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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Norvar Health Services--Protest and Reconsideration

File: B-286253.2; B-286253.3; B-286253.4

Date: December 8, 2000

Robert M. Cambridge, Esq., for the protester.
John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Jennifer A. Mahar, Esq., and Nils R. Kessler, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Hunter Medical, Inc., an intervenor.
Charles A. Walden, Esq., and James E. Hicks, Esq., Drug Enforcement Administration, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that the agency is acting improperly in conducting a reopened competition by permitting submission of revised prices despite the release of the protester's award price in the earlier competition during postaward debriefings of unsuccessful offerors is denied where the disclosure was made pursuant to the debriefing requirements in the Federal Acquisition Regulation (FAR); disclosure of an awardee's price and rating (or ranking) under these circumstances does not create an improper competitive advantage.

2. Protest alleging that the agency violated the guidelines set forth at FAR § 15.507, regarding competitions reopened in response to a protest, is denied where the agency concedes that it failed to advise the protester of the information regarding its proposal provided to unsuccessful offerors during their postaward debriefings, but the protester is unable to demonstrate how it was prejudiced by not receiving this information given the significant revisions to the solicitation between the initial and reopened competitions.

3. Request for reconsideration of issues dismissed during development of a protest on the basis that the protester is not an interested party to raise them is denied where the reconsideration request raises arguments that the protester could have made, but did not, in its initial protest, and where those arguments are now untimely.

DECISION

Norvar Health Services protests a decision by the Drug Enforcement Administration (DEA) to terminate a contract initially awarded to Norvar, and to reopen discussions with, and request final revised proposals from, Norvar and all other offerors in the competitive range. In a supplemental protest, Norvar claims that the agency failed to follow the guidelines applicable to reopened procurements set forth at Federal Acquisition Regulation (FAR) § 15.507 by failing to provide Norvar with the information about its proposal provided to Hunter during its earlier postaward debriefing. In addition, Norvar requests reconsideration of a decision by our Office dismissing several, but not all, of the issues raised in Norvar's initial protest.

We deny the protest and the request for reconsideration.

BACKGROUND

The underlying solicitation here, request for proposals (RFP) No. DEA-00-R-0002, anticipated award of a fixed-price contract for the facilities, staff, materials, and equipment necessary to provide non-personal healthcare services at the DEA headquarters facility in Arlington, Virginia, as well as at field offices in Newark, New Jersey, and New York, New York. On September 7, 2000, DEA awarded the contract to Norvar at a price of $6.3 million for the base period and four 12-month options.

Five days later, on September 12, a disappointed offeror, Hunter Medical, Inc., filed a protest with our Office alleging that the award was improper. On September 28, DEA advised our Office, Norvar and Hunter, that it would be canceling the award to Norvar and reopening the procurement. DEA explained that it was taking this action because it had "identified an anomaly in the acquisition process other than those arguments put forward in the protest filed by Hunter Medical." DEA Corrective Action Letter, Sept. 28, 2000. The letter also advised that, in the interim, DEA would meet its ongoing needs through an extension of Hunter's incumbent contract. As a result, our Office dismissed Hunter's protest as academic. Hunter Med., Inc., B-286253, Sept. 28, 2000.

By letter dated September 29, Norvar filed an agency-level protest with DEA challenging the decision to reopen the procurement, terminate Norvar's contract, and extend Hunter's contract in the interim. In its letter denying Norvar's protest, DEA provided a more detailed explanation of its decision to reopen the procurement, as set forth below:

> As I stated to you and to counsel who previously represented [Norvar], DEA elected to take corrective action after a review determined that your client's proposal was noncompliant with the terms of the solicitation. Specifically, as I informed you, your client failed to propose a qualified individual for the position of Chief Nurse as

> required in the statement of work. . . Thus, it was determined that DEA had made award to your client on the basis of a noncompliant proposal.

DEA Letter Denying Norvar's Agency-Level Protest, Oct. 2, 2000, at 3. In addition, DEA's letter advised Norvar that its proposal, as written, could not form the basis for a valid contract award. Id.

On October 6, Norvar filed this protest challenging DEA's decision to terminate its contract (rather than suspend it in the face of a protest). In its protest, Norvar argued that none of the improprieties alleged by Hunter's protest required reopening the competition and allowing submission of revised prices. Norvar did not, however, address the agency's determination that its proposal was ineligible for award.

On October 24, our Office concluded that Norvar was not an interested party to pursue a protest of the agency's decision to terminate its contract and reopen the competition. Norvar Health Servs., B-286253.2, Oct. 24, 2000, at 2-3. Our decision explained that since the agency advised that it was reopening the procurement because it had concluded that Norvar's proposal could not properly be accepted for award, and since Norvar failed to challenge this assessment, Norvar lacked the direct economic interest necessary to pursue a challenge of the termination decision. Id. at 2. On the other hand, our October 24 decision expressly acknowledged that one issue in Norvar's protest remained unresolved, and should be addressed by the parties--i.e., whether in reopening the competition the agency was abusing its discretion by allowing offerors to reprice their proposals, given the earlier disclosure of Norvar's price. Id. at 3.

On October 30, Norvar supplemented its protest with a contention that the agency was also violating the requirements of FAR § 15.507 by refusing to advise Norvar of the debriefing information provided to Hunter about Norvar's initially successful proposal. In addition, on November 3, Norvar asked for reconsideration of our October 24 decision dismissing portions of its initial protest. In this filing, Norvar argued that our decision wrongly dismissed its contentions that the DEA decision to terminate Norvar's contract (rather than suspend it in the face of Hunter's protest) was improper, and that DEA's extension of Hunter's existing contract was improper.[1]

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[1]Norvar's request for reconsideration also argued that our Office improperly dismissed its contention that the agency violated FAR § 15.507 by not providing Norvar the information about its initially successful proposal that was provided to the unsuccessful offerors during their debriefings. This portion of Norvar's reconsideration request is based on a misunderstanding. Our Office did not consider this issue to be raised by Norvar's initial protest, and thus did not dismiss it. Instead, this issue was the subject of Norvar's October 30 supplemental protest (filed some 6 days after our dismissal decision), and is addressed in this decision.

PROTEST ISSUES

As set forth above, Norvar's protest raises two issues: (1) whether the agency abused its discretion by permitting submission of revised prices despite the release of Norvar's initial award price to unsuccessful offerors during their postaward debriefings on the earlier award decision; and (2) whether the agency violated the requirements of FAR § 15.507 regarding reopened competitions. In Norvar's view, allowing offerors to reprice their proposals with the knowledge of Norvar's price places it at a competitive disadvantage during the reprocurement, as does the agency's failure to provide Norvar with the information required by FAR § 15.507.

With respect to the first issue, DEA argues that it was not only reasonable, but necessary, for the agency to permit offerors to submit revised prices in the reopened competition. In this regard, DEA points out that there were a total of 80 additions to the requirements established in the statement of work, changes to two of the evaluation subfactors, and a newly-issued wage determination applicable to the personnel covered by this contract. In addition, DEA contends that the solicitation revisions were sufficiently significant that knowledge of Norvar's total initial price was of little use to the offerors responding to the reopened competition. With respect to the second issue (regarding the guidelines at FAR § 15.507(b) for reopened procurements), DEA concedes that it did not follow the FAR guidelines. In this area, however, DEA argues that Norvar was not prejudiced by its error.

Norvar's complaints highlight a tension between the information provided during postaward debriefings, and subsequent competitions resulting from a decision to reopen a procurement or to conduct a new competition. This tension arises because the same information that makes an unsuccessful offeror's postaward debriefing meaningful--such as, for example, the successful offeror's price and its technical score or ranking--could be considered to provide a competitive advantage in any subsequent recompetition or reopened competition held soon after the initial competition.

The FAR guidelines for postaward debriefings of unsuccessful offerors specifically enumerate six types of information that, at a minimum, must be made available in every postaward debriefing. FAR § 15.506(d). Of relevance here, the required information includes "[t]he overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror . . . ." FAR § 15.506(d)(2). While we recognize that possession of this information could provide a competitive advantage under some circumstances, an agency is not required to equalize such an advantage unless it results from preferential treatment or other improper action by the government. Federal Auction Serv. Corp., et al., B-229917.4 et al., June 10, 1988, 88-1 CPD ¶ 553 at 3, recon. denied, B-229917.8, June 22, 1988, 88-1 CPD ¶ 597 at 2. We have held that where later events require the reopening of a procurement, there is nothing improper about any competitive advantage provided by the disclosure of an awardee's price and rating

(or ranking), where that disclosure has been made pursuant to the FAR's debriefing requirements. NavCom Defense Elec., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 4; Sherikon, Inc., B-250152.4, Feb. 22, 1993, 93-1 CPD ¶ 188 at 4; Federal Auction Serv. Corp., et al., supra. Accordingly, we deny Norvar's contention that the DEA abused its discretion by not taking steps to ameliorate any advantage given the other offerors by their knowledge of Norvar's earlier price.

In any event, we agree with the agency that knowledge of Norvar's price under the initial solicitation provides little benefit to any other offeror in this procurement. The agency points out, and Norvar does not deny, that there were some 80 additions to the requirements established in the statement of work, changes to two of the evaluation subfactors, and a newly-issued wage determination applicable to the personnel covered by this contract. Under these circumstances, we conclude that the agency reasonably concluded that knowledge of Norvar's earlier price was of little significance in light of the solicitation changes.

We reach a similar conclusion with respect to Norvar's contentions regarding the FAR's guidelines on reopened procurements. In this regard, Norvar correctly notes that the FAR requires that if, as the result of a protest, an agency issues a new solicitation, or issues a request for revised proposals, the contracting officer shall provide the following information to all prospective offerors (in the case of a new solicitation), or to all offerors that were in the competitive range and are requested to submit revised proposals (in the case of a reopened procurement):

> (1) Information provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror's proposal; and
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> (2) Other nonproprietary information that would have been provided to the original offerors.

FAR § 15.507(c). DEA concedes that it failed to advise Norvar of the information disclosed to Hunter in its debriefing. Specifically, Norvar was not advised that Hunter was told Norvar's total price, its total point score (88 on a 100-point scale), or that Norvar and Hunter were the only two offerors in the competitive range. DEA Debriefing Letter to Hunter, Sept. 8, 2000, at 1.

Despite DEA's failure to comply with the requirements identified in the FAR, our Office will not sustain a protest unless there is a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). For the same reasons that lead us to conclude that the agency did not abuse its discretion by not taking steps to ameliorate any advantage given by knowledge of Norvar's earlier price, we conclude that, under the circumstances here,

Norvar was not prejudiced by not receiving this information prior to the time that it submitted its second proposal.

As discussed above, when the agency reopened this competition it made substantial changes to the statement of work, changes to two evaluation subfactors, and incorporated a revised wage determination. Of the three pieces of information Norvar claims the agency was required to disclose, Norvar clearly knew its own price, and should have known that its price was disclosed to unsuccessful offerors, since disclosure of an awardee's price is mandated by FAR § 15.506(d)(2). While Norvar did not know its total point score, or the fact that it was one of two competitive range offerors,[2] we fail to see how it was prejudiced given the significant revisions made to the solicitation. In short, Norvar cannot (and did not) claim any meaningful prejudice arising from preparing a response to a significantly revised solicitation without knowing its total point score under the earlier competition, or without being expressly advised that there was only one other offeror in the competitive range.[3]

RECONSIDERATION ISSUES

In its request for reconsideration of the issues that were dismissed at the start of this process, Norvar argues that our Office wrongly concluded that it was not an interested party to challenge DEA's decision to terminate its contract (rather than suspend it in the face of Hunter's protest), or to challenge the extension of Hunter's existing contract. In this regard, Norvar argues that its general challenge to the award should have been sufficient to establish its direct economic interest in the outcome. In support of its contention, Norvar now provides--for the first time--a substantive response to the agency's conclusions regarding the acceptability of its proposal.

As set forth above, Norvar's initial challenge to the agency's corrective action was dismissed because it provided no basis to disturb the conclusion that the company's proposal was ineligible for award. Thus, we concluded that Norvar could not be considered an interested party. In its reconsideration request, Norvar now disputes DEA's conclusion that its proposal was unacceptable, but its attempt comes too late

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[2]We take no position on whether knowledge of the size of the competitive range falls within the scope of FAR § 15.507(c), as we conclude that even if it does, the protester was not prejudiced, under the circumstances here, by not having this information.

[3]For the record, we note that, despite our long-standing requirement that protesters demonstrate prejudice, Norvar refuses to "speculate on all the various ways that the uncertainty generated by the agency action impacted on its bid decisions . . . ." Norvar Comments at 3.

for consideration by our Office, as Norvar was required to raise these issues not more than 10 days after the basis for its protest was known. 4 C.F.R. § 21.2(a)(2) (2000). Since DEA advised Norvar of the problems with its proposal in a letter dated October 2, Norvar's response--first filed in its reconsideration request over a month after receipt of the agency's letter--is untimely.

Moreover, our Regulations require that a protester's request for reconsideration include a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law or fact or information not previously considered. 4 C.F.R. § 21.14. In our view, information not previously considered means information that was not available to the protester when the initial protest was filed--as opposed to information that could have been presented, but was not. Global Crane Inst.--Recon., B-218120.2, May 28, 1985, 85-1 CPD ¶ 606 at 1-2. Here, since Norvar could have presented its response to the agency's rejection of its proposal in its initial protest, but did not do so, it is not entitled to reconsideration of the matter based on its untimely rebuttal of the DEA's conclusions. PDC Machines, Inc.--Recon., B-244724.2, Aug. 7, 1991, 91-2 CPD ¶ 141 at 2.

Finally, Norvar asks that we reconsider its contention that the agency's decision to extend Hunter's existing contract while the reprocurement is ongoing is improper and somehow violates the automatic stay provisions of the Competition in Contracting Act (CICA).

Norvar's allegation regarding the automatic stay provisions of CICA is based on a flawed understanding of that statute. These provisions operate to preserve the status quo for a protester while its protest contentions are being resolved. Here, the protester at the time the agency decided to take corrective action was Hunter, not Norvar. Hunter, in essence, received the relief it sought when the agency decided not to proceed with Norvar's award. Now that Norvar is the protester, the agency is similarly barred from proceeding with award. These provisions, however, in no way bar an agency from deciding to back away from an award decision and essentially "redo" the procurement. Norvar's assertion to the contrary has no merit, and we will not consider this matter further.

The protest and the request for reconsideration are denied.

Anthony H. Gamboa
Acting General Counsel