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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Environmental Protection Agency; CGI Federal, Inc.--Reconsiderations

File: B-299504.3; B-299504.4

Date: July 23, 2008

Avital G. Zemel, Esq., Environmental Protection Agency, for the agency/requester. Mark D. Colley, Esq., Christopher R. Yukins, Esq., Kristen E. Ittig, Esq., and Cameron W. Fogle, Esq., Arnold & Porter LLP, for CGI Federal, Inc., a requester. Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will not grant request to vacate protest decision based on subsequent developments where the parties requesting such action have not demonstrated that newly-disclosed information has rendered the decision as issued invalid, or that the public interest would be served by vacating the decision.

DECISION

The Environmental Protection Agency (EPA) and CGI Federal, Inc. ask that we reconsider our decision in IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64, in which we sustained IBM's protest of the award of a contract to CGI under request for proposals (RFP) No. PR-HQ-05-12521, issued by the EPA for the upgrade of the agency's financial management system. In its protest, IBM argued, among other things, that the agency did not reasonably evaluate the offerors' price/cost proposals. We sustained the protest, concluding that the agency improperly made upward adjustments to fixed-price elements of IBM's proposal and did not reasonably evaluate CGI's price/cost proposal. However, because of subsequent developments, the agency and CGI ask that we reconsider and either rescind (*i.e.*, vacate) or modify our decision sustaining IBM's protest.

We deny the requests for reconsideration.

BACKGROUND

The RFP contemplated the award of an indefinite-delivery/indefinite-quantity contract under which performance-based task orders would be issued.¹ After evaluating the four initial proposals submitted in response to the RFP, the agency selected the proposals of IBM and CGI to be included in the competitive range. Following discussions, IBM and CGI submitted final proposal revisions (FPR). The agency's technical evaluation panel (TEP) evaluated the FPRs and reported its results to the contracting officer, who then prepared a selection decision with final technical and price/cost evaluations for IBM and CGI. The contracting officer recommended that the award be made to CGI and, after conferring with the TEP chair and others, the agency's source selection authority approved the award to CGI.

In its protest filed with our Office, IBM argued that the agency improperly evaluated proposals, failed to conduct meaningful and equal discussions and, as a result, made an unreasonable selection decision. We sustained the protest, concluding that the agency improperly adjusted fixed-price elements of IBM's proposal and performed an unreasonable evaluation of CGI's price/cost proposal.² We recommended that the agency reevaluate proposals, consistent with our decision; we further recommended that the agency reexamine its requirements, providing offerors an opportunity to revise their proposals, if necessary, and that the agency make a new selection decision. In addition, we recommended that IBM be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees.

EPA'S REQUEST FOR RECONSIDERATION

In its request for reconsideration, the agency asks that we rescind or modify our June 4, 2007 decision sustaining IBM's protest, based on events that took place after we issued our decision and based on information not previously considered by our Office. In making its request, EPA relies on an "Interim Agreement," dated April 3, 2008, between it and IBM, pursuant to which IBM, on April 4, 2008, withdrew its proposal from further consideration for award during the agency's implementation of our recommendation for corrective action and agreed to reimburse the agency for the costs paid by the agency to the firm in accordance with the above-described recommendation for corrective action.

¹ Details of the facts, arguments, analyses, and conclusions from the underlying decision sustaining the protest are not required to understand the requests for reconsideration and, therefore, are not repeated here.

² With respect to IBM's other grounds for protest, which we denied, we concluded that the agency's technical evaluation was reasonable and supported by the record and that the agency conducted meaningful discussions with IBM.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a) (2008). Here, we conclude that the standard for reconsideration has not been satisfied.

As stated above, in requesting reconsideration, the agency relies on events that took place after we issued our June 4, 2007 decision sustaining IBM's protest. In this regard, on March 27, 2008, the agency suspended IBM from receiving federal contracts based on information developed during the course of a federal investigation into activities related to IBM's proposal and negotiations in this procurement. According to the record, as documented in the requests for reconsideration (not in the record as developed during our review of IBM's original protest), the agency's debaring official determined that there was adequate evidence to support allegations that IBM employees obtained protected source selection information relevant to this procurement from an EPA employee--information which IBM officials knew was improperly acquired--and that IBM used this information during its negotiations to improve its chance of winning a contract, in violation of federal procurement procedures and the procurement integrity provisions of the Office of Federal Procurement Policy Act. Interim Agreement, Apr. 3, 2008. The agency's suspension of IBM was issued as a temporary action pending completion of the investigation and other possible proceedings, including debarment action. Suspension Notice, Mar. 27, 2008.

Following IBM's receipt of the suspension notice, IBM acknowledged the apparent violations by its employees and agreed to withdraw its proposal from further consideration for award in this procurement; IBM also agreed to refund to the agency all costs paid to IBM in connection with the underlying protest and to take other steps, such as conducting a full examination of the firm's federal compliance program and cooperating with EPA investigators and other federal officials, to promptly and appropriately conclude the matter. In return, the agency agreed to immediately terminate the temporary suspension and to remove IBM's name from the Excluded Parties List, subject to specific terms and conditions. Interim Agreement, supra. IBM formally withdrew its proposal on April 4, 2008.

In requesting rescission or modification of our decision sustaining IBM's protest, the agency states that it "recognize[s] the public interest in providing the federal acquisition community and other interested parties with the results of [our Office's] thorough analysis in this matter," but maintains that "there are countervailing considerations when an offeror's efforts to secure a federal contract have been tainted by improper conduct," and it asks that we "recognize these circumstances in [our] final disposition of the protests." EPA Request for Reconsideration at 2. However, we conclude that the agency has failed to provide any basis warranting our rescission or modification of the underlying decision sustaining IBM's protest.

In this regard, the agency has cited no legal authority to support its request and it has not, for example, demonstrated any error or injury that results from the decision as written; moreover, the agency has neither alleged nor shown any nexus between the alleged improper use of proprietary information by IBM employees and our finding with respect to the agency's improper adjustment of fixed-price elements in IBM's proposal. In short, the agency has not pointed out any procedural or substantive flaw in the underlying decision resulting from subsequent events and from information that was not previously disclosed during the development of the protest record or at the time the decision was issued which would necessitate some sort of correction of that decision in light of the newly-disclosed information.

While we are not aware of any instance in which our Office has been asked to rescind a published protest decision, the United States Civilian Board of Contract Appeals recently addressed a request that the Board vacate one of its decisions. See Hedlund Constr., Inc. v. Dep't of Agriculture, CBCA 105-R, Civilian B.C.A., June 5, 2008 (citing U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994), in which the Supreme Court explained its view that settlement of a dispute by the parties after the issuance of a decision does not justify vacatur of an issued decision). See also ROI Invs. v. GSA, GSBCA 14402-R, 99-1 BCA ¶ 30,353 (absent some extraordinary circumstance, the public interest would not be served by rescinding a published decision).

In our view, published decisions provide valuable information to the procurement community in terms of, for example, analyzing violations of procurement statutes and regulations and explaining why such violations provide a basis for sustaining a protest. To the extent that EPA asks that we "recognize [the] circumstances" regarding the subsequently disclosed investigation and the agreement between it and IBM, the discussion in this decision denying the agency's request for reconsideration effectively does so. In this connection, we note that our recommendation for corrective action was valid under the facts as they existed during our Office's review of IBM's original protest, and we expect no further action with regard to that recommendation based on subsequent events.

CGI'S REQUEST FOR RECONSIDERATION

CGI requests that we vacate the underlying decision sustaining IBM's protest on two grounds--first, that IBM was not an interested party and, therefore, lacked standing for purposes of filing a protest in light of its acknowledged procurement integrity violations resulting in its suspension from receiving federal contracts and, second, that "profound factual uncertainties undercut the factual conclusions on which the GAO decision was premised." CGI Request for Reconsideration at 1.

Regarding its first argument, CGI points out that a "non-responsible bidder" has no interest in the outcome of a procurement--suggesting that a suspended offeror would similarly lack the requisite interest for filing a protest--thereby implying that IBM's

suspension and subsequent agreement to withdraw its proposal from consideration for award in this procurement should, in essence, void the published decision. Id. at 2. We do not find this argument persuasive.

More specifically, it is clear from the record that when IBM filed its protest on February 26, 2007, it was not a suspended contractor. We issued our decision sustaining IBM's protest on June 4, 2007. The agency issued its notice of suspension on March 27, 2008, and the Interim Agreement between the agency and IBM was signed on April 3, 2008. The agency's suspension notice stated, "effective immediately, I [EPA's debarring official] have suspended [IBM] from participating in Federal procurement and nonprocurement activities." Suspension Notice, supra, at 1. Thus, the suspension notice makes clear that the suspension was to have an immediate, as opposed to a retroactive, effect.³ Therefore, since IBM had not been suspended from competing for federal contracts at the time the protest was filed, during the development of the protest record, and when the decision sustaining the protest was issued, the firm was eligible to compete under the RFP and had the status of an interested party to challenge the agency's evaluation of proposals and award decision.

Moreover, Federal Acquisition Regulation (FAR) Subpart 9.4, which the agency cited in its suspension notice as authority for its actions, makes clear that suspension and debarment do not have a retroactive effect. For example, FAR § 9.405-1(a) provides that "[n]otwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise." Therefore, contrary to CGI's suggestion, we have no basis to conclude that the suspension and Interim Agreement between the agency and IBM should retroactively affect the interested party status or standing to protest that IBM had at the time it filed its protest since, as stated above, at that time, IBM was not a suspended contractor. In other words, until the suspension was imposed and IBM was notified (see FAR § 9.407-3(c) (requires that a contractor be immediately advised when it is suspended)), IBM was "an actual . . . offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract," satisfying our regulatory definition of an interested party with standing to file and pursue its protest. 4 C.F.R. § 21.0(a)(1). On this record, we find no merit in CGI's argument that IBM's status as an interested party should be viewed from the vantage point of the subsequent events, as set forth above, which would involve the complete disregard of the facts as they existed from the point at which the protest was filed until the decision sustaining IBM's protest was issued.

³ In this regard, the suspension notice also stated that "[n]otwithstanding this suspension, IBM may continue awards in existence as of the date of this suspension, unless an agency directs otherwise." Id.

Regarding its second argument, we similarly find no merit to CGI's allegation that "factual uncertainties," which purportedly cannot now be resolved, were the foundation for our decision, thereby compromising the precedential value of that decision. As discussed above, no error or injury has been demonstrated that would result from the decision as written, nor has any nexus between the alleged improper use of proprietary information by IBM employees and our finding with respect to the agency's improper adjustment of fixed-price elements in IBM's proposal been alleged or shown. The value of the underlying decision sustaining IBM's protest derives from the legal conclusions that were drawn in the context of the existing and known facts. While a subsequent change in facts could lead to a different legal conclusion, the facts that emerged based on subsequent events do nothing under the circumstances here to alter the validity of the original decision, which applied the law to the facts as presented during our Office's review of IBM's original protest.

The requests for reconsideration are denied.

Gary L. Kepplinger
General Counsel