



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Thermal Combustion Innovators, Inc.--Protest and Reconsideration

File: B-279602.2; B-279602.3

Date: October 15, 1998

Raymond C. Schreck, Esq., for the protester.
Merilee D. Rosenberg, Esq., and Philip S. Kauffman, Esq., Department of Veterans Affairs, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under solicitation providing for award on the basis of price, including option years, selection of offeror with lowest total price for base and option years was reasonable and consistent with solicitation.
2. Request for reconsideration that reiterates arguments made previously and merely expresses disagreement with prior decision does not meet standards for granting reconsideration.

DECISION

Thermal Combustion Innovators, Inc. (TCI) protests the award of a contract to Amaritime Environmental Solutions, Inc. under request for proposals (RFP) No. 600-018-98, issued by the Department of Veterans Affairs (VA) for medical waste removal and disposal services. The protester also requests reconsideration of our decision, Thermal Combustion Innovators, Inc., B-279602, July 1, 1998, 98-2 CPD ¶ 3, in which we denied TCI's protest against the terms of the solicitation.

We deny the protest and the request for reconsideration.

On February 17, 1998, the agency issued the RFP for a fixed-price contract to furnish labor, materials, equipment, transportation, and other items necessary for the removal, storage, treatment, and disposal of certain specified types of medical waste at four VA facilities in southern California, for an initial 1-year period, with four 1-year option periods. RFP § A. The solicitation provided for award on the basis of price and contained the clause at Federal Acquisition Regulation (FAR) § 52.217-5 providing that, unless the agency determined it not to be in the government's best interests, the agency would evaluate offers by adding the total price for all options to the price for the base year. RFP §§ M.1, M.2.

By letter dated March 10, TCI filed several objections to solicitation provisions with the contracting officer. On March 13, the agency issued an amendment to the RFP and provided a letter responding to TCI's objections. On March 19, TCI filed a protest with the agency. The agency proceeded with the receipt of offers as scheduled, on March 20, and 3 days later, TCI filed a protest with our Office, which we denied by decision dated July 1. TCI requested reconsideration of this decision on July 13, and the VA awarded a contract to Amaritime 3 days later. TCI then filed a second protest with our Office.¹

The protester contends that its price for the initial 1-year period of performance is lower than Amaritime's and that the selection of Amaritime was therefore improper given that the solicitation provided for award based on low price.

In reviewing an agency's evaluation and selection decisions, we examine them to ensure that they were reasonable and consistent with the stated criteria. LTR Training Sys., Inc., B-274996, B-274996.2, Jan. 16, 1997, 97-1 CPD ¶ 71 at 4. As noted above, the RFP here included FAR § 52.217-5, providing that prices would be evaluated by adding the total price for all options to the price for the base year unless doing so is determined not to be in the government's best interest. Where that clause is properly included in a solicitation, the FAR requires the evaluation of offers on the basis of all options unless the contracting officer determines that evaluation would not be in the best interests of the government such as where there is a reasonable certainty that funds will be unavailable to permit exercise of the options. FAR § 17.206; see Crowley Co., Inc., B-258967, Feb. 21, 1995, 95-1 CPD ¶ 105 at 4.

We see no basis to object to the contracting officer's decision to evaluate all option prices here. Although the agency has the right to determine that it is in the government's best interest to consider only base period prices, the agency made no such determination here; on the contrary, the contracting officer advises our Office that she considers it reasonably certain that the agency will exercise the options.

TCI contends that the contracting officer could not reasonably expect that the options would be exercised, arguing that when the same services will be purchased over a period of time for which a number of contractors are available, "it is unreasonable to suggest that the VA should opt for higher priced services for [the

¹TCI contends that our Office should ignore the contents of the report because the agency was 4 days late in providing a copy of it to the protester. A delay in the submission of the agency report does not provide a basis to disregard the report and its contents. See Diesel Parts of Columbus, B-200595, July 20, 1981, 81-2 CPD ¶ 50 at 3-4.

first] two years in order to potentially obtain slightly lower-priced services in subsequent years more than two years from now." Protester's Comments, Sept. 10, 1998, at 5. TCI also asserts that evaluating option prices was improper because funding for the option years has not been approved. TCI's first argument essentially represents a disagreement with the agency's decision to acquire these services in future years via exercise of the options under the contract; such disagreement does not demonstrate that the agency's determination regarding the reasonable likelihood of the option exercise is unreasonable. With regard to TCI's second contention, we think the contracting officer reasonably decided that evaluation of the option prices was appropriate notwithstanding the lack of current funding for the option years based on the reasonable likelihood that future funding will be made available in light of the type of services being procured here and the continuing need for them.² See Charles J. Merlo, Inc., B-277384, July 31, 1997, 97-2 CPD ¶ 39 at 3-4 (agency need not be "clairvoyant" in forecasting the availability of option funding). In sum, based on the record here, we find the evaluation of prices and the selection of Amaritime reasonable and consistent with the solicitation criteria.

In our prior decision, we dismissed TCI's assertion that the solicitation should have been set aside for small businesses because a small business, Amaritime, was in line for award, notwithstanding that the agency issued the solicitation on an unrestricted basis. Under these circumstances, TCI, which was not the lowest-priced small business offeror, was not an interested party to challenge the agency's failure to set the solicitation aside for small businesses. See GTA Containers, Inc., B-240422, Nov. 14, 1990, 90-2 CPD ¶ 396 at 2-3. We also denied TCI's protest against a solicitation requirement for providing portable, hand-held radiation scanners because the protester failed to respond to the agency's argument that the requirement was intended as an added precaution to ensure compliance with Nuclear Regulatory Commission regulations; further, despite the protester's allegations that there were no such scanners available on the market, the record

²The protester contends that the agency's attempt to renegotiate prices for option periods under two of its existing contracts supports its position that evaluation of option prices is not in the government's best interests. The documents supplied by TCI are preliminary notices of intent to exercise the options under TCI's contracts and state only that the actual notice would be sent after review of prices. This statement is consistent with FAR § 17.207(c)-(d), which requires that, prior to exercising an option, a contracting officer must determine, inter alia, that the option price is better than those otherwise available, by issuing a new solicitation or by conducting a market survey, or by determining that the time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. TCI's documents contain no indication that the agency is intending to renegotiate the option price.

showed that there were several firms able to locate such scanners for the purposes of preparing an offer.³

In requesting reconsideration of our earlier decision, TCI essentially argues that, as the lowest-priced offeror for the base year, it is an interested party for purposes of filing a protest against the solicitation. As noted above, this argument was also a part of TCI's protest here, and we find no merit to it. 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. § 21.14(a) (1998); Eastman Kodak Co.--Recon., B-271009.2, Oct. 7, 1996, 96-2 CPD ¶ 136 at 3. The remainder of TCI's request, which consists almost entirely of repetition of the arguments that it made before and expressions of disagreement with our findings, does not meet our standard for granting reconsideration. Gordon R.A. Fishman--Recon., B-257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3.

The protest and request for reconsideration are denied.

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³With regard to the scanner requirement, TCI's counsel contends that the protester would have responded to the agency's arguments if he could have shared with his client documents that the agency had marked as protected. Under the terms of the standard protective order issued in connection with TCI's protest, we may review whether documents are properly marked as protected. We will not conduct such a review, however, where, as here, it is made for the first time in connection with a request for reconsideration.