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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205594.3

DATE: September 24, 1982

MATTER OF: Space Age Engineering, Inc.--Reconsideration

DIGEST:

1. Requirement in GAO Bid Protest Procedures that requests for reconsideration specify errors of law or information not previously considered refers to information which may have been overlooked by GAO or which was unavailable during pendency of protest, not to information which party seeking review had opportunity to submit but declined to submit.

2. Allegation that bidder had submitted a bid modification which made its bid balanced does not provide the basis for reconsideration where the interested party knew that agency had based its report on the original bid, without reference to any alleged modification, and the interested party expressly declined to provide any information in this regard during the pendency of the protest.

3. Where protester's argument is based on disagreement with earlier decision, without demonstrating that it was erroneous, protester has not presented basis to reverse prior decision.

Space Age Engineering, Inc. (SAE), requests reconsideration of our decision regarding the protest of Lear Siegler, Inc., B-205594.2, June 29, 1982, 82-1 CPD 632.

We affirm our decision of June 29, 1982.

In that decision, we found that SAE had submitted a mathematically unbalanced bid which required rejection. However, since the solicitation in question had failed to include a required clause warning bidders of the possible rejection of unbalanced bids as nonresponsive, we held that the solicitation was materially defective and recommended that it be canceled.

SAE argues that our decision failed to take into consideration material facts which require that the solicitation be reinstated. In particular, SAE argues that our decision considered the September 29, 1981, bid which it submitted to the Army, but did not consider a bid modification which it made in December and confirmed on January 11, 1982, which made the terms more advantageous to the Government. SAE asserts that the amended bid was accepted by the Army on February 24, 1982, and was not materially unbalanced. However, the so-called "acceptance" of February 24 states "The necessary approval to award has not been received as of this date." Further, the record indicates that the approval for award was never given.

Our Bid Protest Procedures, 4 C.F.R. § 21.9 (1982), require that requests for reconsideration contain a detailed statement of the factual and legal grounds for such action. In addition, the request must specify any errors of law made or information not previously considered by our Office.

Information not previously considered refers to that which a party believes may have been overlooked by our Office or to information to which a party did not have access during the pendency of the original protest; additional information obtained under a Freedom of Information Act request would be an example of the latter. Any other interpretation would permit a protester, an agency or an interested party to present information to our Office piecemeal, disrupting a procurement for an indefinite time. B&M Marine Repairs, Inc.--Request for Reconsideration, B-202966.2, February 16, 1982, 82-1 CPD 131.

SAE has not met the criteria for reconsideration. There is nothing in its request which it could not have presented for our initial consideration had it elected to do so. The protest was filed by Lear Siegler, Inc., on February 22, 1982. The Army report was sent on April 23, 1982. As an interested party to the protest, SAE was provided with a copy of the report and was invited by our Office to comment on the report. The report made no reference to the alleged bid modification; rather, it dealt only with whether or not the original bid submitted by SAE was unbalanced. By letter to our Office dated May 7, 1982,

SAE stated that it declined to provide any comments on the report. Clearly, at that time, SAE was well aware that our Office was considering the propriety of its original bid and was not considering the alleged modification. SAE was fully aware of its submission of the alleged modification before it submitted its comments and was aware that the Army report made no reference to the modification, but SAE declined to make any comment in this regard. Interested parties who withhold or fail to submit all relevant evidence to our Office, expecting that the contracting agency will adequately represent their position or that we will draw conclusions favorable to them, do so at their own risk since our Office bases its decision on the written record before us. B&M Marine Repairs, Inc., supra.

Our decision, which we believe was correct when it was made, was based on a careful examination of the prices submitted by the bidders for base and option years. SAE has not shown that we misunderstood the facts then known or misapplied them to the applicable provisions of law.

In any event, we note that SAE's argument is based on a mistaken premise, namely, that it could properly amend its bid after bid opening. Defense Acquisition Regulation § 7-2002.2(d) (1976 ed.) provides that a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted. SAE argues that this provides a basis for acceptance of its late bid modification. In fact, it is only a narrow exception to the general principle that bid changes submitted after bid opening may not be considered. The prerequisite for permitting such a late change is that the bid as originally submitted must already be the low responsive bid and, thus, be the "otherwise successful bid" within the meaning of the regulation. United Baeton International, B-200721, February 2, 1981, 81-1 CPD 59.

In our decision, we found that SAE's bid was materially unbalanced and, therefore, unacceptable. Thus, it was not "otherwise successful" prior to the alleged modification. SAE alleges that its original bid was only

mathematically unbalanced until our decision made the bid materially unbalanced. However, this is merely to disagree with our finding that the bid was materially unbalanced. It was not our decision which rendered an otherwise acceptable bid materially unbalanced. Rather, our decision determined that the bid as submitted was materially unbalanced. In essence, SAE is merely taking exception to our legal conclusion without providing any new argument in this respect. Mere disagreement with our prior decision does not provide a basis to reverse our decision. Biospherics, Inc.--Reconsideration, B-203419.4, March 16, 1982, 82-1 CPD 246.

for Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-205594.3 September 24, 1982

The Honorable John O. Marsh
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision B-205594.3 of today denying the request for reconsideration of Space Age Engineering, Inc., regarding a prior decision of our Office concerning solicitation No. DAKF40-81-B-0001 issued by Fort Bragg, North Carolina.

In our prior decision, we sustained a protest filed by Lear Siegler, Inc., and recommended that the solicitation be canceled. We advised your office that, since the decision contained a recommendation for corrective action, in accordance with section 236 of the Legislative Reorganization Act of 1970, 32 U.S.C. § 1176 (1976), the Army was required to submit written comments to the appropriate House and Senate committees concerning the action taken with respect to our recommendation.

By letter dated July 7, 1982, the Chief, Contract Law Division, Office of the Judge Advocate General, questioned whether it was necessary to submit these comments to the committees. The letter recognized the need to file comments with respect to decisions containing recommendations which result in termination for convenience of the Government or nonexercise of an option under an existing contract, but suggested that such comments should not be required where the Army agrees to follow a recommendation that a solicitation be canceled when no contract has been awarded.

We have interpreted the comments requirements under section 236 to apply to decisions which contain recommendations for definitive corrective action. We agree that such recommendations usually involve the termination of an existing contract or the nonexercise of an option. However, in this instance, we noted the fact that the Army determination not to cancel the solicitation had been made in response to the filing of a suit in United States District Court and constituted a reversal of an initial determination to cancel. In the circumstances, we viewed our decision as containing a recommendation for definitive corrective action.

We note that by letter of August 31, 1982, your Office has advised us that the required comments have been sent to the Chairmen of the appropriate congressional committees.

Sincerely yours,

Comptroller General
of the United States

Enclosure