

Miller



Comptroller General
of the United States

428197

Washington, D.C. 20548

Decision

Matter of: Advanced Research Projects Agency--
Reconsideration

File: B-259479.3

Date: July 18, 1995

Lee Curtis, Esq., and William A. Roberts III, Esq., Howrey & Simon, for the protester.
Diane M. Sidebottom, Esq., Advanced Research Projects Agency, for the agency.
Behn Miller, 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 the requesting party does not provide any facts, evidence, or arguments that were not already considered in the prior decision, but merely disagrees with the decision.

DECISION

The Advanced Research Projects Agency (ARPA) requests reconsideration of our decision, KPMG Peat Marwick, LLP, B-259479.2, May 23, 1995, 74 Comp. Gen. ____, 95-2 CPD ¶ ____, in which we sustained Peat Marwick's protest of the award of a contract to Bradson Corporation under request for proposals (RFP) No. MDA972-94-R-0001, issued by the agency for financial management support services at the agency's Comptroller Office, located in Arlington, Virginia. In that decision, we sustained the protest based on our finding that ARPA had improperly failed to perform a cost realism analysis of the awardee's proposal and had otherwise improperly permitted the awardee to modify its technical proposal after award without giving other offerors the same opportunity. On reconsideration, ARPA contends that we misinterpreted the record and made several errors of law.

We deny the request for reconsideration.

The RFP contemplated the award of a cost-plus-fixed-fee contract and required offerors to submit both a technical and cost proposal. The required financial management support services were organized into four "task" categories: Fiscal Control Desk (Task 1); Budget Analyst Support (Task 2); Program Analyst Support (Task 3); and

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Administrative Support (Task 4). For their technical proposals, offerors were required to submit a detailed "Technical Plan" describing a personnel placement plan and technical approach for accomplishing the required services and including resumes for each proposed individual. In this regard, while the RFP contained a "desired" labor mix chart requiring offerors to propose a minimum staffing plan comprised of 4 Fiscal Control Desk personnel, 7 Program Analysts, and 2.5 Budget Analysts, the experience level and organization of the proposed personnel--as well as whether to propose more than the required minimum staff--were left to the discretion of each offeror to be evaluated as part of that offeror's proposed technical approach.

By the September 9, 1994, closing time, three offers--including those of Peat Marwick and Bradson--were received. Of significance here, the technical evaluation board (TEB) determined that the proposals of Peat Marwick and Bradson were both "excellent" and significantly exceeded the third offeror's proposal in technical merit. After receiving the TEB's evaluation results, the advisory council excluded the third offeror's proposal from further consideration, and otherwise determined that because there was only a slight point difference between the two remaining proposals, they were technically equivalent. Consequently, in accordance with the RFP's evaluation criteria--which provided that the government would select for award the most advantageous offer--the advisory council decided that contract award would be based on cost.

According to the contracting officer--who was the de facto chair of the advisory council--because three offerors had competed for this requirement, she concluded that the agency had obtained "adequate price competition," and consequently no cost realism analysis was required. The record showed that the contracting officer awarded a contract to Bradson based on its significantly lower price, but without performing any meaningful cost realism analysis. The record also showed that by means of post-award modifications, the agency permitted Bradson to alter its proposed technical approach and replace many of its proposed staff with less experienced personnel.

We sustained Peat Marwick's protest on two grounds: (1) that ARPA improperly failed to perform a cost realism analysis; and (2) that ARPA improperly permitted the awardee to modify its technical approach and proposed personnel after award. On reconsideration, ARPA essentially disagrees with our conclusion that no meaningful cost realism analysis was performed and otherwise asserts--as it did during the initial protest--that no such analysis was required. ARPA also challenges our finding that the agency awarded the

contract to Bradson with the intent to engage in post-award modifications.

Our Bid Protest Regulations require that a party requesting reconsideration 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) (1995). Repetition of arguments made during the original protest or mere disagreement with our decision does not constitute a valid basis for reconsideration. Varec N.V.--Recon., B-247363.7, Mar. 23, 1993, 93-1 CPD ¶ 259. Here, ARPA has not presented any new facts, evidence, or arguments that were not already considered in our prior decision. Rather, ARPA continues to object to our decision that a cost realism analysis was legally required and disagrees with our weighing of the evidence in the record in resolving the cost realism and post-award modifications issues which were presented.

To the extent ARPA continues to insist that a cost realism analysis was not required in this case, as discussed at length in our prior decision, the agency is mistaken. On reconsideration, ARPA maintains that because the Federal Acquisition Regulation (FAR) does not explicitly state that the contracting agency must perform a cost realism analysis for every cost reimbursement-type contract to be awarded on a "most advantageous" basis, and because Defense Federal Acquisition Regulation Supplement (DFARS) § 215.805-70(a) merely states that "the contracting officer should perform a cost realism analysis when a cost-reimbursement type contract is anticipated (emphasis added)," this Office has erroneously "inferred a requirement for a cost realism analysis into the FAR where none exists."

First, the FAR is not silent regarding the requirement for a cost realism analysis; as noted in our prior decision, FAR § 15.605(c)¹ establishes that the basis for the cost

¹At the time of our initial decision, this provision was enumerated as FAR § 15.605(d); however, on March 31, 1995, this provision was renumbered as FAR § 15.605(c). This provision states:

"[i]n awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement

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realism analysis rule is that an offeror's estimated costs may not provide valid indicators of the final and actual allowable costs that the government is required to pay. Moreover, although the "should" language of the DFARS provision renders a cost realism analysis a matter of discretion, this regulation does in fact recommend that a cost realism analysis "should" be performed whenever a cost reimbursement-type contract is contemplated--even if there is adequate price competition. See DFARS § 215.805-70(a). While these two regulations apparently fail to enunciate--to ARPA's satisfaction--that a cost realism analysis is absolutely required for all cost-reimbursement type contracts to be awarded on a "most advantageous" basis, this rule has otherwise been established and consistently reiterated throughout our case law. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325; CACI, Inc.--Federal, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542; Tecom, Inc., B-257947, Nov. 29, 1994, 94-2 CPD ¶ 212. Simply stated, no agency cost evaluation under a "most advantageous" award scenario can be considered reasonable unless it takes into account whether the contractor can perform at its proposed costs. See Grey Advertising, Inc., supra. The term used to refer to an agency's consideration of whether offerors can perform at their proposed costs is "cost realism" analysis--and, as indicated both here and in our prior decision, is an analysis which must be performed whenever a cost reimbursement-type contract is to be awarded under a "most advantageous" award scenario.

ARPA next argues--again repeating arguments made during the prior protest--that the contracting officer's limited review of costs was sufficient to constitute any required cost realism analysis. We have already considered and rejected this position; as discussed in our prior decision, we found the agency's representations regarding the cost review to be unpersuasive. First, it was clear from the contracting officer's testimony that the review she performed was clouded by a belief that no cost realism analysis was required; apparently because of this belief, the contracting officer's analysis was not performed in any meaningful

¹(...continued)

contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria."

detail. For example, when significant flaws in the contracting officer's review of Bradson's indirect rates were pointed out by the protester's counsel during cross-examination in the hearing on the protest, the contracting officer responded that her examination was only performed to obtain a "warm and fuzzy feeling" about Bradson's indirect rates. Transcript Volume Number (Tr. Vol. No.) 3 at 257. Similarly, the contracting officer stated that documentation of her review "wasn't required"--consequently, all notes on the review were discarded--and otherwise asserted that notwithstanding errors or discrepancies in her analysis, she was under no obligation to perform this type of review. Tr. Vol. No. 3 at 266; 274; 295.

Other flaws in the contracting officer's review which were repeatedly pointed out by the protester's counsel throughout the initial protest were not rebutted or reasonably explained by the agency; for example, while the agency takes issue with our characterization of one of the comparison contracts used to examine Bradson's direct rates as a "graphics services" contract, the fact is that the contracting officer improperly deemed word-processing-type skills provided under that contract to be comparable to the financial management services and analysis required under the instant procurement, even though word-processing does not require the educational background, *i.e.*, an accounting degree, which the agency set forth as a minimum qualification for personnel performing the services required here. Tr. Vol. No. 3 at 15 and 16. In sum, we found the contracting officer's review to be insufficient due to its lack of detail and depth, and consequently concluded that the cost realism analysis was flawed.² Nothing in the agency's reconsideration request changes our conclusion.

ARPA also takes issue with our conclusion that the agency awarded this requirement to Bradson with the intent to permit post-award modifications. As noted above, ARPA's disagreement with our interpretation of the evidence does not constitute a basis for reconsidering our prior decision. See Varec N.V.--Recon., *supra*. In any event, as explained below, we see no basis to reconsider our conclusion--based on testimony provided at the hearing--that ARPA awarded the

²On reconsideration, ARPA contends--as it did during the initial protest--that the cost proposal review performed by the advisory council and source selection authority constituted adequate cost realism analyses. We continue to find this contention unpersuasive since the contracting officer's deficient analysis formed the basis for the conclusions reached by both the advisory council and the source selection authority.

contract to Bradson expecting significant post-award modifications.

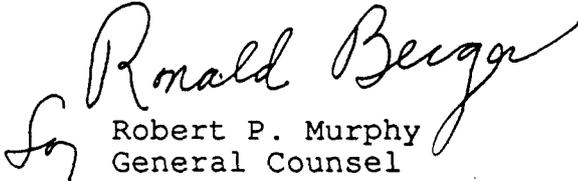
The testimony by ARPA personnel demonstrated that the agency expected Bradson's performance to be successful only if Bradson changed its technical approach and personnel.³ The record also showed that because of the agency's post-award meeting with Bradson, Bradson substantially modified its technical approach and personnel. Although the ARPA Comptroller stated that he did not literally instruct Bradson to bring in new personnel or alter the organization of its staff, we concluded from the record as a whole that the Comptroller in fact conveyed this suggestion to the awardee during the post-award meeting.

In any event, even assuming for the sake of argument that the Comptroller did not intend to engage in post-award modifications, the fact is that regardless of intent, the agency actually did permit Bradson to change its technical approach and substitute less qualified personnel after award--apparently believing that such modifications were permitted by the RFP's key personnel clause. As pointed out in our prior decision, such post-award changes exceed the scope of the key personnel clause, which is simply intended to permit the natural turnover of personnel that tends to occur during the performance of the contract. That is, the clause cannot be used by the agency in the manner it was here if the effect of the personnel substitutions is to significantly modify the contract awarded since such an interpretation would render meaningless the competition on the original solicitation requirements. See Planning Research Corp. v. U.S., 971 F.2d 736 (Fed. Cir. 1992).

³For example, the ARPA Comptroller testified that with respect to Bradson's proposal to place "a contract manager in the technical offices as opposed to the comptroller's office . . . we felt that would be--that would be a very difficult situation." Tr. Vol. No. 4 at 10. Additionally, with regard to one of the personnel proposed by Bradson, the Comptroller testified as follows: "[we] said, 'my god.' I mean you would never put that kind of person in an entrance level job." Tr. Vol. No. 4 at 13. In addition, one of the technical evaluators testified that, as proposed, aspects of Bradson's performance would have been "humanly impossible" and "would have created one heck of a problem." Tr. Vol. No. 4 at 206-207. Finally, the TEB's evaluation notes indicated that Bradson's proposed project manager faced "overwhelming" performance difficulties because of his assigned "dual hatted" responsibilities.

In this regard, while the agency continues to contend that the post-award timing of the Bradson contract modifications renders these particular actions matters of contract administration beyond the scope of this Office's jurisdiction, we will review such actions which occur during the contract performance stage where--as here--the protester alleges that the post-award actions evidence improper action by the agency during the evaluation and award phase of a procurement. See McLaughlin Research Corp., 71 Comp. Gen. 383 (1992), 92-1 CPD ¶ 422; Dash Engineering, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363.

The request for reconsideration is denied.


Robert P. Murphy
General Counsel