



Decision

Matter of: National Aeronautics and Space Administration--Reconsideration

File: B-408112.3

Date: May 14, 2014

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DIGEST

Request for reconsideration is denied where the agency reiterates arguments made previously, expresses disagreement with the prior decision, and fails to show that our prior decision contains errors of fact or law, or present information not previously considered, that would warrant reversal or modification of the prior decision.

DECISION

The National Aeronautics and Space Administration (NASA) requests reconsideration of our decision in Wyle Laboratories, Inc., B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16, in which we sustained the protest of Wyle Laboratories against NASA's award of a contract to Science Applications International Corporation (SAIC), pursuant to request for proposals (RFP) No. NNJ12399614R, for medical, biomedical, and health services supporting NASA's human spaceflight programs. NASA asserts that our earlier decision was incorrect as a matter of fact and law, and should now be reversed.

We deny the request for reconsideration.

In our prior decision, we found that SAIC's proposal, and NASA's evaluation thereof, failed to reflect the manner in which SAIC actually intended to perform the contract. We reached this conclusion because the agency was aware that SAIC contemplated an imminent corporate restructuring that would divest the parent corporation of the primary business unit (SAIC Company 116) responsible for the subject health services contract.

The record in our prior protest showed that SAIC had advised NASA during discussions that it intended a corporate restructuring in which SAIC would spin off certain technical services business units, including Company 116. The remainder of the "old" SAIC would then be renamed "Leidos," a solutions-focused business, and the spun-off firm thereafter renamed SAIC.¹ SAIC specifically advised the agency that it intended that "new" SAIC--a technical services company with approximately one-third of the corporate resources of "old" SAIC--would be the prime contractor for the requirement.

The record also showed that SAIC's technical proposal was inconsistent with this intended plan, and instead reflected the corporate structure and full corporate resources of "old" SAIC. In our decision we concluded that the evaluation was improper where SAIC's proposed technical approach and cost proposal were materially different from SAIC's stated intent, as reflected in the discussions responses furnished to NASA.

NASA maintains that our decision erred by improperly divesting the agency of its reasonable discretion concerning a matter of contract administration (SAIC's intended post-award corporate restructuring) beyond the scope of our bid protest authority, and by relying on incorrect facts and speculation about future events. NASA also contends that our decision will chill competition, by precluding awards to firms contemplating corporate restructuring, and will therefore have a detrimental impact on full and open competition.

To prevail on a request for reconsideration, the requesting party either must show that our decision contains errors of fact or law, or present information not previously considered that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a) (2011); Department of Veterans Affairs--Reconsideration, B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 3. A request that reiterates arguments made previously and merely expresses disagreement with the prior decision does not meet the standard for granting reconsideration. *Id.* at 4. We have reviewed NASA's request and conclude that it does not provide a basis for us to reconsider our earlier decision.

¹ Herein, we refer to the pre-restructuring entity as "old" SAIC, the majority successor firm as Leidos, and the spun-off firm as "new" SAIC.

With regard to NASA's assertion that our decision erred as a matter of law by divesting the agency of its discretion regarding a matter of contract administration--specifically, its discretion to award the contract to SAIC and later consider whether to novate the contract to the spun-off "new" SAIC--we conclude that the agency's arguments concerning contract administration were raised during the initial protest, and considered in our prior decision. In its supplemental agency report, NASA asserted that the entire matter of SAIC's proposed restructuring, so long as it had not yet occurred by the time of contract award, was a matter of contract administration concerning the awardee's ability to perform the contract, and was not for consideration by our Office. Supplemental Agency Report at 7-8. In this regard, NASA relied on our Office's decisions in Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77, and Bosma Mach. & Tool Corp., B-257443.2, B-257443.3, Oct. 17, 1994, 94-2 CPD ¶ 143, for the proposition that, where there is no evidence that the agency awarded the contract with the intent to novate it to another firm, "the novation relates not to the award of a contract but to contract administration." Bosma Mach. & Tool Corp., supra, at 4.

In our decision sustaining Wyle's protest, however, we concluded that the publically available information, and information in the evaluation record, demonstrated that both SAIC and the agency were aware that SAIC's divestment of Company 116 was both imminent and essentially certain. Wyle Laboratories, Inc., supra, at 3-4. In this regard, unlike other corporate restructurings (for example, the sale of a business unit, which would involve an arms-length transaction with a third party) the timing and manner of the spin-off contemplated by SAIC was within the control of SAIC and did not require the coordination or consent of another firm. Further, the record in the underlying protest showed that SAIC had disclosed detailed separation plans to the Securities and Exchange Commission as early as March 7, 2013, and had expressly advised the agency that the separation was expected to occur in the latter half of 2013, pending only the final approval of the SAIC board of directors. Wyle Supplemental Comments, Exhibit 1; Agency Report (AR), Sub-Tab 126, Exchanges with Offerors, at 024840. Under these circumstances, we did not view the proposed corporate restructuring in this case to be a speculative or uncertain future matter at the time of the agency's August 21, 2013 award decision.²

Accordingly, we rejected NASA's contention that "there is no evidence that NASA made the award to SAIC with the intention of entering into a novation agreement." Supplemental Agency Report at 9. We instead concluded that both SAIC and the agency understood that SAIC, as constituted at the time of its proposal, would not be performing the required medical, biomedical, and health services requirements.

² The record in the prior protest reflected that SAIC's board of directors approved the proposed restructuring on September 9, 2013, with an effective reorganization date of September 27, 2013. Supplemental Agency Report at 6-7.

It was clear at the time of the award that NASA knew that it would have to accept performance of the contract by an entity that was fundamentally different from the one presented in SAIC's technical proposal, on which the agency's evaluation findings and award decision was based.³ Thus, despite NASA's assertions to the contrary, our decision to address SAIC's corporate restructuring issues as a matter relating to the award of a contract was consistent with our previous decisions in Acepex and Bosma, *supra*. In any event, where NASA's argument is a reiteration of an argument made, and addressed, in our prior decision, it does not provide a basis for reconsideration.

NASA next argues that our prior decision contained factual errors and was improperly based on speculation about future events where it presumed that "new" SAIC would perform the contract. NASA asserts that, because "old" SAIC had no authority to unilaterally assign the contract to "new" SAIC, our Office incorrectly assumed that "new" SAIC would inevitably perform the contract, because NASA retains the ability and discretion to compel performance of the contract by Leidos, or otherwise tailor the performance of the contract based on the facts of the corporate restructuring. NASA argues that by exercising its discretion to control the manner of performance during contract administration, it could seek various considerations from SAIC, such as improved rates, which may be more advantageous than those anticipated by the initial award.

While our prior decision cites "old" SAIC's express statement that "new" SAIC will be the firm to ultimately perform the contract, AR, Sub-Tab 126, Exchanges with Offerors, at 024840, the conclusions set forth in the decision are equally applicable whether either "new" SAIC or Leidos ultimately performs as the prime contractor. The basis of our decision was that where "SAIC's proposal, and the agency's evaluation thereof, was based on the technical approach, resources, and costs associated with 'old' SAIC," its proposal reflected resources and an approach to performing the contract that was materially different from its actual intent. Wyle Laboratories, Inc., *supra*, at 11. An award based on such a proposal cannot stand.

For example, in S.C. Meyers & Assoc., Inc., B-286297, Dec. 20, 2000, 2001 CPD ¶ 16 at 4-6, we concluded that an agency properly rejected an offeror's proposal after learning that the offeror did not intend to utilize a proposed key individual for the duration of performance, but instead intended to replace the individual after a short transition period. In addition, the record in the S.C. Meyers case showed that the situation could not be characterized precisely as a "bait and switch" case because the protester disclosed during discussions its intent to perform with a different project director than initially proposed. *Id.* at 3-4. Nonetheless, our

³ As noted in our decision and above, SAIC explained that after its planned reorganization, "new" SAIC--the entity proposed for performance of the health services requirements--would not be affiliated or connected to Leidos in any way.

decision concluded that the agency reasonably viewed the situation as “a kind of ‘bait and switch’” because of the disconnect between the project director offered in the proposal and how the protester intended to perform. Id. at 4-5. See also, Greenleaf Constr. Co., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 8-10.⁴

In the case at hand, the impact of the disconnect between SAIC’s proposal and its intended manner of performance was further magnified where the contract at issue was a cost-reimbursement contract and the entirety of the agency’s cost evaluation was premised on performance by old SAIC.⁵ Under a cost-reimbursement contract, it is the government that bears the risk and responsibility to pay the contractor’s actual allowable costs, regardless of the costs set forth in the offeror’s proposal. See Federal Acquisition Regulation § 16.301.

Next, to the extent the agency presumes that our prior decision will chill competition by precluding awards to entities contemplating corporate restructuring, we believe that NASA over-reads the application of the decision. Our protest decisions in this area demonstrate that matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing. See e.g., Consortium HSG Technischer Service GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Management KG, B-292699.6, June 24, 2004, 2004 CPD ¶ 134 (change in ownership of one of two entities comprising a joint venture did not render the agency’s evaluation of the joint venture’s proposal unreasonable, where the entity remained intact and the resources offered by the entity remained available); AIU

⁴ NASA criticizes our citation of “bait and switch” decisions where there was no argument that NASA was misled. That is, that SAIC’s discussion responses were clear as to its intent that “new” SAIC would perform the contract and, thus, that there was no “bait and switch.” We agree that there was no misrepresentation in this case; however, our Office’s citation of “bait and switch” decisions was simply for the proposition that an agency must be concerned with evaluating the manner in which a contractor will actually perform.

⁵ Concerning NASA’s argument that it could control the manner of performance, and risks presented by SAIC’s restructuring, through contract administration processes, the contemporaneous evaluation documents contained no record of the agency’s consideration of this strategy. Rather, our prior decision found that despite knowledge of SAIC’s imminent and near-certain reorganization, the agency made no attempt to consider the risk of SAIC’s restructuring or possible mitigation of that risk. Instead, the agency’s arguments during the prior protest acknowledged that, even after seeking details relevant to SAIC’s plans, the agency apparently concluded that the risks posed by SAIC’s reorganization were unsuitable for the evaluation.

North America, Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 (evaluation of corporate resources was unreasonable where the agency failed to consider a change in the offeror's corporate ownership).

In this case, we concluded from the record regarding SAIC's intended restructuring--including SAIC's express statements and the fact that the restructuring did not involve a third party--that SAIC did not intend to perform the contract in the manner set forth in its proposal. Rather, the record reflected that SAIC actually intended that the spun-off "new" SAIC would be the prime contractor for the NASA contract, with subcontract support from business units remaining with the organization renamed Leidos. Accordingly, we concluded that SAIC's proposal did not reflect its intended manner of contract performance, and that the disconnect between SAIC's proposal and intended performance was apparent to the agency at the time of the evaluation. Under these circumstances, the agency's failure to record any consideration of the risks to SAIC's proposed approach, or to otherwise reconcile SAIC's technical and cost proposals with SAIC's plan to substitute a different firm as the prime contractor, was unreasonable.

In sum, our prior decision does not conclude that any firm undertaking reorganization will be ineligible for the award of a contract. Instead, the prior decision concludes that agencies cannot ignore an offeror's express statement that it intends to perform a contract in a materially different manner from that reflected in its proposal.

We deny the request for reconsideration.

Susan A. Poling
General Counsel