISION

Baxter Healthcare Corporation requests reconsideration of our denial of its protest of the award of a contract to McGaw, Inc. under invitation for bids (IFB) No. M5-1-94, issued by the Department of Veterans Affairs (VA). Baxter Healthcare Corp.; Abbott Labs.--Recon., B-253455.3; B-253455.4, May 10, 1994, 94-1 CPD ¶ 301. Baxter had protested that McGaw's bid should have been rejected as unbalanced.

We deny the request for reconsideration.

As explained in our initial decision, the pricing structure of McGaw's bid raised concern on the part of the VA that the bid might be materially unbalanced. After extensive review, however, the agency finally determined that McGaw's bid was not materially unbalanced. We found the agency's ultimate conclusion unobjectionable because, at the time of award, McGaw's was effectively the only eligible bid: of the two other bids, one, that of Abbott Laboratories, offered prices which the VA had found were unreasonably high and which were, in any event, significantly higher than McGaw's for every period of performance; and the other, Baxter's, had been submitted by a bidder who was suspended, and therefore ineligible for award, at the time of award on December 21, 1993.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains 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) (1994). Mere repetition of arguments made during our consideration of the original protest, while it demonstrates that the protester disagrees with our decision, does not satisfy this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Baxter's reconsideration request does no more than repeat arguments which it had presented in the extensive pleadings (including the record of the hearing conducted in this matter), and which our Office considered in reaching our initial decision. Baxter argues, however, that our decision was premised on two errors of law.[1] We briefly address each.

First, Baxter argues that there is no legal authority for what it refers to as "dividing a day into hours, minutes, or, conceivably, seconds, for purposes of determining eligibility." This argument pertains to the fact that, while the document awarding the contract to McGaw was signed by the contracting officer during the morning of December 21, an agreement lifting Baxter's suspension was signed by the Deputy Assistant Secretary for Acquisition and Materiel Management during the afternoon of that same day. According to Baxter, since both events occurred on the same day, our Office erred in attaching legal significance to the fact that one event happened before the other. In support of its position, Baxter relies on our decision Tracor Applied Sciences, Inc., B-221230.2 et al., Feb. 24, 1986, 86-1 CPD ¶ 189.

Far from supporting Baxter's view, Tracor itself provides the precedent that Baxter claims is lacking, and demonstrates the reasonableness of the VA's position here.

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[1]Baxter also asserts that our decision was premised on a factual error. In Baxter's view, the award actually took place after the suspension was lifted, since the document issued on the morning of December 21 stated that McGaw had been selected for award "effective February 16, 1994." After considering the parties' extensive briefing of this point during the initial protest, we concluded that the evidence supported the agency's position that the reference to February 16 as the effective date of award was an error (corrected by the agency on December 30), and that the award date was, indeed, December 21. Baxter's request for reconsideration on this point offers no new factual or legal argument, and merely disagrees with our conclusion, which does not provide a basis for reconsideration. 4 C.F.R. § 21.12(a).

In that case, as in the present one, award was made during the morning, and an agreement lifting the protester's suspension was signed several hours later. In both cases, the contracting officer did not know at the time of award that the suspension was about to be lifted. In both cases, the protester argued that the agreement lifting the suspension should be construed to mean that the suspension ended at the beginning of the day the agreement was signed (that is, the agreement should be considered as having taken effect a number of hours before it was signed) and that the law does not take notice of fractions of a day. We found in Tracor, however, that the contracting officer reasonably awarded to the second-ranked offeror because of the suspension of the protester, whose proposal would otherwise have been in line for award. Tracor thus supports the proposition, which we find unremarkable, that a contracting officer may properly exclude from consideration an offeror suspended (or reasonably understood to be suspended) at the time of award, even if doing so involves "dividing a day." Further, Baxter provides no authority for the proposition that the agreement should have been considered retroactive to some time before it was actually signed by the government.

Second, Baxter contends that our Office erred as a matter of law in finding that, where there is only one eligible bid, it cannot be found materially unbalanced. In support of this view, Baxter points to the apparent mathematical unbalancing in McGaw's pricing structure and the potential that Baxter's bid could cost the government less than McGaw's.

Under Federal Acquisition Regulation (FAR) § 52.214-10, a bid cannot be found materially unbalanced, regardless of how mathematically unbalanced its pricing structure is, unless there is reasonable doubt that the bid will result in the lowest overall cost to the government.[2] Such doubt can arise only where there is another eligible bid against which to compare the mathematically unbalanced one and which might cost the government less. Here, one competing bid had been rejected for unreasonably high prices and the only remaining bid was submitted by a suspended firm; thus, there was no eligible bid which might cost the government less than

[2]The one exception is where the pricing structure is so grossly front-loaded as to be tantamount to requiring an advance payment. FAR § 52.214-10. For the reasons explained in our initial decision (and not challenged by Baxter in its request for reconsideration), McGaw's bid could not properly be rejected on that basis.

McGaw's. It was for that reason that we concluded that the agency's determination that McGaw's bid was not materially unbalanced was not objectionable.[3]

The request for reconsideration is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

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[3]Although the sole eligible bid cannot properly be rejected as materially unbalanced, it may be rejected if the contracting officer determines that its prices are unreasonable as to price. FAR § 14.404-2(f). In this case, however, the record did not support such a finding.