



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Deployable Hospital Systems, Inc.--Reconsideration

File: B-260778.4

Date: July 8, 1996

Michael A. Gordon, Esq., and Fran Baskin, Esq., Holmes, Schwartz & Gordon, for the protester.

Barbara S. Kinosky, Esq., Bean, Kinney & Korman, for TVI Corporation, an interested party.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where request either restates arguments raised earlier and disagrees with the original decision, or presents no new information warranting reversal.

DECISION

Deployable Hospital Systems, Inc. (DHS) requests reconsideration of our decision in Deployable Hospital Sys., Inc., B-260778.2; B-260778.3, Feb. 12, 1996, 96-1 CPD ¶ 113, in which we denied its protests against the affirmation of the award of a contract to TVI Corporation under request for proposals (RFP) No. FA0021-95-R-0009, issued by the Department of the Air Force for deployable integrated mobile hospital tent systems.

We deny the request for reconsideration.

We sustained DHS' protest of the original award to TVI because the Air Force's failure to document its technical evaluation and its determination that TVI satisfied a definitive responsibility criterion compelled a conclusion that they lacked a reasonable basis. Deployable Hosp. Sys., Inc., B-260778, July 21, 1995, 95-2 CPD ¶ 65. We recommended that the Air Force reevaluate the proposals, adequately document the evaluation, and make a best value determination based upon the reevaluation results. Pursuant to that recommendation, the Air Force determined that TVI satisfied the solicitation's definitive responsibility criterion and its unrated general considerations, and rated TVI's proposal superior to DHS' acceptable under both technical evaluation factors. Based upon these findings and a consideration of

the large difference between the offerors' prices, the Air Force affirmed its award to TVI.

DHS' protest first challenged the agency's determination that TVI satisfied the definitive responsibility criterion, which required offerors to provide "a list of the three most recent sales of this or similar items/services"¹ This solicitation sought offers for soft shelters packed within a utilities trailer--a soft shelter system. As explained in our decision, since TVI had no recent sales of "this item"--a soft shelter system--the question was whether the contracting officer reasonably determined that TVI's sales of soft shelters alone and/or its sales of targets and decoys were sales of "similar items" for the purpose of this satisfying this criterion. As discussed in our decision, during the reevaluation, the contracting officer prepared detailed findings in which she answered this question in the affirmative.

During the protest, DHS argued that a "similar item" must be comprised of all the elements of the system, in this case, the soft shelters and the utilities trailer. We concluded, however, that previous soft shelter sales would constitute evidence of sales of "this item"--a soft shelter system--and that DHS' proffered reading unreasonably eliminated the "similar item" provision from the criterion. Since the contracting officer's documented determination that TVI's recent sales involved "similar items" was supported by the record, we had no basis to find it unreasonable. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154.

In its request for reconsideration, DHS again contends that TVI's recent sales of soft shelters alone were not sales of "similar items" because these were but one element of the system. DHS' request consists largely of quotations from its prior filings. 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. See 4 C.F.R. § 21.12(a) (1995); R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. DHS has not met this standard.²

¹A definitive responsibility criterion is a specific and objective standard established by an agency for use in a particular procurement for the measurement of an offeror's ability to perform the contract. Federal Acquisition Regulation (FAR) § 9.104-2; D.H. Kim Enters., Inc., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86. The parties here did not dispute that this requirement is a definitive responsibility criterion.

²DHS' reliance on language in our initial decision, in which we queried whether the sales of soft shelters alone were sales of "similar items," is misplaced. Our concerns then were in response to the agency's complete failure to document its
(continued...)

DHS' protest next challenged the agency's finding that TVI met the solicitation's general consideration with respect to financial capability.³ DHS contended that the agency's reliance upon TVI's pre-award survey results in making this determination improperly ignored evidence calling those results into question.

The contracting officer's initial evaluation relied upon the Defense Contract Management Area Operations (DCMAO) office's pre-award survey findings. In that survey, DCMAO reviewed copies of TVI's financial information, provided over the signature of TVI's then-president, Mr. Brent Molovinsky. DCMAO concluded that the firm had made a strong recovery from its 1991 bankruptcy; had a strong ability to meet cashflow needs; and had sufficient working capital available to perform the contract.

During the initial protest, DHS submitted documents questioning DCMAO's positive assessment. In a March 1995 bankruptcy court filing, TVI's shareholders' committee objected to a report filed by Mr. Molovinsky, asserting that it contained false or misleading information. The committee stated that there was evidence that the firm had been unprofitable; that Mr. Molovinsky had not filed required financial reports; and that there was a pattern of concealment and evidence of improper use of company assets. The firm's June 2 report to its shareholders, issued after Mr. Molovinsky was asked to resign, suggested that TVI had been operating at a very low level of sales and with a significant monthly loss, resulting in cashflow problems; that the firm had not filed required bankruptcy reports and had deviated from its bankruptcy reorganization plan; and that the firm had violated several Securities and Exchange Commission regulations related to the sale of stock. With respect to the status of the firm's records, the report stated that initial investigations suggested significant malfeasance by Mr. Molovinsky.

In reevaluating TVI's proposal, the contracting officer stated that she had reviewed these documents and concluded that there was nothing to indicate that TVI did not presently have the backing of its financial institution to execute the contract, or the ability to obtain it. TVI's June 2 report specifically addressed each element of the

²(...continued)
initial finding; the agency was not required to adopt them in its ultimate determination.

³The solicitation listed several general considerations that would be considered in the technical evaluation, including financial capability. While an offeror's financial capability to perform a contract is a traditional responsibility factor, see FAR § 9.104-1, in appropriate circumstances, and where the solicitation so appraises offerors, financial capability may be used to assess the relative merits of individual proposals. E.H. White & Co., B-227122.3; B-227122.4, July 13, 1988, 88-2 CPD ¶ 41.

firm's financial status and set forth the management action proposed to resolve the problems. The report stated that TVI believed its bank would finance requirements for government contracts, and the record contained a letter from the bank confirming this statement.

As we stated in our decision, the agency did not ignore the extrinsic evidence produced by DHS, but reviewed it and concluded that, notwithstanding this information, TVI had the financial capacity to perform the contract. In light of the contracting officer's consideration of this evidence, including the fact that TVI's management had clearly set forth the steps it planned to take to recover its businessworthiness, and the fact that a bank was willing to provide working capital to TVI, we could not conclude that her evaluation of TVI as financially capable was unreasonable. See Transco Contracting Co., B-228347.2, July 12, 1988, 88-2 CPD ¶ 34. Hence, DHS' repeated argument in its request for reconsideration that the contracting officer improperly relied upon the DCMAO survey results incorrectly ignores the fact that her determination was made after having reviewed the most current information regarding TVI's financial status including, but not limited to, the letter from the bank.⁴

In its protest, DHS also alleged that TVI's then-president had provided DCMAO with fraudulent information requiring the rejection of the proposal. In our decision, we stated that the record before us was so speculative as to preclude any conclusion of fraudulent activity. TVI's report to its shareholders stated that it was based on "incomplete records and preliminary examination," and that "little if any has been verified and is simply based upon the best documents or information available." Such preliminary and speculative information afforded us no basis to find any fraud here, much less a basis to reject TVI's proposal.

In its request for reconsideration, DHS asserts that it has been advised that a Naval Investigative Service criminal investigation of TVI concluded that Mr. Molovinsky admitted that he made intentional false statements to DCMAO, and that DCMAO personnel relied upon these statements in preparing its preaward survey report. DHS points to this information and asserts that its allegation of fraud is no longer speculative, and that TVI's proposal must be rejected.

We have stated that an offeror's submission of a misstatement which materially influences consideration of a proposal should disqualify the proposal. Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53. Here, the record shows that the

⁴While DHS also alleges that TVI has "underbid" this contract, there is no prohibition against a procuring agency's accepting an unreasonably low or below-cost offer on a fixed-price contract. Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18.

agency's consideration of TVI's proposal during the reevaluation was not based upon Mr. Molovinsky's representations to DCMAO, but on the currently available information regarding TVI's corporate status, financial and otherwise, described above. Moreover, TVI has not endeavored to hide or abet Mr. Molovinsky's allegedly false representations to DCMAO, but has taken every step to distance itself from his actions and to illuminate the agency as to his alleged misdeeds and the firm's actual status. The record shows that TVI has filed criminal charges against Mr. Molovinsky; named him as a defendant in three civil lawsuits; and intends to file additional such lawsuits. Under the circumstances, we cannot conclude that the agency is required to reject TVI's proposal on this basis.

DHS' protest finally challenged the agency's evaluation of the offerors' technical proposals as both lacking a rational basis and evidencing a disparate treatment of the two offerors. DHS provided numerous allegations with respect to nearly every evaluation factor and subfactor which we explored, by way of example, in our decision. As fully described there, we found no impropriety save with respect to one area of the evaluation. In that regard, we determined that even if the evaluation results were adjusted in the manner most favorable to the protester, the proposals were approximately technically equal, and that price therefore properly could become the determinative factor in award. Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332. Considering the solicitation's specific instruction that the importance of price would increase as the quality differences between proposals decreased, we had no basis to question the agency's best value determination in light of DHS' substantially higher price. See Newport News Shipbuilding and Dry Dock Co. et al., B-261244.2 et al., Sept. 11, 1995, 95-2 CPD ¶ 192.

In its request for reconsideration, DHS reiterates its general disagreement with our conclusion, and again interprets specific aspects of the evaluation as evidence of disparate treatment. DHS has not presented any new facts, evidence, or arguments that were not previously considered. Since repetition of arguments made during the original protest do not constitute a valid basis for reconsideration, DHS' current request provides no justification for reexamining our earlier decision. See Docusort, Inc.--Recon., B-254852.3, July 18, 1995, 95-2 CPD ¶ 25. We reviewed all of DHS' allegations during the initial protest, and found no basis in the record--aside from that noted above--to support the protester's contentions. DHS' disagreement with our decision does not warrant its reconsideration. See Logics, Inc.--Recon., B-237411.2, Apr. 25, 1990, 90-1 CPD ¶ 420.

The request for reconsideration is denied.

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